Remorse and the Courts: A Defence of Remorse-based Sentencing

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Jamie M. Henson

School of Social Sciences
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Abstract

This thesis defends the central claim that remorse ought to be considered a mitigating factor in sentencing decisions. I advocate a communicative approach to punishment, arguing that it is important that the state attempts to enter into a moral dialogue with those that it punishes and that this requires state actors to be receptive to offender-remorse. I contend that this requires us to accept a weak form of character retributivism and acknowledge that certain limited aspects of an offender’s character impact upon their blameworthiness. In making these arguments I look at the nature of remorse and its relationship to apology, alongside the role that remorse currently plays within the courts. I also discuss the role of shame in the courts, the role of mercy in sentencing and argue that there is a correlation between remorse and reduced recidivism.
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For my brother Joel.
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Introduction

Remorse plays a significant role in sentencing decisions. Its presence is frequently seen as a mitigating factor and its absence as an aggravating factor. However, there is a great deal of inconsistency within the courts as to what the nature of remorse is, how it can be identified, its value, and the impact it ought to have on sentencing decisions. This is perhaps due to a lack of overlap between legal scholarship and policy making with the fields of philosophy and psychology. In recent years there has been a growth in the philosophical study of emotions, and specifically work relating to remorse (and apology) and its relationship to punishment (see, for instance: Maslen, 2015; Smith, 2014; Tudor & Proeve, 2010; Bennett, 2008). Much of this work fits within, or pays close attention to, the communicative approach to punishment developed by Anthony Duff (1986; 2001). Duff’s work (see also: von Hirsch; 1993) has had a profound impact on the philosophy of punishment and led to a huge volume of responses. It is to this tradition that this thesis contributes. I offer a defence of remorse as a mitigating factor from within a communicative theory of punishment, distinguishing my account from others by explicitly endorsing a weak form of character retributivism. In doing so, I link two distinct areas by bringing together material on emotion and the nature of remorse with practical and theoretical work on sentencing.

Chapter 1 analyses the moral emotions of shame, guilt and remorse. Adopting a broadly cognitivist understanding of emotion and drawing on the work of Gabrielle Taylor (1985), I differentiate remorse from shame and guilt, as well as from the related concepts of regret and agent-regret. This analysis is directed at showing that whilst shame and guilt are often selfish emotions, remorse is necessarily selfless and always motivates a remorseful agent to attempt to repair the harm they have caused. In contrast, whilst shame and guilt can sometimes motivate an individual to take positive actions they are not always as valuable as remorse. I argue that the conditions required for remorse differentiate it as a uniquely valuable species of guilt. Further to this, I also argue that remorse is appropriately felt in response to acts of evildoing, rather than mere wrongdoing, and that this distinction reflects the common language distinction often made between guilt and remorse. In analysing remorse this chapter outlines those aspects of remorse which will subsequently be shown to (i) make remorse a uniquely valuable emotion and (ii)
show that remorse ought to play a prominent role in determining the appropriate punishment for contrite offenders.

Chapter 2 addresses two questions regarding the nature of apology. Firstly, what is required from a performativ act for it to count as an apology? Secondly, what standards ought to be used to determine whether or not an apology is considered to be a good apology? Breaking down the conditions required for a speech act to count as an instance of apology I first argue that, whilst insincere apologies do count as instances of apology, and can play an important social role in the absence of remorse, they are substantially lacking. Moving on to discuss Nick Smith’s (2008; 2014) work concerning categorical apologies I then look at the conditions necessary for an ideal apology. Specifically, I contend that sincerity and remorse are necessary to a full apology. Furthermore, I argue that remorse is central to the practice of apologising for serious wrongs, as it is the action tendencies associated with feeling remorse which motivate an individual to apologise and which are valued by the wronged party. I thereby distance my account from Smith’s by arguing that greater emphasis needs to be placed on the emotional aspect of apology. The chapter concludes by relating the preceding discussion of apology to punishment. I argue that there is value to the emotional suffering undertaken by those who feel remorse and discuss Christopher Bennett’s views on apology and punishment (2008).

Chapter 3 looks at the role that remorse currently plays within the courts, looking at both US and UK court systems. This discussion illustrates the varied and muddled practices which currently occur when the concept of remorse is invoked by the courts. This survey of current practice is key to showing why it is so important that the issues raised throughout the thesis must be addressed. Significant decisions are routinely made with insufficient understanding of the psychological and philosophical issues involved. If the courts are to be just then the role of remorse must be made clearer. This discussion also touches on epistemological issues which are frequently raised as an objection to remorse playing a role in sentencing (see for example: Murphy, 2007; Bagaric and Amarasekara, 2001). I suggest that, in light of these epistemological concerns regarding determining the veracity of claims to be remorseful, the model of apology outlined in Chapter 2 justifies the use of higher standards when showing leniency to remorseful offenders, as those who are truly
remorseful can reasonably be expected to make an extraordinary effort to apologise and address the harm that they have caused, despite the potential personal cost. The chapter concludes by arguing that though there are still unresolved epistemological issues regarding remorse, these do not justify reducing the role that remorse plays in sentencing if it can be shown that remorse has an inexorable and central role within a just theory of punishment.

Chapter 4 takes up the final line of argument from Chapter 3 by looking at various attempts to justify the institution of punishment. I reject traditional consequentialist and retributivist theories of punishment, arguing that it is only a communicative approach that can adequately address certain key issues. Drawing on work from Anthony Duff (1986; 2001) and Kimberley Brownlee (2011) I further argue that the nature of communicative approaches to punishment means that they must pay attention to the response offenders have to their own crimes in order to treat them justly. I contend that it is important for the state to approach punishment in a way which fosters a moral dialogue with offenders, and that this requires offender-remorse, when it is present, to play a role in sentencing.

Chapter 5 further develops the communicative theory of punishment I advocate. I argue that the state ought to favour a form of character retributivism. Character retributivism has typically been viewed as an undesirable philosophical position. I contend that this is because of an unfairly portrayed dichotomy between pure character retributivism and pure act retributivism. Drawing on the recent work of Nick Smith, I argue for a middle ground between these two positions which allows the state to consider certain, limited aspects of a defendant’s character relevant to blameworthiness and sentencing. I argue that remorse is one such characteristic, in light of its intimate connection to both an individual crime and to the wider purpose of punishment. The chapter also addresses some of the common attacks made against character retributivism. I argue that these objections only succeed against pure character retributivism. I also argue that the position I am advocating only justifies remorse playing a role as a mitigating factor in sentencing and does not justify viewing its absence as an aggravating factor.

Chapter 6 returns to the distinction between shame and remorse discussed in Chapter 1. The character retributivist position defended in chapter 5 raises the
possibility that shame may also be a relevant consideration in sentencing. In
discussing recent work on the moral value of shame, alongside the work of John
Rawls (1971) I argue that, though there are cases of moral shame which can play a
valuable social role, shame nonetheless lacks the same intimate relationship with
punishment that remorse possesses. By contrasting cases in which an individual feels
only remorse or shame I aim to show that shame does not occupy a comparable role
to remorse in the logic of punishment.

Chapter 7 looks in detail at a competing argument in favour of offering
remorse-based sentence reductions: mercy. The chapter begins with a broad
discussion of the relationship between remorse and mercy before moving on to
discuss in greater detail the role that mercy ought to have within a communicative
theory of punishment. The discussion primarily focuses on the work of Anthony
Duff and John Tasioulas. I argue that mercy is a value internal to the criminal law
but does not provide a ground for leniency in response to offender remorse. The
chapter concludes by contrasting my earlier defence of character retributivism with
the views of Hannah Maslen, who has also defended remorse-based sentence
reductions. I argue that Maslen’s position is ultimately comparable to an appeal to
mercy and that this fails in light of the argument presented in the first half of the
chapter.

Chapter 8 concludes the thesis with an analysis of the relationship between
remorse and recidivism. I argue that offender remorse is linked to reduced recidivism
rates. Firstly, this offers an additional pragmatic reason to show leniency to those
who are remorseful. Secondly, I contend that a correlation between remorse and
reduced recidivism can provide empirical support for claims made earlier in the
thesis regarding the action tendencies associated with remorse, and our
understanding of how we ought to expect remorseful offenders to behave.

The thesis concludes with a summary and brief discussion of the impact the
preceding arguments ought to have on future research and policy.
Chapter 1 – What is Remorse?

If any discussion of the role remorse ought to play in the courts is to take place then it is first vital to ensure we have a clear concept of the nature of remorse. This chapter will therefore outline the concept of remorse which will be used as the basis for discussion in subsequent chapters. I will begin by looking at the related emotions of shame and guilt, as well as the nature of regret. The discussion of these topics will be particularly focused on highlighting the distinguishing features of remorse which make it a uniquely valuable emotion, and will take place within a broadly cognitivist approach to the philosophy of emotion.

1. Shame

A useful initial description of shame is provided by Gabrielle Taylor. In *Pride, Shame and Guilt* Taylor claims that for a person to feel shame 'there is firstly the self-directed adverse judgement of the person feeling shame: she feels herself degraded, not the sort of person she believed, assumed, or hoped she was or anyway should be' (Taylor, 1985: 64). For Taylor, 'this judgement is constitutive of the emotion, it is the person's identificatory belief' (1984: 64). Further to this 'a person feeling shame judges herself adversely. This judgement is brought about by the realization of how her position is or may be seen from an observer's point of view' (Taylor, 1985: 68). Taylor also claims that 'shame can be seen as a moral emotion......not because sometimes or even often it is felt when the person believes himself to have done something morally wrong, but rather because the capacity for feeling shame is so closely related to the possession of self-respect and thereby to the agent's values' (1985: 84). Shame's status as a moral emotion stems from the fact that shame is felt in situations in which an agent feels that they are lacking in, or have an undesired excess of, something which they value. An individual may feel shame at being naked, for instance, if they feel that they are lacking in beauty or that they are failing to meet standards of decency which they hold to be important, but they will not feel shame if they do not place value on such things: whilst most people would feel shame at being seen naked at a football match a streaker does not, precisely because they do not place the same moral value on social norms which prohibit public nakedness as others do. This accounts for the distinction between shame and
the weaker notion of embarrassment. If I stumble as a result of catching my foot on a loose paving slab whilst walking down the street I would likely be embarrassed, but I would not feel ashamed. I would not feel ashamed because there is no excess or deficiency of something I hold to be valuable; there is no moral element to embarrassment in the sense there is to shame.

As Taylor observes, shame is often 'felt when the person believes himself to have done something morally wrong'. However, the fact that shame is often felt in regard to situations where an individual feels they have done something wrong does not mean that this is necessary. One may feel shame where no perceived wrongdoing has taken place. For example, an individual may feel shame as a result of actions their parents took before they were born whilst feeling no sense of responsibility for those actions. Alternatively, an individual may be ashamed about their physical appearance but this does not entail that they feel they have done something morally wrong in appearing that way.

This is important in helping to explain why shame is not an emotion worthy of the same level of moral consideration as remorse. The fact that an individual feels shame for their past actions does not necessarily entail that they either are, or feel, responsible for those actions. More importantly, it does not mean that they necessarily view their past actions as wrong or immoral.

This point is well illustrated by the paradigmatic case of feeling shame at being seen naked, assuming that one is in a situation where nakedness is not prohibited by legal or moral sanctions. As Bernard Williams observes 'the basic experience connected with shame is that of being seen, inappropriately, by the wrong people, in the wrong condition. It is straightforwardly connected with nakedness, particularly in sexual connections' (1993: 78). Williams claims that 'the root of shame lies in exposure in a more general sense [than the literal exposure of one's body], a loss of power. The sense of shame is a reaction of the subject to the consciousness of this loss' (1993: 220). If this is the root of shame then we may reasonably expect many wrongdoers to feel shame. Their shame will stem from either an actual or imagined 'loss of power' and from being seen, or imagining themselves being seen, 'in the wrong condition'. However, this does not necessarily entail that a shameful wrongdoer considers themselves blameworthy or responsible for their situation. It may be that they believe they have done something wrong and blame themselves for their situation, but it is not necessary for them to feel ashamed.
This point is made clearer by consideration of the action tendencies associated with shame. Shame does not necessarily motivate someone to make reparations for their past wrongs, but is instead characterised by a desire to disappear from view. If all that shame motivates is a desire to not be seen then this suggests that shame may not be a moral emotion of much worth. However, in certain cases shame will motivate an individual to change and to better themselves in the future. If a wrongdoer feels ashamed of their past deeds then it may be that they will wish to act differently in the future in order to become a different sort of person: one who no longer has to feel shame about acting in such a way. However it is important to realise why it is that such a wrongdoer feels shame; it is not caused by a recognition of the harm that they have caused but rather by a recognition of their own status.

2. Guilt

In situations in which a wrongdoer feels bad about their past actions as a result of recognising the fact they have done something wrong it is not shame, but guilt, which they ought to feel. Guilt differs from shame firstly in that it requires the belief that a rule or law has been transgressed. Taylor's discussion of guilt begins with the observation that 'guilt, unlike shame, is a legal concept' (1985: 85). This means that someone may 'of course be guilty and not feel guilty'; for someone to feel guilty further requires that 'he must accept not only that he has done something which is forbidden, he must also accept the authority of whoever or whatever forbids it' (1985: 85). In order to account for instances of seemingly irrational guilt, where one feels guilt but rejects the authority which forbids the relevant action, Taylor suggests that 'it is illuminating to describe the person who feels guilty as thinking of himself as having violated some taboo, for this carries the requisite implication of having done something forbidden, without any further indication that what is forbidden is so for good reason because harmful in some respect' (1985: 86). However, the idea that feeling guilty requires an agent to believe that they have violated a taboo, or broken an explicit moral or legal rule, is threatened by cases where such a belief is reported to be absent, despite continued guilty feelings. These cases include (but are not limited to) guilt felt for states of mind and cases of survivor guilt. Guilt felt for states of mind refers here to cases in which an individual may report feeling guilty for spontaneous thoughts on which they do not act and for which they do not claim to
feel responsible. For instance, in the midst of a heated argument a husband may wish that his wife be struck dead and subsequently claim to feel guilty, whilst maintaining that he has done nothing wrong, for it seems that he has not done anything. Survivor guilt refers to instances in which individuals report feeling guilty for surviving situations in which others have died as a result of actions for which they do not claim to feel responsible, such as one being the lone survivor of a plane crash.

One response to this problem is to offer a definition of guilt which does not require the belief that a rule or law has been transgressed. Herbert Morris offers such a definition. Morris provides a description of what he calls non-moral guilt. Morris argues that holding guilt to only be appropriate in cases where there is a culpable responsibility for wrongdoing 'provides a distorted picture of guilt's role in our lives' (1987: 220-221). Instead, Morris contends that guilt can appropriately exist in cases where the guilty agent 'is not “culpably responsible for wrongdoing”' and the 'guilt incurred by the person derives from what may fairly be described as a fundamental moral posture towards the world' (1987: 222).

Consider Morris' example of 'someone who, feeling intense anger, wishes that another be struck dead' (1987: 226) and who subsequently feels guilty about having such thoughts. It may at first seem plausible to suggest that we cannot be held responsible for such spontaneous thoughts in the same way we are for our actions. However, there is no need to accept Morris’ claim that guilt in such a case does not require the belief that there has been the transgression of a rule. This is the case because, firstly, we do hold ourselves responsible for our own thoughts in a way which we do not hold ourselves responsible for the thoughts of others. I may have limited control over what thoughts occur to me but I certainly feel some form of responsibility for them, for they are my thoughts. If, in a flash of anger, I wish a colleague of mine were to be struck dead I would feel responsible for that thought in a way which I would not if they were to have such a thought about me. Whether or not I should be held responsible does not alter the fact that my guilty feelings are motivated by my own belief that I am responsible to some extent for the relevant thoughts. This illustrates the fact that we do feel responsible for our own thoughts in an important sense but it does not by itself show that we believe that in having 'evil' thoughts we hold ourselves to have done anything morally wrong.

This is because it seems that in such a case there has been no actual deed for the agent in question to feel guilty about. However, this does not mean that one could
not feel that there had been a transgression of a taboo. Wishing that someone be
struck dead is a thought which contradicts the basic moral principles of many, if not
most, people; it does not seem far-fetched to suggest that there is a taboo against
wishing for the deaths of one's colleagues. Of course, if I wish my colleague were to
be struck dead I will feel a great deal less guilty than I would if I were to act on that
thought. Despite this, I may still reasonably feel guilty for merely having the
thought, because I believe that the very having of the thought is morally wrong. I
would not feel guilty for a spontaneous thought unless I believed there was
something wrong with the having of the thought; I would not feel guilty for
spontaneously wishing I was eating ice cream because there is nothing wrong in
having such a thought. As such, it seems that cases in which people report feeling
guilty about their thoughts can be explained by a model of guilt which requires there
to be a belief that some kind of transgression of a rule or taboo has taken place.

The second type of case Morris discusses where there is potentially a kind of
blameless guilt is what he describes as 'guilt over unjust enrichment' (1987: 232).
This is typified by cases of survivor guilt. To take one of Morris's examples: consider
a situation whereby 'a flood causes the death of all in a large family but one
individual who survives through pure chance' (1987: 232). In such a situation it
would not be unusual for the survivor to report feeling guilty, even if they
maintained that they did not believe that they had done anything wrong. As with the
above case, what is important for our purposes is determining whether the guilty
survivor holds themselves to have transgressed a rule or taboo, not whether they
actually have. On the description given, that they survived through 'pure chance', it is
objectively apparent that they have not. Despite this lack of culpable wrongdoing,
people in situations such as this do commonly report feeling guilt.

It is important to explain situations such as these because a failure to do so
threatens the concept of guilt outlined above. If we accept that in instances of
survivor guilt individuals are genuinely experiencing guilt and that they do not hold
themselves to be responsible for transgressing a moral rule then we are left with a
model of guilt which does not require a belief in personal responsibility. This is
problematic because by removing the element of personal responsibility from guilt
we make it indistinguishable from regret. Regret is a wish that a specific state of
affairs had not come to be. Though it may be a deeply painful and moving emotion,
it does not imply any level of responsibility; I may regret things with which I have
no personal involvement. The same is not true of guilt, principally because it requires a belief that there is culpable responsibility for wrongdoing. Morris' description of non-moral guilt removes one of the fundamental components of guilt and leaves it as something which cannot be differentiated from a localised or personal form of regret.

If we wish to adequately distinguish guilt from regret then the options we are left with are either that survivor guilt is explained by an unconscious belief that the transgression of a rule or taboo has taken place; or that instances of survivor guilt involve a misreporting of the agent's emotions. I maintain that both of these options provide plausible explanations and that the specifics of individual situations will determine which is true in any given instance. Often, those who have survived in circumstances where others have not will on some level blame themselves. This may be because, for instance, they feel that they should have done more to try and save others, even if the facts suggest that such efforts would have been a futile sacrifice: 'the subject may irrationally construe his having survived as the result of his own previous actions or omissions, which he takes to have violated a norm, in this case probably a moral one. Second, he may also feel guilt for the thoughts and emotions his having survived lead to. For instance, he feels happy for having been the lucky one, an affective reaction he construes as forbidden' (Teroni & Deonna, 2008: 738).

There will also be cases in which, due to the gravity of the situation, a complex combination of painful emotions is experienced by the survivor. In such cases it is perfectly plausible that an individual would have difficulty in accurately describing the emotions they are feeling. A complex state which involves grief, shame and regret may well, in some instances, be phenomenologically indistinguishable from guilt. These two options are sufficient to explain cases of survivor guilt without threatening the idea that guilt requires an agent to believe they have transgressed a rule or taboo.

2.1 Reparations

There is a further element in guilt which is entirely absent from shame: a desire to offer some kind of repayment for the apparent wrong committed. This follows from the thought that guilt is appropriately felt about past actions for which
an agent is responsible. In the case of guilt, unlike shame, 'because of the agent's thought that he is directly instrumental in bringing about some forbidden state of affairs [it is the case] that he thinks of himself as “owing payment”, as being liable to retribution' (Taylor, 1985: 92). However, this does not mean that the focus of guilt is on the wrong done. According to Taylor's conception, guilt is focused on the wrongdoer themselves; it is not a desire to repair the damage which may have been done but is rather a recognition by an agent that they have done wrong and wish, for their own sake, to attempt to offer some kind of repayment for that wrong. In Taylor's terms 'the thought involved here is not so much: “I have done this terrible thing to him;” but is rather: “I have done this terrible thing to him.”' (1985: 92). The idea of the 'focus' of guilt can be better understood by looking at what it is that motivates a guilty individual to offer repayment; that is to say, what is it that they wish to achieve with this repayment? According to Taylor, the goal of offering repayment is to alleviate painful guilt feelings; guilt is self-directed in that the repayment it inspires is ultimately directed at altering the emotional state of the guilty agent and the impact the repayment has on the harm done is merely instrumental in achieving this goal.

This description of guilt means that it is essentially a 'selfish' emotion. Whilst shame is characterised by a desire to disappear from view; guilt is characterised by a desire to have a painful burden lifted.

3. Remorse

However, this is not the case with remorse. Remorse differs from shame and guilt firstly because its primary focus is not on the agent themselves but on the harm which they have caused. As Taylor describes it: 'the important feature of guilt is that the thought of the guilty concentrates on herself as the doer of the deed… … The righting of a moral wrong may well be the form the repayment takes, but from the point of view of the guilty person this is only a means towards the end: that she should be rid of the burden, that she should be able to live with herself. The painfulness of the guilty feelings is therefore explained as the uneasiness the person concerned feels about herself' (Taylor: 1985: 97-98). As mentioned, 'the thought in remorse, by contrast, concentrates on the deed rather than on the agent as he who has done the deed' (Taylor, 1985: 98). As Ilham Dilman puts it: 'in remorse it is the pain
of what one has done to others that is sovereign in one's consciousness of it, and leaves no room for any thoughts about oneself' (1999: 325). This means that in an individual who feels remorse there will be a belief that damage has been caused and a desire, often an extremely powerful or overwhelming desire, to repair that damage: 'it is precisely these thoughts which are the agent's identificatory beliefs, i.e., when feeling remorse the agent believes that she has done harm which she ought to repair' (Taylor, 1985: 104). This is not essential to guilt; what is essential to guilt is that 'the person feeling guilt believes that she has done something forbidden and that in doing what is forbidden she has disfigured and harmed herself' (1985: 103). This forbidden act may often be seen to have harmed others or the agent themselves, but this is not true of all cases.

As previously mentioned, Taylor also holds that 'it is central to guilt that the agent sees herself in a position where repayment is due, but not that she thinks she must repair and so in some way undo the damage she has caused' (1985: 103). Here, repayment may mean a literal repayment of a debt. Alternatively, it may mean undergoing punishment which is considered to be an appropriate 'repayment' for the wrong done. For example, consider an individual who has committed fraud and is subsequently pained with guilt. They may believe that in the act of committing fraud they took an unfair advantage over the rest of society and that by serving a prison sentence this advantage is nullified; their debt to society is repaid. However, the serving of time in prison does not directly undo the damage that their crime may have caused. A desire to repair and undo this damage, in the sense which would be motivated by remorse, would only be satisfied if the fraudster were able to directly repay those who lost out as a result of his crime and undo the harm caused to them. This harm may well be to such a wide number of people that such repayment is impossible. If the relevant fraud resulted in a significant loss of tax revenue for the government, for instance, it would be impossible to even begin to calculate how to repay those who may have lost out as a result of decreased government funding. Even in cases where it is possible for a fraudster to repay those who suffered financially this cannot undo the harm which they may have already suffered as a result of past financial difficulties; giving someone money today does not pay for the meal they couldn't afford last week. It is a desire to undo this kind of harm which remorse motivates. Guilt, on the other hand, is typically concerned with a more achievable type of repayment; undergoing punishment may alleviate guilt but it will
not fully alleviate remorse, for while it may in some sense repay the wrongdoer's debt, it cannot literally undo the harm they have caused.

This means that in some cases remorse will be an unresolvable emotion. Whether attempts to repair the harm done can alleviate feelings of remorse depends upon whether an individual believes the harm they have caused is repairable. In the case discussed in the preceding paragraph it would not be possible for the fraudster to ever completely resolve their feelings of remorse. They would be able, perhaps, to lessen the painfulness of the feelings by lessening the harm caused to the greatest possible extent. The intensity of their feelings would also likely diminish over time: unless an individual is driven to suicide by the pain of the remnants of the emotions it is clearly implausible to suggest that a person who is, at one time, overwhelmed with remorse will never be able to direct their thoughts to other things. However, if they feel genuine remorse for past wrongs then it ought to be the case that they experience painful feelings when their thoughts are directed towards those wrongs.

3.1 Repudiation

Remorse is further distinguished from guilt by the fact that it requires the repudiation of past actions. This idea is present in various discussions of remorse, especially when contrasting remorse with regret. For example, Stephen de Wijze asserts that 'proper and genuine remorse is always accompanied by the conviction that the immoral actions in question should never be repeated' (2005: 460). Similarly, Taylor writes that 'perhaps regret always implies acceptance of what has been done. It had to be done although there were unfortunate or disagreeable aspects to the deed. Remorse, on the other hand, never implies acceptance. It is impossible to feel remorse and yet believe that overall it was right to act as one did' (1985: 99). Bernard Williams puts a similar point regarding regret in milder terms: 'regret necessarily involves a wish that things had been otherwise, for instance that one had not had to act as one did. But it does not necessarily involve the wish, all things taken together, that one had acted otherwise' (1976: 127). This wish, that one had acted otherwise, is necessary for remorse. This gives us a further way to distinguish guilt and remorse, for it is possible to feel guilty for past actions without fully repudiating them.

Consider the case of a starving man who steals food in order to save his life.
Let us suppose that the man in question is, in usual circumstances, a law-abiding citizen who has genuine respect for the state, the police and the importance of law and order. Also let suppose that he has very suddenly fallen on hard times and that the house which circumstance has forced him to steal from belongs to an old acquaintance whom he likes and feels some level of affection for. Perhaps we should also assume that the acquaintance is out of town, so that appealing to him for help is not a valid option. In such a case it seems plausible that the man may feel guilt and anguish as a result of his actions, whilst still believing that, all things considered, he would do the same should a similar situation arise. His guilt is not irrational; he may support prohibitions on theft and breaking and entering as being important in maintaining social order. He may feel guilt for the financial burden he has imposed on the home-owner who must now pay to replace a broken window and recognise that he has caused them undue harm; where possible he may wish to make some kind of future repayment for the harm caused. Nonetheless, his overriding concern to stay alive is sufficient to support the belief that he would pursue the same course of action in another relevantly similar situation. This means that, if repudiation is essential to remorse, then he is not capable of feeling remorse whilst holding such a belief. However, it seems far-fetched to suggest that he cannot possibly feel (rational) guilt. Similarly, but on a more trivial level, I may feel guilty for taking the last cookie from the jar, despite knowing my friend had been looking forward to eating it, whilst maintaining that I would likely do the same thing again.

The starving man example outlined above also raises a serious problem for Taylor's account of guilt. As Taylor describes it, guilt is a 'selfish' emotion: the reparations it motivates an individual to make are ultimately aimed at alleviating that individual's painful feelings. However, it seems far-fetched to give such a description of the above example. The starving man sees his actions as having been necessary and as such would not view himself as a bad person. His desire to offer reparations is primarily motivated by a genuine concern for the unfair burden he has forced upon the acquaintance whose property he damaged and stole. To suggest that in any such case a guilty individual's motives are ultimately selfish is both cynical and unnecessary. Instead, we can simply say that his guilt motivates him to make reparations for the sake of another. This means we must broaden our definition of guilt to allow for instances of guilt which are not selfish in nature. We can, however, still hold that Taylor's account of guilt is typical. This means that we should view
guilt as something which necessarily entails a desire to make reparation for any harm caused. This desire may typically be aimed at alleviating an individual's guilty feelings, but it may sometimes be the case that this desire is 'more honest' in its intentions and is simply directed at making repayment for the sake of those wronged.

If we accept that feeling guilt in such cases is not irrational then we also need to understand why it makes sense to feel guilt but not remorse; the explanation cannot be that there is no harm to feel remorse for because, in the cases mentioned above, guilt is felt for an action that has caused harm. One seemingly plausible thought is that the guilt is a form of painful regret. In order to make sense of this idea we need to look more closely at the notion of regret. As Bernard Williams puts it: 'the constitutive thought of regret in general is something like “how much better if it had been otherwise”, and the feeling can in principle apply to anything of which one can form some conception of how it might have been otherwise, together with consciousness of how things would then have been better' (Williams, 1976: 123). This is of course a very general notion of regret and one which encompasses things which it would be entirely irrational for me to feel guilty for; I may regret the fact that there is a long history of violent conflicts in the Middle East but I can hardly feel guilty about such a fact.

The notion of regret relevant here is what Williams describes as agent-regret. Agent-regret is a form of regret 'which a person can only feel towards his own past actions' (Williams, 1976: 123). The idea of agent-regret, as described by Williams, covers voluntary and involuntary actions and is relevant to actions for which it is perhaps not appropriate to feel guilt. The classic example Williams uses to illustrate the idea of agent-regret is that of 'the lorry driver who, through no fault of his, runs over a child' (1976: 124). As Williams observes, the lorry driver will feel very differently from a spectator who is watching the event, and it is entirely understandable that he feels a different sense of regret; a sense of regret that stems from his causal role in bringing about the death of a child. However, on my account of guilt it would not be an appropriate emotion for him to feel as there has been no culpable wrongdoing. For an individual to feel guilt the situation must meet the conditions required for agent-regret (i.e. there must be a sense of regret about one's own past actions) and there must be a belief by the agent that some level of culpable wrongdoing has taken place on their part. This means that were the lorry driver in Williams' example to describe himself as feeling guilty he would either be
misreporting his emotions or mistakenly taking himself to have culpably done wrong.

On Taylor's account however, it would be appropriate for the lorry driver to feel remorse; remorse is focused not on the agent but on the harm they have caused. On Taylor's account it is possible that a person should experience remorse but not guilt, where the agent does not see herself burdened or stained by her wrongdoing. The wrong done need not present itself to her who feels remorse as forbidden, she need not think of herself as having disobeyed a categoric demand. Not every action a person sees as morally undesirable and would like to undo need be seen by her as leaving a stain' (1985: 100). If the lorry driver has caused the death of a child, even if through no fault of his own, then it is understandable that he would feel responsible and wish there were some way to undo the harm caused. Of course in this case, and in others similar to it, there is no act which can possibly undo the harm which has been done; as mentioned earlier this is one of the reasons why remorse is often unresolvable. Such a description roughly equates agent-regret with remorse. However, this idea is problematic. Remorse is an emotion which is appropriately directed towards our past wrongdoing; it is not merely a form of regret which is relevant to our own actions. This means that remorse requires the same conditions as guilt; that the damage caused must be held by the agent to be the result of culpable actions on their part. However, if this is true then it seems that in the case of the lorry driver it is wrong to suggest that he can truly feel remorse; retrospectively he would be unable to pick out any of his past choices which culpably transgressed moral rules in order to provide a sufficient ground for him to feel remorse. An awareness of his causal responsibility is only sufficient for him to experience a kind of agent-regret. Equally, he would be unable to repudiate his past actions in a relevantly meaningful sense. He would of course wish that things were otherwise, but with regard to his past actions there are no forbidden acts of which he could meaningfully say 'I would never do such a thing again'. He could perhaps vow never to drive a lorry again, but such a vow misses the point; the act of driving a lorry is not something which transgresses any (internalised) moral rule or law. There is no relevant past action for him to repudiate because the intention to pursue a course of action which would knowingly bring about the death of a child, or recklessly endanger the life of a child, is not something he previously identified with; there is no past action for him to reject. The agent-regret he feels may be deeply painful but on the description given
here it does not qualify as an instance of remorse.

3.2 Wrongdoing and Evildoing

Further to this, there may be certain kinds of harm to which guilt is, in some sense, an inadequate response; harms to which remorse is a more appropriate response. It may be the case that remorse 'reveals the depth of the problem for the person concerned' (Phillips & Price, 1967: 19). Remorse reflects an appreciation for the true gravity of the harm done or for the significance of the wrong to the agent experiencing remorse. Linguistically this appears to have merit. It sounds reasonable to speak of feeling guilty about taking the last cookie from the jar, but it sounds peculiar to speak of being remorseful about such an act. Yet if someone were to knowingly take the cookie when it was being saved for a diabetic who might urgently need it to increase their blood sugar level, then it feels much more natural to talk of them feeling remorse, assuming of course that they subsequently had a change of heart. The question is then whether this linguistic distinction between the terms 'guilt' and 'remorse' actually reflects a more significant, conceptual difference.

John Deigh proposes an idea along these lines. Deigh's distinction between guilt and remorse hinges on a further distinction between wrongdoing and evildoing. Deigh writes: 'wrongdoing, lately considered, I conceive as transgression of a limit on one's conduct set by a moral rule or a duty correlative to a moral right. Evildoing, on the other hand, I understand, roughly, as an act that destroys or does damage to something of value' (1982: 400). 'Something of value' is taken to mean either persons or objects, though it is reasonable to consider that the value of other people will be the most common type of value. A useful example of when this would not be the case is given by Alan Thomas who writes: 'If, while out walking in the countryside, I wantonly destroy the last wildflower of an endangered species, not protected by any legal or moral sanction, I have voluntarily destroyed an object of value' (1999: 7). The distinction between wrongdoing and evildoing is a distinction between the transgression of a moral rule and the destruction of something of value. According to Deigh's terminology an agent properly responds to wrongdoing with guilt and to evildoing with remorse. According to Deigh, the notion of wrongdoing aligns approximately with the breaking of a law whereas evildoing is instead focused instead on non-legal values (1982: 399).
Deigh notes that wrongdoing and evildoing may, of course, coexist in certain situations. This means that 'consequently, we may assume that the two emotions [of guilt and remorse] often occur together as indistinguishable constituents of a complex emotional experience' (Deigh, 1982: 400). However, this does not adequately capture the relationship between guilt and remorse. A useful parallel may be drawn with sadness and grief. Sadness and grief are not the same emotion; rather grief is a species or type of sadness. Equally, remorse should be seen as a species of guilt. In order to show why this is the case we must look at the distinction between the two as drawn by Deigh.

The distinction Deigh draws relies on the thought that evildoing can exist without wrongdoing. Deigh claims that 'where someone has no rights or has surrendered the rights that normally protect him from injury, one can injure him without also wronging him. Such situations make possible experiences of remorse that are distinguishable from experiences of guilt' (1982: 400). If we go back to Thomas' example, the destruction of the last wildflower of an endangered species, there appears to be evildoing without wrongdoing. This is the case because, as Thomas puts it, the flower is 'not protected by any legal or moral sanction'. However, this misses the fact that the person concerned will only feel remorse because they believe they have transgressed the moral rule that it is wrong to destroy something of value. This is the case in any apparent instance of evildoing without wrongdoing. For an act to be considered 'evil' we must accept that it is wrong to destroy or damage things of value. The fact that transgressing this moral rule is necessary for an act to count as evil/doing means that evildoing necessarily incorporates wrongdoing. The person who destroys the wildflower has to accept or internalise the moral rule that the destruction of valuable objects is wrong in order to be able to feel remorse for having destroyed it. Without the acceptance of such a rule they cannot plausibly feel remorse, for they have no reason to see the flower's destruction as something regrettable.

However, this does not mean that the distinction between wrongdoing and evildoing is meaningless or lacking in value. There is still a distinction to be made because wrongdoing can exist without evildoing, even if the reverse is untrue. A drunk driver who injures no one can feel guilt for his wrongdoing but there is no evildoing; he has not destroyed or damaged something valuable. Drawing the distinction in these terms means that guilt may be appropriate in situations where
remorse is not, but that the reverse does not hold. If remorse is the appropriate response to evildoing and guilt is the appropriate response to wrongdoing then, because evildoing entails wrongdoing, one also ought to feel guilt in any situation where remorse is appropriately felt.

This still provides a useful distinction between remorse and guilt. Remorse does not equate to Williams' agent-regret because it requires culpable wrongdoing. However, it goes deeper than guilt, which also requires culpable wrongdoing, in requiring what Deigh calls evildoing; the destruction of something valuable. It is this destruction of value which, to return to Taylor, a remorseful agent feels a powerful desire to undo. The impossibility of this in many situations explains the anguish often experienced by those who are deeply remorseful for their past actions. The fact that guilt can exist without evildoing explains why offering repayment or suffering punishment may alleviate the emotion in a way which they cannot in instances of remorse; this comes down to the distinction between a desire to offer repayment and a desire to undo the harm done discussed earlier.

To summarise the preceding discussion:

Shame is, in comparison to guilt and remorse, the 'simplest' of the three emotions. It requires a 'self-directed adverse judgement', a judgement that the shameful agent is 'not the sort of person she believed, assumed, or hoped she was or anyway should be' (Taylor, 1985: 64). This 'judgement is brought about by the realization of how her position is or may be seen from an observer's point of view' (Taylor, 1985: 68). Importantly, shame does not imply any level of responsibility or blameworthiness.

Similarly, guilt requires a self-directed adverse judgement on the part of the guilty agent. However, it also requires a belief that there is culpable responsibility for wrongdoing. In some cases, such as those of survivor guilt, this belief may be unconscious. The introduction of responsibility is also important in distinguishing guilt from regret. Additionally, guilt motivates a desire on the part of the guilty agent to offer some kind of repayment for the wrong done. This repayment may typically be aimed at alleviating the guilty agent's painful feelings, but it may in some cases be motivated by a purer desire to make up for the harm that has been done.

Remorse shares with guilt the requirement of culpable responsibility for wrongdoing. It also motivates a desire to undo the harm which has been caused;
though in remorse this desire is necessarily aimed purely at repairing the damage done. This distinction stems from the fact that remorse is necessarily not a self-directed emotion, though both guilt and shame may be. Remorse is further distinguished from guilt by the fact that it necessarily entails a repudiation of one's past actions; a conviction that such actions should never be repeated. This is not necessarily the case with guilt (or regret) which can appropriately be felt about actions which one would repeat in a relevantly similar situation: remorse requires a powerful renewed or newfound commitment to moral principles.
The following chapter will address the relationship between apology, remorse and punishment. The first half of the chapter will focus on the issue of whether remorse is necessary for a genuine apology. Section 1 will address views which argue that apology primarily plays a functional social role which can be achieved in the absence of remorse. Section 2 will develop the contrasting view that remorse is necessary for a full or genuine apology and, furthermore, that genuine apologies are expressions of remorse. The final part of the chapter will then move on to discuss the relationship between apology and punishment. Section 3 will discuss, with a particular focus on Christopher Bennett’s recent work, the view that apology plays a central role in determining the just punishments for criminal offences.

1. Social Role of Apology

Before any discussion of the nature of apology can take place it is first necessary to have an initial idea in mind as to what is meant by the term ‘apology’. I am taking an apology, roughly, to be an expression of regret about past actions, typically characterised by the use of the word ‘sorry’. I will also be focused specifically on instances in which an individual is apologising for their own past actions. There are interesting philosophical questions concerning whether it is appropriate, or even possible, for individuals or organisations to apologise for the past actions of others (such as a state apologising for its past involvement in slavery, or relatives of deceased criminals apologising for their family members’ actions). However, such questions are not directly relevant to discussion of the relationship between remorse and one’s past actions. It is also worth noting, that although Section 1 is focused on the social role of apology I will not be concerned with cases in which apology plays an essentially non-moral role. I am referring to cases in which, though there is an apparent apology (almost universally due to the use of the word ‘sorry’) there is no wrongdoing. These are cases, such as an estate agent telling a prospective buyer ‘I’m sorry sir, but that property has already been sold’, in which the apology is a matter of etiquette rather than indicative of wrongdoing. There are also cases, such as apologising for bumping into a stranger whilst walking down the street, in which it
may be unclear whether the apology is again merely a matter of etiquette or is indicative of genuine wrongdoing. Whilst it may not be clear in some cases whether an apology is simply a matter of etiquette or has a more significant meaning, distinguishing these cases from one another is not necessary for the current discussion and it is sufficient to say that I am concerned with apologies which are offered for actions for which the apologiser would admit they personally had done wrong. A classic example of such a situation can be found in the breaking of a promise to a friend. The breaking of a promise represents a failure to fulfil a moral obligation and, assuming there are no extenuating circumstances, would typically be seen as something worthy of an apology.

The key question, then, is what criteria an apology in such a case ought to fulfil. It is important to note here that I will be relying on the claim that an individual ought to feel guilt or remorse upon recognising that they are culpable for a past wrong (Ch. 1). However, even if those who have done wrong ought to feel guilt or remorse, it is still clear that an apology can be given without the presence of such emotions on the part of the apologiser. Indeed, many of our earliest memories of apologies as children are of cases in which apologies are coerced by parents and given without any real conviction on the part of the child. Yet despite this lack of conviction, parents still encourage or instruct their children to explicitly ‘say sorry for what you did’ to other children they have wronged in some way. This is, of course, done largely to highlight to a misbehaving child what it is they have done wrong and to further their moral and empathetic development. However, it also plays a more immediate function by helping to repair a damaged relationship: even a forced apology and begrudging acceptance between siblings can help to turn a heated argument over thrown food into a moderately peaceful meal. We can ask two important questions about an example such as this: does the coerced and insincere apology count as an apology and, if so, does it succeed in fulfilling the role an apology ought to fulfil?

In order to address the question of whether we ought to consider a child uttering ‘I’m sorry I threw food at you, it was wrong of me’ (whilst not feeling guilty) to his brother at the behest of their parent a genuine apology, it is first necessary to have a more precise analysis of what constitutes an apology. Louis Kort offers five
conditions which he contends are ‘separately necessary and conjointly sufficient for the performance of an apology’ (1975: 83). These conditions are:

1) In saying U to Y, X expresses regret about A.
2) In saying U to Y, X accepts responsibility for A.
3) In saying U to Y, X acknowledges that by virtue of his having been responsible for A, he has treated Y in a way which constitutes an offence to him.
4) In saying U to Y, X expresses regret about A as something, being responsible for which, he has offended Y.
5) In saying U to Y, X makes a gesture of respect for Y as a person having a right not to be treated as X is acknowledging having treated him.

(Kort, 1975: 83-87)

These criteria fit well with a common-sense understanding of what an apology is and provide us with a good basis to determine whether a given speech act should be considered an apology. As such, I will now address each condition in turn, in relation to the coerced apology for throwing food.

Firstly, an apology must express regret about the relevant action. The phrase ‘I’m sorry’ superficially appears to be an expression of regret. That is, the meaning of the words ‘I’m sorry’ purport to express one’s regret. Kort states that ‘in claiming that to apologize for something, one must, inter alia express regret about it, I do not, of course, mean to imply that one must actually regret it’ (Kort, 1975: 84). Kort uses expression in the weak sense of merely meaning that the message conveyed by an apology must be expressive of regret about a past action. Assuming our food thrower says ‘I’m sorry I threw food at you, it was wrong of me’ with some degree of sincerity (and without any obvious contradictions such as visibly shaking his head) then he has expressed regret by Kort’s standards. In this situation the sincerity is, however, feigned. The utterance is expressive of regret even if the child does not actually regret their actions (they may well be delighted to have thrown the food). The apology is insincere, but it is not negated as an apology altogether. The subsequent section will develop the view that good or genuine apologies must also be genuine expressions of regret; that they must not only convey the message of feeling regret but must also be an outward expression of one’s genuine feelings of
regret. However, to contend that bad or insincere apologies fail to count as apologies altogether is to provide too narrow a definition of apology: the inwardly defiant child may, perhaps, not be able to apologise meaningfully but by speaking the words ‘I am sorry’ they are nonetheless able to perform the act of apologising. Though there is good reason to consider an insincere apology a bad apology, for now we can accept that insincere apologies are still very much apologies of some kind.

Secondly, acceptance of responsibility. Kort observes that in many, if not most, apologies the acceptance of responsibility is implicit or tacit rather that explicit (1975: 84). This seems to me to be true of our current example. In agreeing to say sorry the child has accepted some degree of responsibility for their actions. The use of the phrase ‘I am sorry’ shows an ownership of their past actions. This would be negated were they to add extra details to their apology in an attempt to remove the blame from themselves. Just as ‘I’m sorry I threw food at you’ succeeds in accepting responsibility, ‘I’m sorry I threw the food at you, but I only did it because Lucy made me’ fails.

Thirdly, acknowledging that one has committed an offence against the recipient of the apology. This condition separates apology from expressions of regret about one’s past actions for which no apology is necessary (‘Mum, my mouth’s burning, I wish I hadn’t put chilli sauce all over my food’ both expresses regret and accepts responsibility but is not an apology). The phrase ‘I’m sorry I threw food at you’ captures this through the use of the words ‘at you’. The apology is directed towards the wronged party and recognises that it is him who is deserving of the apology, even if the instruction and motivation for the apology comes from elsewhere (i.e. an angry parent).

Fourthly, expressing regret for an offence as such. Kort introduces this condition to rule out instances in which an individual could express regret at having committed an offence to another, not because of the wrongness of the action, but because they regret that the offence had not been greater (1975: 85-86). Amongst adults such expressions of regret, of the kind ‘I’m sorry I conned you for £100, you’re so gullible I could have got £200’, are not likely to occur very often. Such expressions of regret seem more likely to occur in the food-throwing example. Consider the three possible following versions:
i) ‘I’m sorry I threw food at you, it was wrong of me’
ii) ‘I’m sorry I threw food at you… while Mum was looking’
iii) ‘I’m sorry I threw food at you… I should’ve thrown the plate’

As with the first three conditions i) again succeeds as an apology. It expresses regret about the throwing of food at his brother because it was the wrong thing to have done. Version ii) clearly fails as an apology because it is an expression of regret at having been caught, not about having wronged his brother. However, it still expresses regret, accepts responsibility and recognises that an offence has been committed. Equally, version iii) fulfils Kort’s first three conditions but fails to be an apology because it considers the harm regrettable because of its lack of magnitude rather than because it was the wrong thing to have done.

Finally, ‘making a gesture of respect to the hearer of the apology as a person with a right to be spared such mistreatment’ (Kort, 1975: 79). Kort offers this final condition in order to highlight the fact that apologies are made to people. In apologising to you, I not only express my opinion about my past actions but also make a gesture to you about the way you ought to be treated in future. This gesture is essential in order for apologies to help restore damaged relationships. When we offer an apology to someone we do so in the hope that they will accept that apology and not merely agree with our negative assessment of our past actions. When we apologise we are not only saying that we have done wrong in the past, but that we recognise that we ought not to act the same way again in the future and that the injured party is not deserving of the sort of harm we have caused them. In the case of a child apologising for throwing food it seems extremely unlikely that this gesture is one that would be consciously made (though the same is likely true for many, if not most, apologies made by adults). However, this gesture can be implicit in the apology. Though there is nothing in the utterance ‘I’m sorry I threw food at you, it was wrong of me’ which speaks explicitly to the future treatment of the child’s brother it does not seem a stretch to suggest that it implies that the child knows he ought not to do the same thing again. It is equally plausible for a still coerced and insincere apology to also contain statements such as ‘I won’t do it again’ or ‘I wouldn’t have liked it if you’d done it to me’. Such language would represent knowledge on the part of the apologising child that they ought not to treat their brother the same way again in the future.
According to Kort’s conditions, a coerced apology given by a child should indeed be considered a genuine apology, albeit an insincere one. The question then becomes whether such an apology is able to fulfil the role an apology ought to fulfil. Kort’s conditions can also help begin to answer this question by breaking down apologies into distinct components. In particular, the first and fifth conditions are of particular interest here.

Condition five, the making of a gesture of respect to the listener, helps to illustrate purpose of apologising: as Richard Joyce puts it ‘the function of an apology is to reconcile discordant parties—in other words, although the content of an apology is oriented toward the past, the whole purpose of the act lies in its future consequences’ (1999: 171). The first of Kort’s condition, the expression of regret, also helps to highlight the area in which a coerced apology is lacking: sincerity. The issue is whether an insincere apology can serve to ‘reconcile discordant parties’. There are two distinct issues which must be addressed in answering this question; one concerning the apologiser and one concerning the recipient of the apology. Firstly, does the apology appear to be sincere? Secondly, what expectations does the recipient have regarding the apology? That is to say, do they require sincerity or is the situation such that social norms mean that the ritual of apology is sufficient in itself to bring about reconciliation. It seems to me that there can be no universal answer to these questions; the personality of the individual apologising will affect their ability to feign regret (if they wish to feign it) and the intricacies of different social situations will change the expectations and norms governing apologies. However, there is also nothing inherent in the structure or role of apologies outlined above which proscribes the possibility of an insincere apology fulfilling an important social role, whether due to deception, the lack of an expectation of remorse or a combination of the two. Despite this, I argue that there are situations in which a lack of sincere remorse undermines apologising and prevents an apology being able to play the role it ought to in our social interactions. This is the case when apologies are made for serious harms. Though it is difficult, or perhaps impossible, to specify precisely when a harm should be considered serious, it will be sufficient for the coming discussion to consider this to apply to all cases of wrongdoing for which criminal punishment is justified.
Firstly, however, we can briefly return to an apology at the other end of the spectrum of wrongdoing: a child apologising for throwing some food at his brother. Here, there is no significant harm caused and the ‘reconciliation’ is one which would likely happen fairly soon even without an apology. The performance of the apology requires a tone of reasonable sincerity (i.e. the language must be appropriate and there must be no signs of obvious contradiction or sarcasm) if it is to be accepted, yet it seems plausible that the brother receiving the apology may not genuinely expect his sibling to feel bad about what he has done. Siblings often fight over childish things, and the important aspect of the apology for the wronged brother here is likely the performance of the apology; seeing his brother be told off and made to apologise to him may well restore them to an equal footing whether the apology is sincere or not. However, this is dependent on the situation being one which is reasonably trivial and, again, in which there are low expectations regarding the sincerity of the apology. This provides an example of an insincere, yet effective apology. The apology ‘succeeds in being an apology, in the same way as one may succeed in thanking even if one doesn’t appreciate the gift’ (Joyce, 1999: 166). A contrasting situation, in which one party has caused grievous harm to another, may well result in a situation in which there can be no effective apology, even if it is given with the utmost sincerity.

How then, are we to assess the appropriateness of apologies in situations which require a higher standard of sincere apology if there is to be any hope of reconciliation? In recent work on apology Nick Smith has developed a framework for what he titles ‘categorical apologies’. Smith distinguishes categorical apologies as a form of apology with a particular set of demanding criteria. The following section will discuss these criteria, with a particular focus on the relationship between remorse and meaningful apologies.

2. Smith and Categorical Apologies

In his recent work on apology Nick Smith has developed the concept of a categorical apology. Smith correctly notes that apologies can take a variety of forms and carry differing meaning; a categorical apology is, according to Smith, not the only form an apology can or ought ever to take, but is rather a ‘regulative ideal for
acts of contrition’ (2014: 17). Smith also takes categorical apologies as the form of apology we ought to have in mind when discussing the role of apologies in law. As a model for ideal acts of contrition it is unsurprising that the requirements for Smith’s categorical apology are extremely demanding and, as such, that only a small minority of apologies will ever fully satisfy the conditions set out. The categorical apology is, according to Smith, the ‘highest manifestation’ of the practice of apology (Smith, 2014: 19). Smith discusses at length 13 different aspects which are manifest in a categorical apology. These are:

1) Corroborated Factual Record: the parties involved must agree to a detailed account of all relevant events.
2) Acceptance of Blame: a wrongdoer must accept that they are responsible for the harm they have caused, and not blame external factors.
3) Possession of Appropriate Standing: a categorical apology can only be given by one who has done wrong themselves, and not via a third party.
4) Identification of Each Harm: distinct acts of wrongdoing must be distinguished, and not conflated into one general admission of having acted badly.
5) Identification of the Moral Principles Underlying Each Harm: a categorical apology will demonstrate that an offender is aware of each moral principle they have violated.
6) Shared Commitment to the Moral Principles Underlying Each Harm: the apologiser will show a commitment to the moral principles they have identified themselves as having violated. This is typified by the use of the phrase ‘I was wrong’.
7) Recognition of Victim as Moral Interlocutor: the victim must now be recognised as someone worthy of engaging in moral discourse with.
8) Categorical Regret: the offender must repudiate their actions.
9) Performance of the Apology: a wrongdoer must ensure that their apology is expressed to the victim.
10) Reform: a categorically apologetic offender will reform and refrain from reoffending over the course of their lifetime.
11) Redress: an attempt must be made to offer some form of appropriate reparation for the harm caused.
12) Intentions for Apologising: a categorical apology must be not self-serving, but must be motivated by an intention to repair the damage that has been done.

13) Emotions: an offender must feel emotions of sorrow and guilt commensurate to their crime.

(Smith, 2014: 17-19)

Smith discusses and defends these aspects of a categorical apology at length in *I Was Wrong* (Smith, 2008). A full discussion of each of these points would go beyond the scope of the current discussion. I will instead focus instead on those aspects of Smith’s account which are most controversial and/or most relevant to the relationship between remorse and apology. At times I will group together aspects of the categorical apology for ease of discussion. Doing so is not at odds with Smith’s own work. He himself suggests that when an abbreviated version of his account is useful that we ought to refer to the ‘four corners of apologies: explaining what happened with sufficient detail, accepting blame as deserved, not reoffending, and providing appropriate redress’ (Smith, 2014: 20).

The first two of these four corners of apology (explaining what happened sufficiently and accepting blame) are very similar in nature to the necessary conditions required for an action to count as a genuine instance of apology. In the preceding discussion I have already claimed that an apparent apology in which there is either a failure to identify the harm which requires apology or a failure to accept the responsibility (and blame) fails to count as a genuine apology. Smith’s account places more stringent demands on the apologist than in the largely trivial examples discussed above. This is because, as already noted, the categorical apology is taken to be the ideal standard for acts of contrition and is, according to Smith, the sort of apology we ought to seek or expect in cases of serious wrongdoing (especially those with relevance to the law). This can be seen especially clearly in the first (Corroborated Factual Record) and fourth (Identification of Each Harm) of Smith’s conditions. Smith takes these conditions to mean a categorical apology requires both a corroborated ‘detailed factual record of the events salient to the injury, reaching agreement among the victim, offender, and sometimes the community regarding
what transpired (Smith, 2014: 17) and that the ‘offender will identify each harm, taking care not to conflate several harms into one general harm or to apologise for only a lesser offense or the “wrong one”’ (Smith, 2014: 18). This description of an apology sounds grandiose when discussing a child apologising for throwing food but is appropriate when considering cases of serious wrongdoing. If we are to think of an apology in a legal case for causing injury as a result of driving under the influence of alcohol, an effective apology will indeed require a detailed account of the events being apologised for and the aspects of the defendant’s behaviour which were wrong if it is to be taken seriously. Consider a case in which the drunken driver initially fled the scene but later handed themselves in to the police. A categorical apology would require them not to conflate the wrongs of drunk-driving and evading justice into one single action, but rather to identify the different aspects of their behaviour which were at fault and identify each of those actions within their apology. Whilst speaking in such terms may seem more appropriate to serious cases it is, however, still the case than even an apology for a minor harm must not run contrary to these conditions. We may not demand that an apologising child spell out precisely what has happened (and agree this in detail with the wronged party) or carefully individuate their wrongful actions, yet we do still broadly require that they agree to the facts of what has happened and apologise for the appropriate actions. The thoroughness and level of detail Smith requires for a categorical apology is appropriate when considering such apologies as the ideal standard for apologies.

The final two of Smith’s four corners of apologies, however, do more to distinguish categorical apologies from other instances of apology. Smith distinguishes categorical regret from reform. Categorical regret, for Smith, means that an individual believes ‘she has made a mistake that she wishes could be undone’ (Smith, 2014: 18). When an individual categorically regrets their actions they no longer endorse them or identify with being the sort of person who would intentionally commit such an act. In my terms, they repudiate their past actions. In the preceding chapter I have defended the view that repudiation is a necessary component of remorse. Smith is right to view categorical regret, or repudiation, as being necessary to a full apology. However, I argue that it is also the case that remorse is necessary to a full apology. Repudiation is one component of remorse,
meaning Smith’s claim that repudiation is necessary to an ideal apology is consistent with my own view.

However, no longer endorsing one’s past actions is, for Smith, distinct from reform. Smith argues that the reform necessary to a categorical apology requires that the apologiser ‘will reform and forbear from reoffending over her lifetime and will repeatedly demonstrate this commitment by resisting opportunities and temptations to reoffend’ (Smith, 2014: 18). Smith does not mean by this that the apologiser only promises not to reoffend, but that they both make such a promise and successfully keep that promise for the duration of their lifetime. Smith therefore considers a true categorical apology to be something which temporally extends beyond the initial performance of the apology and is ultimately made over the course of a lifetime. Smith views the gesture or performance of apology as a kind of promise and argues that at the declarative stage such apologies ought to be considered ‘promissory categorical apologies’ (Smith, 2014: 21), noting that strictly speaking we ought to consider ‘even the most exemplary apologies between the living as promissory categorical apologies’ (Smith, 2014: 21).

Smith suggests that some may find the ‘inability to definitively judge an apology at the moment it is offered to be a nuisance’ (Smith, 2014: 21). Categorical apologies must be judged over a long period of time because they require a kind of moral transformation which Smith contends cannot happen quickly. The extension of apology in this way makes Smith’s categorical apology distinct from typical definitions of apology. It is important to remember that, according to Smith, this condition applies only to categorical apologies and not to all apologies. This means that if an individual has made a promissory categorical apology and subsequently reoffends, their apology no longer ‘rise[s] to the level of a categorical apology’ (Smith, 2014: 21) but the initial apology still stands as a lesser form of apology. Smith also contends that this aspect of categorical apologies likely prevents deathbed apologies from ever being categorical apologies, as demonstrating reform and making full redress will not be possible (Smith, 2014: 16).

Smith’s assertion that some may find this aspect of categorical apologies a nuisance does not adequately address the issues raised by viewing categorical apologies as lifelong processes. Nor is the issue here merely a linguistic one. That is
to say, it is not sufficient to say that Smith’s categorical apology is a distinct concept from the ideal form a declarative apology can take; think, for instance, of the best form of apology that would be available to someone on their deathbed. Smith is including future behaviour as part of apologies, rather than as being something distinct from and subsequent to them. This is part of the reason Smith chooses to focus on *apologies*, rather than on related terms such as remorse, contrition, penance and atonement. Smith holds apology to be a broader term which can incorporate a wider range of mental states and behaviours, allowing for the inclusion of future behaviour. However, it still runs contrary to a common understanding of what is meant by apology. Just as one may make a genuine promise and subsequently break that promise, one may apologise and fail to live up to the standards set by that apology. Yet just as the breaking of the promise does not of itself prevent the initial promise being genuine, nor does the failure to live up to the standards set by one’s apology necessarily prevent one’s apology having being genuine.

An apology, like a promise, ought to be judged on criteria available at the time it is performed. To illustrate this we can consider the case of promising in more detail. Specifically, what do we want from the performance of a promise. Imagine you have borrowed money from a friend and promised to pay them back next week. What is it that your friend ought to expect about your promise? This is not the same as asking what they expect from you in the future; clearly they expect you to return their money. As well as the expectation of recompense they will also have expectations about the promise itself; there are conditions it ought to meet if it is to be considered a good or ideal promise. Firstly, the promise ought to be made with good intentions; when you make a promise you ought to intend to keep it. Secondly, you ought to believe that it is within your power to keep the promise. If you were to borrow an amount of money you knew you could not repay you could not make a sincere promise to repay the loan, even if you made the promise wishing that you will be able to make good on your word. These are criteria which it is appropriate to judge a promise by. A promise which is not made with sincere intentions or the belief it can be fulfilled does meet the standards a good promise ought to. It seems reasonable to assume that your friend may justly choose to refuse to lend you the money if they know your promise is lacking in such a way. However even a sub-par promise still counts as a promise, just as an insincere apology is still an apology.
Both promises and apologies are performative illocutionary acts (Austin, 1962: 94-108). This means, assuming that a speaker holds the appropriate status and the situation is governed by accepted norms of conversation, by uttering the words ‘I promise’ or ‘I apologise’ the speaker has performed the act of promising or apologising. The making of a promise still, therefore, creates an obligation even if it is made in bad faith (for more on how promising creates moral obligations see: Thompson, 1990; Pink, 2009) If you promise to repay your friend then you ought to do just that, even if you made the promise with no intention of keeping it. Subsequently failing to do so means you would have failed morally on two separate counts. Firstly, you have deceived your friend by making an insincere promise with no intention of keeping it. Secondly, you have failed to fulfil the obligation created by your (deceitful) promise. It is possible to separate the two elements and judge them separately. It would also be possible for you to make an insincere promise yet ultimately keep your obligation (you may deceitfully promise to repay a loan but subsequently win the lottery and decide to pay the money back as it now makes very little difference to you). In such a case, despite the keeping of the obligation, we can still judge the promiser negatively for making a promise without intending to keep it. Though our evaluation of the promise itself and our evaluation of the promiser’s subsequent behaviour ultimately result in judgement’s regarding the individual they are distinct judgements. We could combine these judgements and talk instead only of ‘fulfilled-promises’; a fulfilled promise being one which is made in good faith and which is upheld, and is viewed as one ongoing act. A fulfilled promise, it could be argued, should be seen as the regulative ideal of acts of promising. However, to do so suggests that we then ought to see fulfilled promises whose obligations have not yet been met as promissory fulfilled promises. This over-complication and circularity occurs because to combine the act of promising and the fulfilment of a promise into one act is to conflate two separate actions which ought to be considered and judged as such.

Returning to apologies, we can see that the same is true. We can judge an apology separately from the subsequent actions of the apologiser. Furthermore, in the case of apology this distinction is more apparent. A promise is a commitment to act a certain way in the future. An apology, on the other hand, is an expression of regret and acceptance of blame for past actions. Though an apology may also contain
an implicit or explicit commitment to alter one’s behaviour in the future, the primary subject of an apology is one’s past actions. Recognising this means we ought to have an ideal for apologies which can be judged at the time of the apology being given. This is especially important if we are to base our future treatment of those who offer apologies on the nature and quality of their apologies. Subsequent reoffending may provide us with evidence that the original apology was insincere or lacking in some other way, but it does not necessarily do so. Rather than including future behaviour as one aspect of the ideal form apology can take we ought instead to focus on those aspects of apology which are most valuable at the time of an apology being given.

Smith’s account of categorical apologies is of value here, as certain of the criteria Smith defends are indeed those aspects of apology which give them their moral worth. Specifically, this relates to conditions 8, 12 and 13 from Smith’s account: categorical regret, one’s intentions for apologising and the emotions felt by the apologiser. Though Smith distinguishes categorical regret from feeling the ‘appropriate degree and duration of sorrow and guilt as well as empathy and sympathy for the victim’ (Smith, 2014: 19), this is a mistake. In the preceding chapter I defended the view that repudiation is a necessary component of remorse, arguing that repudiation distinguishes remorse as a distinct species of guilt. Repudiation is not only a component of remorse, but is also inexorably tied to it. One cannot repudiate past wrongful actions whilst taking responsibility for them and not feel remorse. Painful feelings of remorse are not intrinsically good because of the pain they cause to an individual, yet they ought to be felt by those who are aware that they have done wrong. A failure to feel such emotion demonstrates a failure to appreciate the relevant moral standards. Smith refrains from describing the emotions which ought to be felt by those offering categorical apologies, instead claiming that the appropriate emotions felt by one apologising are determined by ‘cultural practices and individual expectations’ (Smith, 2014: 19). This contrasts with the description of remorse I have detailed in the preceding chapter. Such emotion ought to be felt by anyone who is aware that they have committed a serious wrong in the past and is aware that they are culpable for the harm caused.

Further to this, feeling such emotion is not only necessary if an apology is to be sincere but it also ought to play a role in motivating an individual to apologise. Smith argues that a categorical apology requires an individual to apologise for the
right reasons. These reasons cannot be self-serving, but ought to be directed towards benefitting the wellbeing of the harmed party and repairing the initial harm (Smith, 2014: 19). An individual may ultimately benefit from their apology, but their benefit should be a by-product rather than the primary objective of the apology. This fits with what we, as social beings, desire from an apology. If I am angry at my partner for not having done the washing up after having promised to do so and they apologise, I would hope that such an apology was motivated by the recognition that it was wrong to have broken a promise and not simply by a desire to make their own life easier. Whilst we often recognise that people offer apologies for self-serving reasons, it is also true that we hope for and place greater value on apologies which are made for primarily unselfish reasons; whilst not all apologies are unselfish an ideal one will be.

It is here that the intimate relationship between remorse and apology becomes apparent. Repudiation engenders remorse, and remorse motivates apology. One of the ways in which emotions can be differentiated from one another is through their characteristic action tendencies (Frijda, 1986; 1987). These action tendencies represent a state of readiness in an individual feeling a specific emotion to act in a certain way: fear is characterised by a desire to flee, disgust is characterised by a desire to recoil, shame is characterised by a desire to hide and so on. It is possible for one emotion to be associated with more than one action tendency; fear, for instance, may be associated with the desire for either fight or flight (Elster, 2012: 271). It is also worth noting that a specific action tendency does not have to map directly onto one precise set of actions. For instance, the tendency to flee from danger may manifest itself in a variety of ways depending upon the options available to the threatened party (Frijda, 2004: 160). Our emotions bring about action readiness and motivate us to act in certain ways. Frijda has argued that ‘motivation for action is one of the main and major components of emotion’ (Frijda, 2004: 170). When we feel violent anger, for instance, we are motivated to injure the object of our anger. Our intent is to cause them harm, whether this is through punching, kicking, shouting or some other means. All of these actions have the same intent, as they share the same common end state: causing injury to the object of our anger (Frijda, 2004: 159-160). The emotion we feel brings about in us action tendencies which are directed towards bringing about a certain goal, whether this is being far away from a
frightening animal or being hidden from the view of a judgemental gaze. The precise actions we undertake will be determined by a large number of factors specific to any given situation. Our initial motivation to act comes from our emotion but the local environment, the options which are practically available to us and the norms governing behaviour in a given situation will all play a role in determining how we ultimately act.

In some situations we will be insufficiently motivated to act or prevented from doing so by our environment. Though many emotional episodes will provide insufficient motivation to actually drive action, the more powerfully an emotion is felt the more likely it is to provide sufficient motivation for an individual to pursue a related action. This is true of instances which require immediate attention, such as ‘when one is under physical threat, or faced with an opportunity that will rapidly pass by’ (Frijda, 2004: 167). Increased motivation to act is also provided by situations in which there is a ‘major emotional dimension’, especially in situations where felt emotions affect one’s sense of self (Frijda, 2004: 167). Remorse inevitably brings with it harsh judgements about one’s own character and represents a decision to no longer endorse the sort of person you once were. It is an emotion which therefore always provides an individual with a powerful motivation to act. As discussed in Chapter 1, the primary focus of remorse is not the self as a wrongdoer but on the harm one has caused. This means that a remorseful agent will tend towards trying to repair or make amends for that harm. In some situations this will not be possible, making remorse a sometimes tragic and deeply painful emotion. However, in most situations there will be courses of action available to a wrongdoer which will help to make amends for or repair the harm they have caused, even if it the case that they can never undo the wrongful act itself.

Apologies often play an important role in helping to make amends for past actions; an apology addresses the harm caused, identifies the apologiser as one who no longer endorses their past actions and aids the process of repairing damaged relationships. Apologies are part of the fabric of our society. They play a prominent role not only in our private lives but also in public and political discourse (Joyce, 1999: 159-160). As the above discussion of childhood apologies helps to illustrate we are raised from a young age to apologise when we act wrongly and to consider apologies an integral part of the way we maintain relationships with others. The
norms which govern our social behaviour clearly dispose us to typically consider apologising an appropriate course of action when we wish to make amends for our past actions. This is not to say that we are led to believe that apologising for our actions will simply repair any harm that has been caused, nor that it is the only thing we ought to do. Yet it is an important first step in the process of making amends. It will often be followed by other forms of redress directed more specifically at addressing the precise nature of the wrong in question, such as returning a stolen item or paying for a damaged item to be repaired. However, whilst an apology can sometimes be sufficient in itself to make amends for one’s past actions it is typically the case that more direct redress is considered insufficient if it is not accompanied by an apology. We expect apologies from those trying to make up for their past actions and consider a failure to apologise a failure to accept responsibility for what has been done. In light of this, it seems clear that an individual who feels remorse will be strongly motivated to offer an apology for their actions. Doing so may well bring with it a significant cost to the wrongdoer. This is especially true of cases which involve criminal wrongdoing. If an individual commits a criminal offence for which they have not been apprehended and subsequently comes to feel remorse for their actions there will likely be a significant cost if they wish to put themselves in a situation where they are able to offer a genuine apology. To do so would require them to hand themselves into the police and face the punishment for their crime. Despite this, a truly remorseful individual will be motivated to do so if the reassessment of their past self is sufficient to bring about a meaningful change in character.

3. Apology and Punishment

In the preceding sections I have discussed the elements which are key to good and meaningful apologies. Though insincere or inauthentic apologies may sometimes suffice to repair damaged relationships, they do this by virtue of imitating or piggy-backing on genuine apologies. Genuine apologies, which we ought to expect from reformed offenders, are sincere expressions of remorse. They are an outward expression of a painful emotional experience. The desire to apologise for our past wrongs ought to be motivated by an emotional reaction stemming from the
repudiation of our past actions, alongside an acceptance of responsibility for those actions and a commitment to the relevant moral principles. In the following section I begin to explore how such a model of apology ought to impact on our approach to punishment.

Christopher Bennett has recently developed an approach to punishment centrally focused on the role of apology (2008). Bennett views apology as redemptive for wrongdoers and contends that the redemption offered by apology requires apologies to ‘express guilt and be backed up by penance’ (Bennett, 2008: 115). For Bennett, ‘an apology works when it is sincere: that is, when it expresses the wrongdoer’s acceptance that what she did was wrong and her repudiation of it’ (2008: 115). By ‘works’ I take Bennett to mean that a good apology will be successful in helping to make redress for past wrongs and bring about reconciliation between the relevant parties. This is not purely because the practice of apologising relies on the existence of sincere apologies if it is to be maintained. There are also aspects integral to individual apologies which, for Bennett, seem to rely upon the claim that apologies are genuine expressions of internal feelings of guilt. At the personal level apologies do not derive their value purely from the fact that they are able to help facilitate the restoration of damaged relationships. Bennett’s reasons for viewing apology as central to punishment stem, at least in part, from a desire to capture the moral intuitions felt by those who are genuinely apologetic (2008: 1-7).

The response one ought to have in light of realising they have done wrong is apologetic. The change in attitude felt by a reformed wrongdoer is something that allows them to re-establish their status in an area in which it was damaged by their wrongdoing; whether this is within a friendship, a family, amongst neighbours or as part of a wider moral community. This requires not only that an apology be accepted but that the apologiser themselves is sincere. If they are not then they will remain, in some sense, an imposter; though they may outwardly appear to be reconciled with those they have wronged they themselves will merely be feigning such reconciliation. Genuine reconciliation requires that both parties have the appropriate attitudes towards one another, and this is not true in the case of one who apologises insincerely.

At the very least, truly meaningful apologies, of the sort we ought to value and expect, are genuine expressions of guilt or remorse. This means that one offering
a meaningful apology in the light of serious wrongdoing ought to suffer emotional distress. This is not because such suffering is good in its own right but because a failure to feel such emotions shows a wrongdoer is morally lacking in some way, whether by failing to recognise the harm they have caused, failing to take responsibility for the causing of such harm or by a lack of commitment to relevant moral principles. Bennett concurs on this point, viewing guilt as a form of self-directed blame which genuinely apologetic individuals will feel in light of recognising what they have done (Bennett, 2008: 115-117). Whilst it may initially appear harsh to claim that all of those who offer apologies ought to suffer some degree of emotional discomfort, I believe that on closer inspection such a claim becomes less controversial. Firstly, it is important to consider the degree to which we believe one who ought to apologise also ought to emotionally ‘suffer’. This will vary dramatically on a case by case basis. When a loved one apologises for a relatively minor offence we clearly do not wish them to truly suffer prolonged emotional distress. However, we nonetheless expect (assuming that they have acted wrongly) that they feel at least a twinge of guilt. As I have previously suggested, we hope that it is feeling guilty which has motivated their apology to us. “It doesn’t even seem like you feel bad about it” feels a natural response to an apology which is plainly not contrite. Of more philosophical interest, however, are cases of serious moral wrongdoing in which the appropriate emotional experience involves genuine struggle on the part of the wrongdoer. In such cases recognition of the nature of one’s crimes brings with it a significant emotional cost. As I have previously suggested, a failure to feel the appropriate degree of remorse is indicative of a moral failing of some kind. Consider for instance ‘a Raskolnikov, say, who goes on to become a major philanthropist without a moment of remorse for his murder of the old lady’ or a ‘rehabilitated mass murderer who goes on to lead an exemplary life but never feels remorse’ (Greenspan, 1994: 60). In either such case we do not find the rehabilitation morally satisfying ‘because it is important to us that such changes rest on emotional self-reflection’ (Greenspan, 1994: 61). In the absence of such emotional self-reflection, an unavoidably uncomfortable and painful process, we are unable to consider a reformed wrongdoer a virtuous or admirable person (as far as we can view them as these things in light of their past crimes) (Greenspan, 1994: 59-63). This emotional distress is a by-product of the moral change brought about by an individual coming to realise that they have acted wrongly in the past.
Emotional suffering is, however, not only valuable insofar as it provides potential evidence for the veracity of an individual’s claims to have reformed. It also has positive value in the action tendencies associated with the emotions of guilt and remorse. It is the action tendencies associated with remorse which lead an apologetic offender to alter their future behaviour. Indeed, Bennett’s ultimate focus is not on the emotions that apologetic offenders ought to feel but on the way they will desire to act. In considering how an apologetic offender ought to act Bennett draws on the notion of a ‘virtuous offender’, which refers to an offender who behaves as they ought to if they are properly moved by the recognition that they have done wrong (Bennett, 2008: 103). Bennett’s virtuous offender is therefore equivalent to the way in which I view a genuinely remorseful offender. Both descriptions refer to an offender who, since the commission of their crime, has come to truly recognise the wrongness of their past actions, repudiates those actions and wishes (as far as is possible) to make amends. It may appear that holding a remorseful offender to be equivalent to Bennett’s virtuous offender places too great a significance on remorse. A truly virtuous offender ought to go above and beyond in order to co-operate with the authorities and attempt to make amends for their actions, even at great personal cost. Can the same be said of a remorseful offender? Can we not conceive of a criminal who recognises their actions as immoral and suffers a deep sense of regret, yet who, out of a sense of fear or self-preservation, fails to voluntarily bring themselves before the criminal justice system, thereby making it hard to consider them a truly virtuous offender? I contend that such an individual is indeed not acting as virtuously as they could; however, I also contend that they are not truly remorseful. Regret is not equivalent to remorse, even if it is felt very deeply. The notion of remorse I am concerned with is a powerful emotion associated with a painful reassessment of one’s self in light of serious wrongdoing. An offender failing to act as they ought to if they have truly reformed means that they are not an ideally virtuous offender. Equally, a failure to act in such a way is (in the absence of countervailing reasons) evidence for a lack of remorse. This is not to say that any offender who fails to act perfectly in accordance the highest conceivable standards of behaviour is thereby not remorseful, but rather that if we are to consider an offender truly remorseful there is a minimum standard of behaviour and co-operation, proportional to their crime, that we ought to expect. Similarly, Bennett argues that there is a course of action which it is appropriate to expect from a virtuous offender.
Furthermore, by looking at the way in which a virtuous and apologetic offender is moved to act Bennett argues that we can draw conclusions about the ways in which we ought to punish wrongdoers (see esp. Bennett, 2008: 144-149).

The current chapter will therefore conclude by briefly exploring what the relationship between apology and punishment ought to be according to Bennett, arguing that his approach overlooks the role apology ought to play in determining individual sentences. Bennet offers an approach to punishment which falls within the recent tradition of communicative punishment (see esp. Duff, 1986, 2001; von Hirsh, 1993). Broadly speaking, communicative theories defend the view that the role of punishment is to deliver deserved censure to wrongdoers. Within this tradition Bennett argues that by looking at how we ought to emotionally respond to, and express our emotional responses about, wrongdoing we can find appropriate symbols for expressing condemnation to wrongdoers (Bennett, 2008: 35-41). Further to this, Bennett argues, in relation to our own wrongdoing, that ‘when one has (culpably) done wrong it is always appropriate to feel guilt or self-blame, and that the appropriate expression of this is through apology, restitution and penance’ (Bennett, 2008: 145). By considering how someone who was genuinely apologetic for a given crime would act, Bennet believes we can gain an understanding of the shape punishment ought to take for that crime (2008: 146-147). Bennett’s claims about the relationship between apology and punishment are of a general nature. That is to say, Bennett argues that understanding apologies in general ought to guide the kind and severity of punishments which are prescribed for different types of crime.

Bennett does not focus on the individual role an offender’s distinct apology ought to take in their unique case. Apology ought to play a role in individual sentencing decisions. Bennet’s view does not support the view that apologetic offenders ought to be treated with greater leniency than unapologetic offenders, as the standard punishment is modelled on how an already apologetic offender ought to act (Bennett, 2008: 177; 2006: 141). This differs from standard judicial practice in which there is a standard punishment which may be reduced in light of a defendant demonstrating their remorse and offering an apology for their crime (Jacobson & Hough, 2007: 24). However, it is possible to consider sentence reductions appropriate even if the standard sentence is seen to be that which ought to be undertaken by an apologetic offender. Remorse motivates a wrongdoer to make
amends for their actions and this process will often begin with an apology. This process of making amends will, for the apologetic offender, begin prior to their being sentenced. If the process of making amends has already begun in the case of an apologetic offender, but not in the case of an unapologetic offender, this suggests we may have reason to punish each in a different manner. However, before it is possible to fully explore this line of argument it is necessary to look in much greater detail at both the role remorse currently plays in the legal system, and the broader justification for punishment. Chapters 3 and 4 will therefore move on to an exploration of these topics.
Chapter 3 – Remorse and the Law

The preceding discussion has focussed on conceptual analysis of the nature of remorse and apology. Before moving on to look at the relationship that these concepts ought to have to the criminal law it is first important to look at the role that remorse currently plays within Western judicial systems. This chapter will therefore look at the significant, yet unclearly defined role, that remorse currently plays in the courts.

1. Current Role of Remorse

Remorse frequently plays a role in the sentencing of criminals; absence of remorse is commonly cited as an aggravating factor when harsh sentences are imposed whilst, conversely, the presence of remorse is often cited as a mitigating factor when more lenient sentences are given. Even a cursory glance at news media is sufficient to provide a number of cases in which remorse has reportedly played a role. One recent example can be found in the case of the tragic murder of four-year-old Daniel Pelka by his mother and stepfather. Both of the defendants in the case were given minimum thirty year prison sentences. In handing down the sentence 'the judge said she had observed “not a single sign of genuine remorse” at any stage during the trial from either of the defendants' (BBC News, 2013a). To take another recent example; in the case of Terence Collins, a taxi driver convicted of raping and sexually assaulting passengers in his car who was sentenced to sixteen years imprisonment, 'Judge Peter Johnson told Collins he had not shown a shred of remorse' (BBC News, 2013b). Conversely, consider the case of Reece Elliot, a British man imprisoned for posting spurious but highly offensive death threats on the internet. In handing down the sentence the judge noted that 'Elliot's early guilty plea and genuine remorse had been taken into account' (BBC News, 2013c). These three cases are all taken from one two month period and from one media source, and there are a great many more comparable cases which could be drawn from the same time frame and source. Expanding to look at cases worldwide across a longer time frame provides a truly vast number of instances in which remorse is cited as a relevant factor in determining the sentences imposed on defendants. This makes it clear that, at the very least, remorse is perceived by the media to be an important and influential
factor in criminal trials. However, the fact that in many of these cases remorse is explicitly referred to by judges also shows that remorse does genuinely influence the severity of the sentences which are imposed.

There are also studies which show that remorse plays an influential role in determining what sentences are imposed. In a study of the reasons jurors in US capital trials gave for choosing whether or not to impose the death penalty Craig Haney observed that whether or not the defendant showed remorse was often a crucial factor in determining whether or not the death penalty was imposed: 'in the opinion of most of the jurors, capital defendants simply did not express appropriate emotion during the penalty-phase proceedings' (Haney, Sontag & Costanzo, 1994: 163). In a similar study of the reasons given by jurors in Florida death penalty cases Geimer and Amsterdam reported that 32% of jurors mentioned the defendant's demeanour, which 'refers to juror impressions of the courtroom manner of the accused, including indications of unconcern, lack of remorse, and simply looking criminal' (Geimar & Amsterdam, 1988: 40) as being relevant to their decisions. In some instances a lack of remorse was explicitly mentioned as the crucial factor. In giving reasons for his decision one juror stated that the 'defendant was unimpressive. His testimony at the penalty phase was unnecessary. He showed no remorse' (Geimar & Amsterdam, 1988: 52). In another detailed study of the role a defendant's remorse (or lack thereof) played in capital cases in the US, Sundby (1998) further demonstrates that remorse plays a highly influential role in the deliberation of jurors, often having a direct effect on whether or not the death penalty is imposed. In addition to these surveys of actual cases, a study by Robinson, Smith-Lovin and Tsoudis demonstrates that people are generally inclined to suggest shorter sentences for offenders who appear to express remorse than for remorseless criminals who have committed identical offences (1994).

This evidence makes it clear that remorse is often a mitigating factor in criminal trials, and its absence an aggravating one; there is a very real sense in which offenders are rewarded for showing that they are remorseful and punished for failing to do so. The first question this raises is; what exactly is it that is being rewarded? There is no universal definition of remorse used by legal professionals and jurors. This being the case, we must ask whether court judgements about an offender’s remorse are entirely subjective, or whether there are certain observable actions or behaviours which are taken by the courts to be representative of genuine remorse.
However, observation of cases in which remorse was cited as a factor vary so widely with regard to the evidence provided to support claims about remorse that it appears there may be no common theme; 'remorse has proven to be an increasingly ambiguous concept, which state court judges have had a great deal of difficulty applying in any coherent or consistent manner. Rather, reflecting the myriad definitions of remorse, state courts have found a myriad of reasons to find remorse present or absent, many of which are illogical at best' (Ward, 2006: 131).

In discussion of the role remorse plays in Australian court proceedings Proeve, Smith and Niblo observe that remorse has been defined in a variety of ways including; 'sorrow because of apprehension for an offence', 'self-centred reproach for a wasted life', 'regret as to participation in the crime' and with the claim that 'genuine remorse in a case such as this would seem to involve contrition for the prospective damage to the lives of innumerable victims' (1999: 17-18). Despite these varied definitions Proeve, Smith and Niblo still contend that, within the Australian system, 'there seem to be well established indicators of remorse in common law, in the form of actions by the defendant from which the presence or remorse is inferred' (1999: 18). These indicators 'include genuine remorse or contrition, making reparation or offering to make reparation, confession and a plea of guilty, and providing information to the authorities' as well as more extreme and unusual reactions such as self-harm and attempted suicide (Proeve, Smith & Niblo, 1999: 18-19). The authors observe that the acceptance of claimed remorse as genuine is closely related to the presence of one or more of these responses to the charge, and judges have refused to accept claims of remorse as genuine without 'concrete' supporting evidence (Proeve, Smith & Niblo, 1999: 18). There is certainly evidence to support the claim that apology alone, or 'just saying sorry', is not sufficient to obtain a reduction of sentence, both in the US and the UK (Ward, 2006: 143). For instance, a trial judge in Alaska stated during sentencing 'I'm not going to let him get away with just saying I'm sorry, that's definite because I don't think people can just say, I'm sorry, and just walk away and think that, well, that's it' (Christian v. State, 1973: 671). This reluctance to reward defendants on the basis of apologies alone likely stems from epistemological concerns. As Margareth Etienne notes 'some of the problems with using remorse as a sentencing factor are epistemological. Who can tell what is in another's heart or mind?' (2003: 2162). These epistemological concerns, in conjunction with a concern that remorse may be feigned by some defendants in order
to reduce their sentences (see Murphy, 2007), often leads sentencers to rely upon observable behaviour with concrete benefits such as cooperation with the courts in order to provide support for more lenient sentencing.

Whilst this does not mean a judge or juror's assessment of the sincerity of a defendant's expressions of remorse does not play a role, it does mean that they are unlikely to reward a defendant for verbal expressions of remorse in the absence of accompanying behaviour which further supports their claims. Indeed, the absence of such an expression of remorse may well be seen as an aggravating factor in its own right. It is for this reason the US Supreme Court ordered a retrial in a case where the defendant was so heavily medicated during the course of his trial that he was unable to fully express his emotions (Riggins v Nevada, 1992). One troubling consequence of allowing an absence of remorse to be an aggravating factor has been discussed in great detail by Richard Weisman (2004; 2009). In analysis of cases from Canada and the US, Weisman has shown that by allowing those who show remorse to receive more lenient treatment we in turn make the situation considerably worse for those who have been wrongfully convicted. Wrongfully convicted defendants, especially those in capital cases, who maintain their innocence throughout their trial and incarceration greatly diminish their chances of receiving either lenient treatment or of being granted clemency. This means that by trying to show leniency to some of those within the criminal justice system, possibly including those who admit to having committed truly horrific crimes, we sometimes end up forcing further unnecessary hardship upon those who have already been most wronged by the very system we are trying to improve.

The usefulness of behaviour such as cooperation with the courts and offers to make reparations is heightened by the difficulty judges have, both consciously and unconsciously, in determining the sincerity of a defendant's verbal claims to feel remorse. As one judge puts it:

If you give too much consideration to it [remorse] then you are a sitting duck, I suppose, for sham protestations of remorse and breastbeating and buckets of tears and appeals of sympathy. And you have got to watch out for that and part of the sentencing process is invariably making a value judgement on the genuineness of the appeals you receive, both from the defendant, expressions of contrition or remorse,
and from the people who write in for him. And I have no doubt that some are more
genuine than others, but you have got to do the best you can to evaluate those. To the
extent that I feel I am able to distinguish between genuinely repentant and the defiant
defendant, I will give it some consideration.


The problem with determining the sincerity of such claims also extends
beyond factors which a judge may be consciously aware of. In a study of the role
race and remorse play in sentencing Everett and Nienstedt provide evidence that
'cultural values inculcated in certain racial/ethnic minorities may prohibit such
required displays of remorse, just as a judge's cultural values may preclude him or
her from perceiving a valid expression of remorse from a member of a different
racial/ethnic group' (1999: 117-118). Their study observes the strongest cultural bias
for defendants who are male and Hispanic. Such defendants often have difficulty in
expressing remorse in terms acceptable to the court, and when remorse is expressed
judges appear less likely to accept these expressions as sincere. This evidence means
that difficulties in determining the sincerity of a defendant's remorse occur in two
separate ways. Firstly, there is a problem with accepting disingenuous expressions of
remorse as sincere. Secondly, there is a problem with rejecting sincere claims
because of cultural bias or a lack of accompanying behaviour which supports the
claim.

However, an understanding of the relationship between remorse and apology
outlined in Chapter 2 shows that, in many cases, showing leniency to defendants due
to factors such as their co-operation with the authorities does not have to be seen as
distinct from showing leniency as a response to remorse. Instead, such behaviour,
when observed alongside claims to feel remorseful, ought to be seen explicitly as
evidence for, and expressions of, a defendant’s remorse. As previously discussed, the
action tendencies associated with remorse motivate an individual to attempt to make
amends for their past actions. This is most commonly seen in a desire to apologise.
However, the court system also provides remorseful offenders with a variety of
formalised ways in which they can help to make up for their past actions (i.e.
pleading guilty, co-operating with authorities, providing additional information to
police). It is reasonable to question the veracity of claims to feel remorse if they are
made by a defendant who fails to avail themselves of these opportunities. In certain
situations there may be powerful countervailing reasons why a defendant fails to co-operate fully, such as fear for their life or the lives of their loved ones if they offer information to the authorities, and in such cases it is not clear that failure to fully co-operate undermines claims to feel remorse. In such cases the doubt raised by a lack of full co-operation may often be sufficient to justify a judge choosing not to show leniency, but this is not to say that a partial lack of evidence to support claims of remorse ought to be seen as an aggravating factor.

However, at the other end of the spectrum there are also cases in which there is powerful enough evidence to support claims of feeling remorse that it would be callous to ignore it. In particular this will apply to cases in which a defendant who is not under the threat of immediate capture chooses to hand themselves in to the police. Such behaviour, despite the clear cost to the individual concerned, should be considered strong evidence that the offender has come to recognise the harm they have caused. If such behaviour is to be taken as indicative of remorse, however, it needs to be made clearer that this is the reason the behaviour is being valued, and that it is not simply being rewarded as a practical matter to help with the expediency of cases. However, sentencing guidelines relating to remorse are not clear enough in detailing precisely why it is certain forms of behaviour are being rewarded.

2. Acceptance of Responsibility

In the United Kingdom remorse is explicitly mentioned in sentencing guidelines. However, there is very little detail and no clarification as to what is meant by ‘remorse’ or what factors should be considered relevant to evaluating claims to feel remorseful. The Sentencing Guidelines Council’s guidelines on seriousness state that ‘the issue of remorse should be taken into account’ as a form of personal mitigation (2004: 1.27). In their published guidelines for sentencing in cases of death by driving some further detail is given into the role remorse should play in the sentencing of offenders. The guidelines state that ‘whilst it can be expected that anyone who has caused death by driving would be expected to feel remorseful, this cannot undermine its importance for sentencing purposes’ and that ‘it is for the court to determine whether an expression of remorse is genuine; where it is, this should be taken into account as personal mitigation’ (2008: §28).
It is interesting to note here that even though the sentencing guidelines specify that remorse should be expected, it should still be rewarded. Bagaric and Amarasekara have argued that the fact we should expect wrongdoers to show remorse for their actions is a reason to dismiss expressions of remorse as a ground for leniency in sentencing: ‘Minimum standards of human decency demand that a person should not unjustifiably encroach on legally protected interests of others. It follows that it is hardly too much to ask that offenders should show some contrition when they violate this proscription’ (2001: 364). They further argue that ‘in no other human activity do agents get credit for doing the minimum that is expected of them’, contending that ‘the reason for this is simple: rewards are not handed out for merely doing what is expected – only for clearly going beyond one’s moral and/or legal obligations. Curiously, it is felt that this principle does not apply to criminals. The only possible rationale for this is the perverse logic that the more rotten one is the less we can expect of them’ (2001: 364). This objection runs contrary to both current sentencing practices and the argument presented in this thesis. Bagaric and Amarasekara fail to recognise that the fact that we ought to expect wrongdoers to feel remorse for their actions does not negate the fact that remorseful offenders ought to be treated differently to unrepentant ones, as will become clearer in the following chapter.

In the United States, according to §3E1.1 of the United States Federal Sentencing Guidelines 'if the defendant clearly demonstrates acceptance of responsibility for his offense, [the judge should] decrease the offense level by 2 levels' (2012: 365). In determining whether a defendant qualifies for a reduction under §3E1.1 the guidelines provide a list of appropriate considerations, though this does not preclude other factors from being considered. The relevant considerations mentioned in the guidelines are: 'truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable'; 'voluntary termination or withdrawal from criminal conduct or associations'; 'voluntary payment of restitution prior to adjudication of guilt'; 'voluntary surrender to authorities promptly after commission of the offense'; 'voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense'; 'voluntary resignation from the office or position held during the commission of the offense'; 'post-offense rehabilitative efforts (e.g., counselling or drug treatment)' and
'the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility' (2012: 365). None of these instructions explicitly mention remorse and the only time the term remorse is used in §3E1.1 is in the instruction that 'this adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse' (2012: 365-366). As one commentator puts it 'words such as “remorse” and “contrition” do not appear in section 3E1.1 or its commentary, except in one context in which the evidentiary value of expressions of remorse is expressly denigrated' (O'Hear, 1997: 1519).

Despite this fact, the phrase 'acceptance of responsibility' has often, though not universally, been taken by judges and scholars to be either synonymous with or necessarily entail the presence of remorse. The United States Second Circuit court expressed the claim that 'acceptance of responsibility necessitates candor and authentic remorse' (O'Hear, 1997: 1511). As O'Hear (1997) notes §3E1.1 is often also used in order to provide a reward purely for co-operation, rather than for remorse. However, there are no studies or statistics available which provide information as to how often the statute is interpreted to be rewarding remorse, co-operation or both. The varied ways in which the guidelines are interpreted clearly indicate ambiguity. There is also a lack of clarity with regard to how the factors listed in the guidelines relate to one another: 'the commentary does not indicate how these considerations are to be weighed. Is the presence of one of these considerations necessary for a defendant to earn the adjustment? Is the presence of one sufficient?' (O'Hear, 1997: 1519).

Given the importance of decisions made on the basis of the interpretation of §3E1.1 this is troubling. If the US court system is to show leniency on the basis of remorse (as it currently sometimes does) then this needs to be made explicit in sentencing guidelines. Furthermore, it needs to be clarified in both US and UK sentencing practice whether leniency shown in response to co-operation is given because of the usefulness of the defendant’s actions or because this behaviour is considered to be evidence of remorse.

It is both surprising and problematic the degree to which sentencing guidelines are unclear and vague. Whilst this may be partially explained by the difficulty in providing both a universally accepted definition of remorse and in providing a comprehensive list of indications that remorse is genuine, this does little
to justify the current situation. Indeed, the complexity of the issues involved suggests that it is precisely the sort of area which should not be left to unguided subjective judgements. Studies mentioned previously have shown that judges disagree about what exactly remorse is (Proeve, Smith & Niblo, 1999) and have difficulty in determining whether expressions of remorse are genuine, especially across cultural boundaries (Everett and Nienstedt, 1999). Given that this is true of judges with expert legal training it seems highly likely that there will be even greater issues when jurors with no specific expertise in the law or psychology are required to make judgements about the veracity of defendants' claims to be remorseful.

3. Epistemic Concerns

These practical issues, especially the risk of fakery, have led some commentators to argue that remorse should be removed from the sentencing process altogether. Jeffrie Murphy has argued that remorse is too problematic a concept to be allowed to continue to influence sentencing decisions. He observes that a 'practical problem with giving credit for remorse and repentance is that they are so easy to fake; and our grounds for suspecting fakery only increase when a reward (e.g., a reduction in sentence, clemency, pardon, amnesty, etc.) is known to be more likely granted to those who can persuade the relevant authority that they manifest these attributes of character' (Murphy, 2007:440). As mentioned, Murphy finds this a persuasive reason *not* to give much weight to expressions of remorse and repentance at the sentencing stage of the criminal process'. He asserts quite plainly that this is because he 'simply see[s] too much chance of being made a sucker by fakery' (2007:444). However, Murphy argues that repentance and remorse may have a more legitimate role to play in clemency decisions. This is because the epistemic issues become 'less worrisome' for the simple reason that 'we will have a more reliable evidential foundation upon which to base judgements of sincerity' (Murphy, 2007:440). In defence of this point Murphy cites both clemency decisions and commentators opinions on those decisions, noting the wealth of evidence they are able to draw upon which is simply not available to a sentencing judge. It is much harder for an offender to feign remorse for many years in prison than it is in the comparatively short period of time leading up to a criminal trial. This helps to illustrate that Murphy does not denigrate the value of remorse itself, but takes issue
with the practicality of its use in sentencing decisions.

Bryan Ward makes a similar point regarding sentencing in extremely forthright terms:

Courts have ultimately failed to fairly and accurately consider the concept of remorse during criminal sentencing—the attempt to effectively and uniformly utilize this concept at sentencing has failed. Often, remorse has been used as a justification for enhancing or reducing a sentence based on the “gut instincts” of a judge, and nothing more. Though the expertise that judges acquire over time should not be minimized, this “skill” should not exclude other, more factually based, methods of sentencing.

The failure of remorse is simply the failure of men to be able to read the innermost thoughts and feeling of other men—an age-old problem which plagues many of mankind's interpersonal relationships. No one really knows what remorse is—and courts certainly don't seem to know it when they see it. Anything that is so intrinsically unknowable cannot fairly be the basis for extended (or reduced) periods of incarceration in any system of justice.

(Ward, 2006: 166-167)

Whilst Ward is correct to judge that courts have thus far failed to ‘fairly and accurately consider the concept of remorse’, he is wrong to consider remorse as something which is ‘intrinsically unknowable’. Though there are situations in which it is extremely difficult to determine whether a defendant is truly remorseful there will be some cases in which there is overwhelming evidence to support such claims. This supports the argument that the standard of evidence required ought to be higher, but not that remorse ought not to play any role in sentencing.

In contrast to Ward, and in direct response to Murphy, Susan Bandes has argued that, despite the risk of fakery, remorse should not be removed entirely from deliberation at the sentencing stage (2009). Susan Bandes argues that this is because remorse is too deeply ingrained in our justice systems for us to ever be able to fully remove it. This claim is well supported by the fact that nearly all scholars and studies which are critical of the role remorse plays cite many cases in which remorse has played a role, or indeed go as far as to provide a history of the role remorse has played in the courts (eg. Ward, 2006: 137-140; O'Hear, 1997: 1512-1521). Such surveys may highlight problems but they also unavoidably show just how deeply 
embedded remorse has become in our criminal justice systems. Indeed, suggestions that decisions regarding remorse are often made based on things such as “gut instincts” may well serve to highlight the way in which showing leniency to those who are remorseful is an apparently natural and intuitive response. Removing such a pervasive and intuitive feature of the sentencing process may well prove impossible. Instead, Bandes argues that we should focus on minimising its role as much as is possible whilst also pursuing research which betters our understanding of the nature of remorse.

However, Bandes’ response to the kind of concerns raised by those such as Ward and Murphy takes the wrong approach. Bandes argues correctly that it would likely be impossible for us to ever remove remorse entirely from our justice systems but this, in conjunction with concerns about differing understandings of remorse and fakery, does not mean we ought to attempt to minimise its role. Firstly, clearer guidelines regarding remorse based explicitly on work from psychology and philosophy will help to address the issues of vagueness. Secondly, epistemological issues do not mean we should attempt to reduce the role remorse plays but, conversely, a better understanding of remorse and its relationship to punishment will show that we ought to spend more time attempting to address those epistemological issues. Bandes’ argument regarding the place remorse should have in the courts is essentially backward-looking. The role remorse plays in the courts should not be determined by history, but rather by normative considerations. If we are to understand the role that remorse ought (or ought not to) play in sentencing decisions then we must have a precise understanding of the reasons why punishment is ever justified. The following chapter will therefore move on to argue that any adequate theory of punishment necessitates the inclusion of remorse as a central component of a fair justice system.
This chapter is divided into two broad sections. The first half of the chapter will introduce a number of problems which must be addressed by any adequate theory of punishment, and ultimately argue that a communicative approach to punishment is better able to solve these problems than more traditional alternatives. The latter half of the chapter will then begin to look at the reasons why communicative theories of punishment ought to consider remorse an essential component of justice. I argue that the position adopted by Anthony Duff, that remorse should not be considered a mitigating factor in sentencing decisions, is in tension with a communicative approach. I further argue that in order for a communicative approach to punishment to show adequate respect to offenders then it must consider their remorse, or lack thereof, relevant to sentencing.

1. Traditional Theories of Punishment

Traditional theories of punishment can roughly be divided into consequentialist and retributivist theories of punishment. Broadly speaking consequentialist approaches are forward-looking, in that they attempt to justify punishment because of its future consequences, whereas retributive approaches are backward-looking, in that they justify punishment as being deserved as a response to a past crime.

1.1 Consequentialism

Typically, consequentialist approaches to punishment are based upon deterrence; punishment exists to deter criminals, and would-be criminals, from committing future offences. Though there are very few, if any, writers who would choose to defend a theory of punishment solely rooted in deterrence it nonetheless plays a fundamental role in a number of approaches to punishment. It is therefore worthwhile considering some of the major issues with deterrence-based approaches.
The first objection often raised against deterrence based approaches is an application of a common criticism of utilitarianism. This is the Kantian demand that we should treat people as ends in themselves, rather than merely as means. It is somewhat unclear precisely what this demand amounts to, or to identify specific demands or constraints it ought to place on our behaviour. However, Nicola Lacey characterises the objection to utilitarian approaches to punishment in the following terms: ‘the claim seems to be that it is wrong that punishment should be motivated by a social goal: whatever is done to individuals should be primarily concerned with them as ends in themselves: should treat them as autonomous moral agents who have chosen their actions: and should respect the choices they have made’ (Lacey, 1988: 36). The claim is that by punishing an individual solely in order to deter others we are failing to treat them with such respect. An obvious objection here is to observe that it likely impossible for us to ever fully live up to this demand, especially with regard to punishment. However, this does not undermine the thought that the Kantian demand is one we ought to aspire to fulfil.

In order to highlight why this Kantian demand raises particular concerns with regard to punishment we need to consider some of the actions which may potentially be justified by a deterrence-based approach. If our primary motivation for punishment is deterrence (or an alternative goal such as social defence) then it seems that we may often be justified, or even obligated, to impose extremely severe punishments upon wrongdoers. If it were true that the use of cruel and unusual punishments provided a better deterrent than more humane methods of punishment then, if deterrence is the guiding principle, this suggests that we should adopt a system which relies on using cruel and unusual punishments. Moreover, we would be equally justified in imposing such punishments upon innocent individuals, so long as the consequences remained the same. Clearly, both of these scenarios are deeply troubling. The obvious response to these concerns is to develop a theory of punishment which is not solely grounded in consequentialist ideas, but also introduces the idea of retributivism.

Mixed theories of punishment typically attempt to combine overarching consequentialist goals with retributive principles which constrain who may be punished and how much they may be punished. The most influential such account is
that of H.L.A. Hart. For Hart, the overall practice of punishment is justified by utilitarian goals but each individual instance of punishment must be governed by the application of retributive principles. In order to illustrate this idea, Hart asks three questions must be addressed by any adequate theory of punishment. Firstly, what is the ‘general justifying aim’ of the system of punishment? Secondly, how much punishment may justifiably be imposed on an individual in any given instance? And thirdly, who may be punished? (Hart, 2008 [1968]: 3-13). Hart answers the first of these questions on utilitarian grounds, arguing that the general justifying aim of punishment is deterrence. Though Hart maintains that there must be limits on punishment to ensure that punishment is not disproportionate or directed towards the innocent, he holds that the ultimate purpose for the institution of punishment is to prevent future crimes via deterrence.

Theories such as Hart’s may be classified negative retributivist accounts: the accounts are negative because an individual being guilty of committing a crime is a necessary, but not sufficient, condition for them being punished. Guilt, or rather its absence, can only be used to preclude someone from punishment and not to justify punishment.

Though Hart’s approach to punishment initially seems to address some of the major issues with purely consequentialist approaches, Hart’s theory is ultimately problematic. Hart fails to fully demonstrate how the second and third questions he raises (who may be punished and how much they may be punished) relate to the overall consequentialist justification of punishment. Though Hart recognises that these questions must be addressed by any adequate theory, this does not in itself solve the issues with having a fundamentally consequentialist approach. If utilitarian considerations may still override individual rights, even in extreme cases, then Hart’s theory is still subject to the same attacks which may be levelled against purely utilitarian approaches to punishment (Lacey, 1988: 47-49).

However, even if Hart’s solution is seen as an adequate response to the issues discussed above, there is still a more fundamental issue with consequentialist approaches. Consequentialist approaches fail because they ultimately address the wrong question, and fail to explain the true nature of punishment.
To illustrate this, consider an alternate version of history in which penal colonies were apparently used to punish the worst criminals in society. As far as the public was concerned these criminals were being sent to a life of hardship and misery. However, in reality those being ‘punished’ were sent abroad on luxury cruise ships to a tropical paradise and a life of plenty. Assuming the general public were never to discover the truth, the deterrent effect of this ‘punishment’ would remain the same as it would if the punishment were real.

There is clearly a very strong intuition that something is wrong with this situation. Furthermore, it would be absurd to even characterise it as a system of punishment. If such a system were plausibly achievable then, according to a consequentialist account, it would be as justified as a genuine system of punishment which achieved the same results. Nicola Lacey raises a similar point. As she puts it, all ‘that is needed is a general belief in the reality of the threat [of punishment]; in fact the whole system could be a sham, if it were feasible to maintain the pretence over a long period. … … So in fact the general deterrence theory might justify no punishment at all, or only punishment in a small number of strategic cases’ (1988: 29).

This highlights the fact that consequentialist approaches fail to get at the heart of what a theory of punishment should aim to explain. In order for a theory of punishment to succeed, it must provide an explanation of why it is intrinsically appropriate to impose hardship upon someone in a single instance, not merely explain why the overall institution is socially beneficial. A theory which fails to do so can, at best, offer a weak defence of punishment as a necessary evil. Though it is difficult to give a precise definition of punishment, it is plain that it necessarily requires the imposition of some kind of penalty or hardship on an individual or group. If this is ever to be truly justified then a theory of punishment must provide a positive reason in favour of an isolated instance of punishment. It should of course be noted that such a positive reason may still be defeated in certain instances by other demands, but there should still be a pro tanto reason which justifies punishing an individual wrongdoer.

In order to provide such a justification retributivist theories of punishment appeal to the notion of desert.
Desert-based, or retributivist, theories of punishment stem from the initial idea that the guilty *deserve* to be punished. In contrast to the negative retributivism of Hart, these theories may be called positive retributivist accounts because, according to them, guilt is not only a necessary but also a sufficient condition for punishment. The intuition that the guilty deserve to suffer is widely held. But an intuition is, at best, a start and is far from being a fully-fledged theory of punishment. The problem is then how to cash this out. The following sections will address two such attempts to understand the idea of desert.

1.2 Unfair Advantage Theories

One seemingly plausibly way to address the problem is that taken by unfair advantage theories. This approach to retributivism is sometimes associated with Jeffrie Murphy (1973) and Herbert Morris (1968), though it is worth noting that both have since criticised the theory themselves. Unfair advantage theories argue that when an individual commits a crime they provide themselves with an unfair advantage over the rest of society; they are creating an opportunity for themselves that is not available to those who act within the bounds of the law. In response to this, punishment should serve the role of taking away or cancelling this advantage. In some cases this will be a literal removal of something (i.e. a fine being imposed on a criminal who has given themselves an unfair financial advantage) and in some cases this removal is symbolic (i.e. the removal of the criminal’s apparent claim to be above the law).

Though this approach to punishment initially seems to provide a neat and clear solution to the issue of desert, it is ultimately an untenable position. Though there are certain instances, such as those in which a thief has taken what seems like a clear advantage over the rest of society, it is troubling to attempt to extend this metaphor to cover a broader range of crimes. Consider crimes such as rape and murder, which involve violence and the infliction of great harm. In these instances it is not appropriate to describe an offender as having taken an unfair advantage over the rest of society. Firstly, to do so implies that the crime they have committed is
something others would want to do if they were permitted to. Secondly, it fails to adequately capture the wrongness of the crimes. It is the harm caused which justifies condemnation and punishment. A failure to be able to address a broad range of serious crimes means that unfair advantage theories are able to provide an adequate defence of punishment.

1.3 ‘The Moral Worth of Retribution’

Others have appealed to emotions to defend the idea of retribution. Typically, the argument that retributive desires are rooted in our emotional reactions to wrongdoing has been taken as a criticism of the retributive position. This dates back to Nietzsche, whose discussion of *ressentiment* still stands as a powerful attack on such positions (1967:36-39). However, a positive account can be made for the retributivist position by appealing to emotion.

One such account is to be found in the work of Michael Moore (2010). Moore argues that we can justify punishing wrongdoers by appealing to the guilt we would appropriately feel if we were to have committed wrongs ourselves. According to Moore, if we imagine ourselves to have committed a crime such as murder we would rightly judge that we would and should feel guilty. Furthermore, Moore argues that if guilt is genuine it is accompanied by a belief that we are deserving of punishment. From this, we can infer that those who have committed crimes should appropriately feel guilty and, as such, we are justified in imposing punishment on them (2010: 148-152).

This account of punishment clearly echoes arguments made in preceding chapters and Moore’s account succeeds in characterising why it is that certain acts are deserving of punishment. However, Moore’s account struggles to make the step to explaining why it is then the role of the state to impose punishment on wrongdoers. Moore argues that if we agree people are deserving of punishment then it clearly follows that it is the right thing to do to set up institutions which punish wrong-doers (2010: 148). Further argument is needed to show that this is the case; the moral desirability of a state of affairs alone is not sufficient to show that it is the job of the state to set up institutions to bring that state of affairs to be. Furthermore,
Moore’s argument is unable to show why it should be the role of the state to punish, rather than something which should be undertaken by private citizens. Perhaps in light of these weaknesses, Moore attempts to strengthen his account by appealing to the deterrent effect of punishment (2010: 150). Whilst it is true that the deterrent effect of punishment is beneficial to society it is nonetheless problematic to use deterrence as a justification for an account which is attempting to provide an independent justification for punishment.

A defensible retributive theory of punishment needs not only to explain why certain individuals are deserving of punishment, but must also justify the state’s role in imposing punishment. In recent decades there has been a move towards communicative theories of punishment, which are able to address both of these concerns.

2. Communicative Punishment

According to a communicative theory, the purpose of punishment is to communicative justified censure to wrong-doers. Such accounts draw on the work of Joel Feinberg (1965) who observed that there is always an expressive element to punishment. That is, when we punish someone we always express a message of condemnation towards them. Communicative approaches take this idea and bring it to the forefront when justifying punishment. But they also develop the notion of expression into one of communication. When the state punishes someone it should not merely try to express something but should actively try to communicative with them; consider the difference between just shouting at someone and actually trying to engage in a meaningful dialogue with them. This means that punishment should ideally be a two-way process in which the state expresses condemnation through punishment and a wrong-doer expresses their repentance by serving their punishment as a form of secular penance. On this account remorse or repentance is the desired goal of punishment. Importantly, however, this does not mean punishment is justified only if it achieves this goal. Instead, punishment is backward-looking because censure (with the hope of reforming behaviour) is the intrinsically appropriate response to wrong-doing. We should try to engage with wrong-doers and
communicate a moral message to them, but we cannot force them to understand it. The best we can do is to give them the opportunity to feel remorse and hope they understand the message.

The first issue which arises for such accounts is whether or not they are able to justify hard treatment of offenders. If the purpose of punishment is to communicate blame then why not merely have a system in which the courts publicly denounce criminals for behaving badly? The answer here lies in the thought that the state must actually punish people to show that it means what it says when it prohibits certain actions.

Anthony Duff observes that, for instance, if a firm claims to oppose racial discrimination in relation to hiring new staff then it must also follow through on this claim by not racially discriminating in its hiring practices, in order to show that it genuinely means what it says: ‘a group that collectively declares racial discrimination in making appointments to be seriously wrong is thereby committed to avoiding such discrimination itself, and to condemning such discrimination by others’ (2001: 28). In much the same way, if a state declares certain actions, such as murder, rape and theft, to be prohibited and to be serious wrongs then it is committed to censuring people who undertake those actions in order to show that it takes such crimes seriously (2001: 29). Hard treatment is then the appropriate method to communicate this message because, as previously mentioned it gives wrong-doers the ability to serve a kind of secular penance and communicate their remorse back to society. As already mentioned, we can’t demand that people actually feel that remorse, but we can require actions of them that are consistent with it.

A communicative approach, as just sketched, is able to deal with the three main issues raised above. Firstly, it can explain the role of the state. Laws (at least some of them) exist to prohibit public wrongs. Public wrongs are deserving of public censure. It therefore makes sense that the appropriate means for a community to publicly censure someone is through the use of public judicial systems.

Secondly, the idea of deserved censure is an easily intelligible idea. Whatever issues there may be with different renderings of the notion of desert the thought it is appropriate to censure wrongdoers is not particularly troubling.
Finally, a communicative approach is able to treat people with a greater amount of respect than alternative approaches. This is because it attempts to engage with them as rational agents who are capable of understanding a message and changing their future behaviour as a result. The hope is not that they will reform their behaviour because they are scared of the threat of punishment, but rather because they will come to realise that they are deserving of censure, and as a result of this realisation be motivated to reform their behaviour in future.

3. Duff on Remorse

In Trials and Punishments (1986), which represents the first significant defence of a communicative approach to punishment, Anthony Duff states that his ‘main aim is to explore the implications of the Kantian demand that we should respect other people as rational and autonomous moral agents – that we should treat them as ends, never merely as means – for an understanding of the meaning and justification of criminal punishment.’ He adds that he does ‘not suppose that a plausible and practicable system of punishment can founded solely on, or indeed be fully consistent with, this moral principle: but I do believe that we find within it values which must be central to any tolerable system of punishment’ (1986: 6). It is an attempt to adhere to this demand which leads Duff to reject traditionally consequentialist approaches to punishment and leads to the development of his communicative approach. Despite Duff’s admission that a ‘plausible and practicable system of punishment’ can never be fully consistent with this demand, it is nonetheless something which he spends a great deal of time trying to make his account live up to. Throughout Duff’s work it remains clear that this is a guiding principle.

However, Duff’s views on remorse fail to meet up to this demand, and this failure is critical for Duff’s theory of punishment. Duff has defended the view the remorse should not be considered a mitigating factor in sentencing (1986, Ch. 9;
Duff initially rejects the idea that repentance should serve as a mitigating factor in sentencing on the basis that there must be ‘a principle of proportionality between the seriousness of the crime and the severity of the punishment’ (Duff, 2001: 120). As Duff notes: ‘a harsher sentence portrays the crime as more serious, a lighter sentence portrays it as less serious’ (2001: 120). This is fundamentally grounded in the notion that ‘the severity of a sanction expresses the stringency of the blame’ (von Hirsch, 1993: 15). Duff interprets this idea to mean that ‘to impose a lighter sentence on a repentant offender is thus to imply that repentance renders the crime less serious. But this is not normally true.’ (2001: 120). The use of ‘normally’ here is only in reference to cases where the repentance is immediate. What I wish to challenge here is the thought that imposing a lighter sentence on a repentant offender automatically implies that we view his crime as less serious than we otherwise would.

Duff’s theory of punishment is built around the idea that we need to accord people the respect they deserve as rational agents and address them as individuals capable of understanding the message punishment is intended to deliver. It is important that punishments exist as more than just, to use Jean Hampton’s phrasing, ‘electric fences’ designed to keep us within certain prescribed limits of behaviour (1984: 212-214). If punishments serve as nothing more than ‘electric fences’ then they fail to treat us with the respect we deserve as human beings. We should not attempt to address only wrong-doers with this level of respect; we need to view the whole of society as being made up of rational agents able to engage in meaningful moral dialogue. Duff’s justification of punishment rests on the idea that ‘given an appropriate set of conventions and a shared understanding of those conventions, a term of imprisonment or compulsory community service, or a fine, can communicate to those on whom it is imposed (and to others) an authoritative censure or condemnation of the crime for which it is imposed’ (Duff, 2001: 29). If we can accept that a community is capable of understanding ‘a set of conventions and a shared understanding of those conventions’ there is no reason to presume that a degree of complexity cannot be built into those conventions.

1 Duff makes an exception for cases in which remorse occurs immediately after the crime. See Chapter 7 for further discussion of this point. (2001, 121).
Though Duff may be correct in noting that lenient treatment of those who are remorseful may sometimes imply that repentance renders the crime less serious, we should not assume that a community will not be able to look past this implication. There is no reason to assume that observers would be unable to interpret lenient treatment of a remorseful offender as saying that there is less need to punish them and not as saying that their crime is considered less serious than it otherwise would be. For comparison, consider a case in which clemency is granted to a terminally ill individual; though their sentence is reduced or commuted this does not carry with it the message that their crime is now seen to be less serious than it was once. There is no reason why this may be not something which is understood as part of the conventions which govern punishment. To consider people unable to understand this difference represents a failure to treat them as beings capable of engaging in meaningful moral dialogue.

The level of seriousness with which a community views a certain act can be enshrined in the laws and guidelines which dictate how seriously it is standardly punished. Sentencing guidelines, and the potential severity of the punishments which may be imposed, make it plain that, for instance, murder is considered a more serious wrong than shoplifting. As has been mentioned previously, it is important for a society to actually punish wrong-doers in order to show that it means what it says (Duff. 2001: 28). However, this can be achieved by the appropriate level of punishment for each crime being imposed in ‘standard’ cases. Deviation from the typical level of punishment in specific cases does not undermine this idea, so long as it is clear in such cases why leniency is being shown.

Despite this, Duff still maintains that punishment should treat both remorseful and unrepentant criminals identically with regard to the severity of their sentences. This is despite the fact that the two types of criminal are different in a way which is far from insignificant. This is problematic for Duff’s account because it undermines the idea that punishment can be a communicative process through which two parties are able to engage in a meaningful dialogue, rather than merely an expressive act. If one party involved ignores an important moral fact about the other party then they cannot be seen to be treating them with an appropriate degree of respect. Consider the analogous case of a conversation between two friends – if one goes to berate someone for a past wrong and finds them already remorseful it would
clearly show a decision to ignore the other’s part in the conversation if one continued to use the same language as would one have had they been defiant. In order for a true dialogue to take place the party doing the censuring must consider the attitude of the other party and adjust their own behaviour accordingly.

4. Generic-Script Problem

Kimberley Brownlee has raised a similar point in response to Duff, which she labels the Generic-Script Problem. Brownlee argues that, in the case of a fully repentant defendant, requiring the recitation of the generic ‘formal script of apology and commitment to self-reformation’ disrespects her and makes a mockery of the idea of meaningful moral dialogue (2011: 60). Brownlee states that:

‘In the case of the wholly repentant offender, this ritual misrepresents her as being of a singular mind and attitude as unrepentant offenders who need to be brought to appreciate the wrongness of their acts and the reasons for reparation and repentance. As such, her punishment, when comparable in harshness to that of an unrepentant offender is indefensibly dismissive of her sincere emotions of remorse, regret, and repentance, and her fervent desires to remedy relations’ (2011: 60).

It is worth noting that Brownlee’s discussion of the Generic-Script problem focuses predominantly on cases of civil disobedience, and is part of a wider discussion of a number of issues which attack the idea that the state can ever truly enter into a moral dialogue with its citizens via punishment. However, in the case of an already repentant defendant the issues raised can be addressed by further developing Duff’s approach.

In response to Brownlee, Duff suggests that we are likely to view the question differently if we no longer assume that the unrepentant defendant’s sentence is the default one. Instead, he contends we should see the ‘normal prescribed sentence’ as ‘one appropriate for a repentant offender’ (Duff, 2011: 373). Framing the discussion this way round instead raises the question: ‘why should an unrepentant offender’s punishment be no more severe than that of a repentant
offender?’ (Duff, 2011: 373). Duff contends that the answer to this question is easy: ‘a liberal polity that respects its citizens’ privacy and freedom should not inquire into the sincerity of their public performances; it should address them and require conduct of them as if they were sincere’ (Duff, 2011: 373).

There are two distinct issues with Duff’s argument here. Firstly, it is not clear that the state is in fact always wrong to inquire into the sincerity of citizens’ public performances. A criminal trial, in which the defendant has pleaded not guilty, is essentially concerned with determining the truthfulness of that plea. This necessarily concerns inquiring into the sincerity of their public performances. Such inquiry is plainly required for the justice system to work. If we are prepared to inquire as to the sincerity of a not-guilty plea why should we not be prepared to inquire as to the sincerity of claimed remorse? There are, of course, differences between the two. Establishing the sincerity of a defendant’s expressed remorse would necessarily involve investigating their emotional state, something which is perhaps beyond the limit of what a liberal society should investigate. However, this distinction is not clear cut. In establishing mens rea a court is often required to make judgements about the mental states of a defendant. The difference then cannot be that one is wholly concerned with internal states where the other is not. Another suggestion would be that investigating the sincerity of a plea is unavoidable in conducting a just trial. However, if it is true that remorse is a relevant factor in sentencing then it would seem that inquiry into the sincerity of expressions of remorse would be equally justified. With this in mind, there is no obvious reason to accept Duff’s argument on this point. This concern will be addressed in more detail in the subsequent chapter.

However, even if Duff were correct that we should ‘not inquire into the sincerity of [a defendant’s] public performances’ this would not require us to treat both repentant and non-repentant offenders in the same manner. To do so would still encounter the Generic-Script Problem outlined above. In fact, it may be even more problematic if we are to assume that all expressions of remorse are sincere. Such an assumption would mean that when we punish a repentant offender as harshly as a non-repentant offender we are saying to them: ‘we accept your expressions of remorse as sincere but nonetheless will treat you as if they were not’ (or vice versa,
if the default sentence is held to be that which is appropriate for a remorseful offender). This would be a tacit acknowledgement on the part of the state that it is not attempting to engage in a communicative dialogue with the offender.

Duff’s response is not sufficient and if a communicative approach is ever to adhere to the Kantian demand that we should respect other people as rational and autonomous moral agents then it must allow remorse to be considered a mitigating factor in sentencing. The following chapter will move on to look at how best a communicative theory can accommodate the role of remorse as a mitigating factor.
Chapter 5 – Character Retributivism

In this chapter I defend the view that a defendant’s character, and specifically their remorse (if it is present), alters how blameworthy they are for their crimes and that, as such, remorse ought to be considered a mitigating factor in sentencing. This means that, with regard to state punishment, we ought to adopt a version of character retributivism. However, character retributivism is typically viewed as an unattractive philosophical position. This chapter will therefore address some significant concerns which have been raised against the character retributivist. Section 1 argues that a communicative approach to punishment should motivate us to adopt a form of character retributivism. Section 2 gives further detail on the form of character retributivism I am advocating. Section 3 addresses the concern that character retributivism is too intrusive into the private lives of citizens to be acceptable in a liberal society. Section 4 moves on to address two specific concerns regarding the claim that remorse can reduce blameworthiness; an apparent conflict between being responsible for a crime and reducing one’s blameworthiness for that crime after the act, and the potentially troubling notion that by feeling remorse for a crime a wrongdoer reduces how bad they ought to feel about having committed that crime. I will show that none of these objections are damning and that character retributivism is both a desirable and defensible philosophical viewpoint.

1. Communicative Punishment, Moral Dialogue and Remorse

Though communicative theories of punishment are a relatively recent development in the philosophy of punishment, (notable early accounts are to be found in the work of Antony Duff (1986) and Andrew von Hirsch (1993)) in the past two decades there has been a significant shift in the literature in favour of such accounts. Much of the discussion of communicative punishment is centred on the theory developed by Duff (1986; 2001), whose work constitutes the most comprehensive account of a communicative approach. As such, the discussion in this chapter will largely focus on Duff’s account.
According to a communicative account, the central goal of punishment is to communicate justified censure or blame to a wrongdoer. Communication is a rich notion which requires more than the state merely expressing blame. Duff asserts that communication is a process which aims to engage a person ‘as an active participant in the process who will receive and respond to the communication, and it appeals to the other’s reason and understanding—the response it seeks is one that is mediated by the other’s rational grasp of its content’ (2001: 79-80). Where expression would be a one-way process in which the state shows its condemnation through punishment, communication through punishment is a two way process by which the state attempts to enter into a meaningful dialogue with a wrongdoer. The difference is akin to the difference between shouting angrily at a misbehaving child with no consideration as to whether they are listening and actively trying to engage in a meaningful conversation with them; both can show condemnation but it is only the latter which allows the child to play an active role in the process.

This means that the process should ideally provide a framework within which the state can express condemnation through punishment and in which a wrongdoer may express their repentance by undergoing their punishment as a kind of secular penance. As Duff puts it, punishment should be ‘a kind of penance which aims to secure and to express the criminal’s repentance of his wrong-doing; and thus as a process of reform (or self-reform) through which the criminal can attain or regain a proper concern for the law and his proper place in the community’ (1986: 234).

Though remorse or repentance is the desired goal of punishment it is important to note that this does not mean that punishment is justified only if it succeeds in achieving this goal. Instead, punishment is backward-looking because censure is the intrinsically appropriate response to wrong-doing. Further to this, censure also serves positive moral functions irrespective of whether it succeeds in bringing about repentance. It addresses both the victim, by recognising that they have been harmed by another’s culpable actions, and the wrongdoer, by communicating a message to him and allowing him to respond appropriately (von Hirch, 1993: 10). In censuring wrongdoers we should attempt to engage in a dialogue which communicates a moral message to them, but we cannot force them to understand or accept that message. Punishment ought to aim to provide the best possible scenario within which a wrongdoer may feel and express their remorse.
Institutionalised attempts to force wrongdoers to repent, or to demand it of them, would be both doomed to failure and advocate unfairly harsh treatment of those being punished. Inevitably, some criminals will be deaf to the message that the state wishes to communicate to them through punishment. In such cases, simply continuing to punish further would likely bring about anger towards the state rather than repentance for the relevant crimes. Demanding repentance from wrongdoers would also lead to a system of indeterminate sentencing whereby a defiant petty thief would serve a longer sentence than a repentant murderer. Such a system would plainly be unacceptable. Instead, punishments must be determined by the severity of the crime and the defendant’s corresponding level of blameworthiness. Yet despite the impossibility of bringing about repentance in some wrongdoers punishment ought to be applied in a manner which creates the greatest possibility of this outcome being realised.

As previously suggested, the best way to achieve this is by attempting to create a moral dialogue between the state and those who are being punished. Kimberley Brownlee defines a dialogue as ‘a sustained, purposive conversation or verbal exchange of thought carried out by two or more persons’, further defining a moral dialogue as ‘such an exchange that has as its subject either a moral issue or an issue that has moral implications’ (2011: 57). Brownlee further outlines five conditions required for a genuine dialogue. These are: (1) reciprocity between the involved parties, meaning that all involved both communicate and receive information; (2) a level of sustained and extended interaction more involved than that of mere call and response; (3) mutual recognition of each party’s rights and duties, meaning that the parties involved modify their responses based on the contributions of the others; (4) connotations of equality and fairness, meaning both parties have an equal right to contribute to, and be heard in, the course of the dialogue; and (5) all parties involved are broadly willing to participate (Brownlee, 2011: 57-58).

Brownlee argues that the relationship a state has with its citizens precludes some of these conditions being met in the case of punishment, therefore undermining the idea of punishment constituting a moral dialogue between the state and wrongdoer. Brownlee’s main objections here do not pertain directly to the issue of the treatment of remorseful offenders with which this chapter is primarily concerned. However, as the idea of creating a dialogue between state and offender is central to my argument
it is first necessary to consider Brownlee’s broader objections, in order to show that they do not successfully undermine such a process.

The broader objections stem from criteria (4) and (5). Brownlee’s fifth criteria for dialogue, that the parties involved are broadly willing to take part, plainly raises a potential problem in the case of punishment. This is particularly true in cases such as those mentioned above, in which the defendant is entirely deaf to the message the state is trying to communicate. However, despite the fact that not all of the parties in such cases are willingly taking part in the process, this does not raise a serious problem for my account. This is because, as stated by Hannah Maslen in response to Brownlee, ‘dialogue should be aimed for as the ideal, and this is unaffected by the fact that sometimes—maybe even most of the time—it is not attained.’ (Maslen, 2015: 111). This argument strongly echoes the view of Anthony Duff, who argues that out of respect for offenders we ought to treat them all as if they are willing to, and capable of, participating in a moral dialogue with the state, thereby allowing them the best possible chance of being able to do so in actuality (Duff, 2001: 81-84).

However, Brownlee’s main objection to the possibility of punishment constituting a dialogue between state and offender focuses on her fourth criterion: fairness and equality between the parties involved. Though Brownlee accepts that a dialogue may take place between two parties who are not entirely equal, such as in the case of a parent and child (2011: 59), she nevertheless maintains that the disparity between the state and a subject of punishment is great enough to preclude the possibility of genuine dialogue. This is because, according to Brownlee, when the state censures a criminal it also condemns them in a way that excludes them from the dialogical process and restricts their ability to contribute meaningfully (2011: 62-63). Though Brownlee concedes that this in part relies on the use of the loaded term ‘condemnation’ rather than censure (2011: 62), this objection nonetheless carries some weight. There is a clear disparity between the state and offender, and the imposition of hard treatment plainly restricts the communicative options available to offenders.

This objection may be met in two ways. The first possible response, as noted by Maslen (2015: 112), is to argue that the offender’s contribution to the dialogue takes place prior to censure. Indeed, if an offender’s remorse is to be considered as a
relevant factor in sentencing then it must necessarily be evident prior to the state’s decision to impose censure. Brownlee accepts that a dialogue may take place between the state and normal citizens, and allowing that an offender may contribute to such a dialogue prior to their ‘condemnation’ avoids the objection raised above. Whilst Maslen’s response goes some way to meeting the objection raised by Brownlee, by itself it is not sufficient to fully alleviate the concern raised. This is because, as noted above, an offender undergoing punishment constitutes part of their role in the communicative process. Though they may also contribute to the dialogue pre-sentencing, their undertaking of punishment nevertheless plays an important role in the dialogical process. In order to allow for this we must turn to a second response to Brownlee’s objection.

This response is to reject the criteria for dialogue proposed by Brownlee in favour of a less restrictive set of criteria. Talk of punishment as a form of a dialogue clearly uses the term ‘dialogue’ in a way somewhat removed from its usual usage. At the very least we must be prepared to admit that the ways in which messages are communicated will differ from the direct person-to-person utterances typical of an everyday conversation. However, despite the fact that the features of the judicial process prevent punishment being a direct replication of a personal conversation, we can still aim to model punishment on this kind of dialogue in a way which is desirable. Punishment can still capture the elements of a dialogue which are central in ensuring that censure is communicated effectively to wrongdoers. These elements of dialogue reflect the first three of Brownlee’s criteria. In setting out her own criteria for dialogue Maslen also highlights these elements, claiming that what is essential to an effective dialogical model of censure is that the process is responsive, involves a shared topic and that the involved parties pay attention to the others involved (2015: 99-100). These criteria represent an ideal to which punishment can realistically strive towards. Furthermore, broadening the criteria required for punishment to be considered dialogical in this way still leaves us with an ideal which is \textit{worth} striving for. A dialogical model provides us with the best possible model of censure available to the state when it punishes wrongdoers.

These conditions for dialogue still have a powerful impact on the way we ought to punish. If a dialogue is to be achieved then the state must be sensitive to the individual characteristics of offenders. This means it must recognise that there is a
significant difference between offenders who are remorseful for their crimes and those who are unrepentant. As Brownlee puts it: ‘in the case of the wholly repentant offender, this ritual [of punishment] misrepresents her as being of a singular mind and attitude as unrepentant offenders who need to be brought to appreciate the wrongness of their acts and the reasons for reparation and repentance. As such, her punishment, when comparable in harshness to that of an unrepentant offender is indefensibly dismissive of her sincere emotions of remorse, regret, and repentance, and her fervent desires to remedy relations’ (2011: 60).

If the state is serious about achieving a dialogue with offenders it must therefore treat those who are remorseful differently from those who are not, for a failure to do so would demonstrate unwillingness on the part of the state to be sensitive to the party it is trying to communicate with. However, this is not to say that the state must take every single feature of an offender into account when determining the appropriate punishment for a given crime. There are certain aspects of offenders’ lives and characters which may be either irrelevant or prejudicial and, as such, should not be considered relevant in sentencing. Distinguishing between those features which should not be considered relevant and those which should is crucial to ensuring that the courts do not go beyond their rightful area of inquiry. I therefore propose that there are two criteria which must be met by any characteristic of a defendant if it is to be considered relevant to the process of creating a dialogue.

Firstly, it must have an intimate connection to the crime under consideration. As noted above, the idea of dialogue relies on there being a shared topic under discussion. If an aspect of the defendant’s life or character is to be influential in shaping the ongoing dialogue then it must be directly related to this topic. The state’s goal in punishing is to communicate a message of blame regarding specific acts of wrongdoing and the dialogue must be focused upon these specific acts. It is therefore only factors intimately related to the wrongdoing which should affect the content of the dialogue of punishment. It is worth noting here that there may also be separate instances in which the state may legitimately decide not to punish wrongdoers for reasons which do not relate directly to the crime under consideration. These are cases in which, for either prudential or merciful reasons, it is deemed to be either against the public interest, or needlessly cruel, to impose a full punishment. Though there may well be compelling reasons for the mitigation of punishment in such cases, the
reasoning behind this mitigation is distinct from the current discussion. In these cases the justification for mitigation stems from consideration of a broader range of factors than is usually deemed relevant in sentencing decisions and is not based on reasoning internal to the dialogical process (for further discussion of the role mercy can play in sentencing see Chapter 7 and: Card, 1972; Dolinko, 2007; Tasioulas, 2003; Duff, 2007).

An intimate connection to the crime under consideration is a criterion which is met by offender remorse. The reaction of a wrongdoer to the harm they have caused is directly related to the subject under consideration. This is not true of a number of other features which are appropriately excluded from sentencing decisions. Physical characteristics, such as hair colour, and attitudes or opinions regarding unrelated topics, such as a defendant’s favourite flavour of ice cream, clearly have no intimate connection to the harm caused and, as such, should be excluded from sentencing decisions. Whilst requiring that characteristics of a defendant must have an intimate connection to the offence rules out a number of possible factors it not does by itself rule out certain other factors which also ought to be excluded from consideration. These are aspects of an offender’s life which may play a more profound role in determining how they will react to both their own past actions and to the intervention of the state. A non-exhaustive list of such factors includes considerations such as religious belief, sexuality, age and gender. It is for this reason that the features of defendants which the courts ought to be sensitive to must also be directly related to the aims of the court.

The religion of a defendant, to focus on one example, should not be considered relevant to the aims of a secular court. This is despite the fact that the religion of a defendant may play a significant role in determining how they react to their past crime (perhaps especially so if they have converted since the commission of that crime) and in determining how they will react to the punishment imposed on them by the state. In punishing a wrongdoer the state should have no interest in influencing the religious belief of that wrongdoer, nor should it be in the business of commenting on that religious belief. To do so is not the job of the courts. As discussed above, the aim of the court should be to censure wrongdoers. This means that punishment should be directed towards the goal of helping offenders to recognise and show repentance for the crimes they have committed.
Unlike religious belief, the remorse of a defendant is directly related to this goal. Remorse belongs to a family of emotions, including guilt, shame and regret, which may be labelled the retractive emotions. When we experience these emotions we ‘in some way retract or withdraw from something which is otherwise seen as belonging to or associated with the self’ (Tudor & Proeve, 2010: 31). Common to these emotions is a thought akin to ‘I wish I had not done that’ or ‘I wish I was not like that’ (Tudor & Proeve, 2010: 31). Having such a belief is a necessary component of remorse; someone cannot feel remorse without believing that they have done wrong. To return to Gabrielle Taylor: ‘it is impossible to feel remorse and yet believe overall it was right to act as one did’ (1985: 99). As previously discussed, recognising the harm that one has caused will also bring about a desire to reform oneself in future (see also: Duff, 1986: 246-254; Lippke, 2008: 260). Both of these elements, the recognition of harm caused and a desire to reform, should affect the way in which the state attempts to engage in a dialogue with a remorseful offender. Offender remorse is not only intimately connected to the crime but is also bound to the aims of the court. In the case of the repentant offender the dialogue must be altered because they are ‘further along’ in the process than in the case of an unrepentant offender.

The claim that a remorseful offender already feels the emotion that punishment aims to induce in them has also been levelled as a criticism against communicative approaches to punishment. Bagaric and Amarasekara have argued that ‘[Duff’s theory] is incapable of justifying the imposition of hard treatment on offenders, especially in the case of contrite offenders’ (2001: 368; also see Bickenbach, 1988; von Hirsch, 1993: 10). They argue that if the purpose of punishment is to induce repentance then there is no need to further punish an already repentant offender. Duff’s response to this relies on the claim that ‘repentance is not something that can be achieved and completed in a moment’ (2001: 119). For Duff, full repentance is something which can only be achieved by undergoing punishment as a form of secular penance. It should also be noted here that Duff himself does not hold that remorse should be considered a mitigating factor (for Duff’s own response to Bagaric and Amarasekara see; Duff, 2000). However, there is space for a defence of remorse as mitigating factor within a Duffian approach to punishment.
Duff is correct to assert that repentance is an ongoing process and that for an offender to show the appropriate level of remorse to the community they must be prepared to accept some form of punishment for the harm they have caused. However, this only provides a reason to not view offender remorse as a ground for entirely mitigating punishment. It does not conflict with the claim that remorse should lead to more lenient sentences, whilst maintaining that some degree of punishment must still be imposed. As discussed above, the idea of attempting to achieve a genuine dialogue with offenders is key to ensuring the success of the communicative process and this requires the state to be sensitive to offender remorse. This is compatible with the claim that offenders must still be punished to some extent if they are to make amends to the wider community for the harm they have caused. A remorseful offender should recognise that they still ought to be blamed for their actions, even if the form that blame takes is less severe than it would need to be were they yet to come to recognise the harm they have caused (for a response to Bagaric and Amarasekara within a Duffian framework which does not rely on the idea of dialogue see: Tudor, 2005: 765-767).

A similar argument to this, proposing that remorse should be a mitigating factor in sentencing, has also been put forward by Maslen who argues that:

If censure is not responsive then it assumes no moral transformation and speaks to the remorseful offender as if he is yet to be convinced of the wrongfulness of his conduct. However, censure that communicates modified disapprobation, in response to the offender’s remorse, has greater communicative and moral force. This moral force stems from taking into account the remorseful offender’s appreciation of the wrongfulness of his offence, addressing him appropriately to his understanding.

(Maslen, 2015: 101)

According to Maslen, this gives us a principled reason to recognise the relevance of remorse in sentencing decisions. Mitigating punishment in response to remorse achieves the best possible form of punishment and allows us to view remorse as a mitigating factor internal to the logic of punishment, rather than being based on external considerations which are viewed as at odds with or tempering justice. This is crucial to addressing the epistemological concerns raised in Chapter
3; the central role remorse plays in justifying the type of punishment that ought to be imposed on offenders means we ought to work on trying to overcome these concerns as best we can, rather than viewing epistemological concerns as a reason to exclude remorse from the courts. In order to illustrate why sensitivity to the relevant characteristics of those being censured is required for the process to be effective consider the following non-legal example. Were you, whilst working in a public park, to see someone littering, an appropriate response would be to tell them that they should not litter and to explain why; to censure them. Consider two possible scenarios in which this might take place (imagining oneself as a park ranger in both): in the first, the person littering is a young man sitting eating lunch with friends and clearly discarding the rubbish with no particular concern for what he is doing; in the second, the man is eating lunch with his two young children and, clearly hurried and flustered by looking after them, decides to leave the rubbish behind after noticing the nearest bin is on the other side of the park. In both cases the harm caused is the same; the same rubbish is knowingly and willingly left and some form of censure is certainly appropriate. However, if one wishes to communicate effectively it is important to recognise (as far as is possible) the relevant aspects of the two men’s characters and address them accordingly. One would presumably be inclined to treat the careless man more harshly than the hurried parent. Furthermore, the ongoing response of the litterer to the situation would justifiably alter the tone in which you continued your conversation; were one man to swear and shout whilst the other apologised this would affect the way you ought to treat them. Similar considerations apply to any number of personal interactions, whether it be a parent disciplining a child who has misbehaved or someone berating their partner for an inconsiderate past action.

What is common to these situations is that different language must be used depending upon whether the person being censured is already apologetic for their past actions, and whether or not they were out of character. This is not merely because feelings of sympathy may be awoken by an apology, but also because if any real sort of dialogue is to take place it is vital for both parties to recognise the character and attitude of the other party. This is not only true of personal interactions but also translates to the legal analogue of communicating censure through
punishment. The attitude of a wrongdoer post-offence can alter both the nature of the conversation that should be had and the tone in which it should be undertaken.

Maslen distances herself from character retributivism and maintains that her position does not rely on the claim that an offender’s remorse can reduce their blameworthiness (2015: 29). This is because Maslen views character retributivism as an untenable position. However, if a non-consequentialist theory of punishment (such as the communicative theory endorsed here) is to allow for the relevance of remorse to sentencing decisions then it necessarily requires the endorsement of some form of character retributivism. Character retributivism simply is the view that the character$^2$ of a defendant should affect the punishment that they receive. A non-consequentialist theory which views remorse as a mitigating factor entails character retributivism. However, character retributivism is typically rejected in the philosophical literature and viewed as an undesirable position. In what follows I will therefore outline and defend a broad version of character retributivism which is compatible with a communicative approach to punishment, with a particular focus on the role of remorse.

2. Character Retributivism

Character retributivism is typically construed in a strong form which I will refer to as pure character retributivism. As Jeffrey Murphy puts it, a character retributivist (of this sort) ‘believes, with the philosopher Immanuel Kant, that the purpose of punishment is to give people the suffering that is properly proportional to what Kant called their “inner viciousness”’ (Murphy, 2007: 443). According to such an account, the offense for which a criminal is currently being sentenced should be viewed as merely one aspect of the information which is to be evaluated when determining the appropriate sentence. It must be evaluated alongside all the other available information which provides a complete, or as complete as is possible, picture of the

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$^2$ It should be noted here that ‘character’ is used here in a broadly legal sense to refer to considerations which relate to the emotions, attitudes, characteristics, expressed opinions etc. of defendants themselves, in contrast to factors which relate directly to the details of the offence under consideration. It should be not taken as a commitment to any particular philosophical view regarding the existence or nature of character.
offender’s true nature. This information may include details from the offender’s life pre-offence, such as whether the defendant has a history of charitable work or a history of re-offending, as well as details of their life and attitude post-offence, such as whether they are remorseful or defiant. Only when all such details have been considered can the correct sentence be handed down as, for the character retributivist, it is the offender themselves who should be judged and not only the wrongness of one particular action (or group of actions).

Pure character retributivism is typically contrasted with, and rejected in favour of, pure act retributivism. According to pure act retributivism the harshness of the punishment deserved by a wrongdoer is directly determined by the severity of the harm they have caused. Jeffrie Murphy refers to this form of retributivism as grievance retributivism, describing it in the following terms: ‘desert is a function of the wrongdoing itself and the legitimate grievance that it creates for individual victims and for society at large’ (2007: 443), the severity of the punishment being determined by the ‘nature and quality of the grievance that the victim (and perhaps society as a whole) has against the criminal’ (2011: 32). This typically means that act retributivists will advocate uniform sentencing, holding that the character of the offender and their response to the crime does not alter the harm caused. As Nick Smith puts it, ‘when the wrong is done, its wrongness crystallizes forevermore’ (2014: 149). This means that an offender’s actions after the commission of a crime are taken to have no bearing on the punishment that they deserve.

Though there are a great many theories of punishment which may fall under the heading of act retributivism, they tend to share the basic thought that for any given criminal act there is a level of punishment which serves as an appropriate form of retribution. This punishment is to be seen as a response to the specific act and not as a comment on the nature of the wrongdoer themselves. By judging the wrongness of the deed itself, rather than of the wrongdoer themselves, act retributivism attempts to avoid making unnecessary intrusions into the private lives of offenders. Crimes are viewed as public wrongs, and should be punished publicly without delving into the private aspects of an offender’s life.

However, language such as this is overly optimistic about the possibility of judging an act in total isolation from judgement of the actor themselves, and
overlooks the simple fact that we have to punish the doer and not the deed itself. In other words: ‘the rapist, and not the act of rape, deserves to experience hard treatment. We imprison people, not crimes’ (Smith, 2014: 151). When we speak of not judging the offender, but rather the specific acts for which they are on trial, we ignore the fact the offender is inextricably bound to the entire process of prosecution, judgement and sentencing. To attempt to the separate the two as cleanly as is desired by some retributivists is a fool’s errand. Even if the sentence is determined wholly by consideration of the crime, and not the criminal, then it is still the case that it is the criminal who receives the punishment.

Furthermore, we are not capable of, nor are courts in the business of, judging crimes independently of all judgements about the nature of the perpetrator. Courts routinely inquire into the past history of offenders and make judgements about their behaviour post-offence when determining the severity of the harm caused and the harshness of sentence appropriate. Taking such things into consideration is widespread in judicial practices and judges often make mention of the good character of offenders or of their remorse when giving reasons for mitigation in sentencing decisions (Jacobson & Hough, 2007: 12-15). Similarly, media coverage of high profile criminal trials also clearly demonstrates that one of the aspects of a trial with which the public is most concerned is the emotional states of defendants: newspaper headlines frequently focus on whether or not remorse has been displayed in court (see, for instance: BBC News, 2015; NBC News, 2014; Daily Telegraph, 2014). Whilst neither of these observations may count as a normative argument in favour of allowing character to play a role in sentencing decisions, they do suggest that some form of character retributivism aligns well with our moral intuitions.

Act retributivists are of course aware that we do not punish crimes directly but nevertheless will maintain that we punish (or blame) people for actions, and it is the details of those actions which should determine the severity of the punishment. However, a refusal to acknowledge the significance of the character of those being punished reflects a failure to pay attention to an important element of the process of punishment. Punishment as communication is a way of communicating blame to offenders. If this blame is to be communicated effectively then it is important to be sensitive to all relevant factors. The character of the recipient of punishment may have a powerful impact on the best way to communicate blame; as previously
mentioned, the form of censure used when addressing repentant and unrepentant offenders must be different if it is to be effective.

In order to be sensitive to this we should seek a middle ground between pure character and pure act retributivism. Such a middle ground is possible because the distinction typically provided between act and character retributivism presents us with a false dichotomy. One possible middle ground position has recently been developed by Nick Smith. The middle ground between character and act retributivism is described by Smith as either dialectical retributivism or “character of act” retributivism (2014: 151). Smith introduces his position by arguing that

We find criminal acts embedded in lives, not served up as frozen slices of time on a scale of justice. One’s acts and one’s character stand in a dialectical relationship. What I do makes me who I am. Who I am determines what I do. How I respond when I err not only presents a strong indicator of my character but also provides opportunities to develop and define my identity in a kind of *felix culpa*. To the extent that we can isolate individual events in a person’s life, we attribute meaning to these acts by triangulating that deed with the person’s past and future.

(Smith, 2014: 151-152)

Smith’s dialectical retributivism claims not that an offender’s sentence should be determined by the wickedness (or otherwise) of their character, but rather that understanding the character of an offender is necessary for us to correctly characterise the nature of the act for which they are being sentenced. This means that ‘criminal desert lies not *either* in the inherent badness of the act stripped of all contexts *or* in the totality of the offender’s being’ (Smith, 2014: 153), and to present these two extremes as the only available options is to present a false dichotomy. However, this does not mean that the totality of an individual’s character is necessarily relevant to our judgement of any act committed by them.

Smith illustrates this idea with the following example: ‘If someone steps on my toe in anger and breaks it, her subsequent response tells me quite a bit about the nature of that act. She may taunt me and threaten to break more toes. She may go on a toe-breaking rampage, targeting people only of my ethnicity. She may apologize immediately, or years later. The nature of the initial assault changes depending on
how it fits into a broader moral narrative’ (Smith 2014: 152). In order to complete our judgement of the act we must consider aspects of the toe-breaker’s character. However, it does not demand that we make any kind of final judgement about her total moral worth. Instead, we should evaluate those aspects of her character which are relevant to the offence in question and which help us to be better able to understand it.

Dialectical retributivism provides us with a middle ground between pure character and pure act retributivism. However, as it is presented by Smith it is a problematic position. This is because Smith talks of the post-offence character of an offender changing the nature of the act for which they are responsible. Ruling out backward causation, this seems to suggest that the act for which an offender is responsible is ongoing. This clearly presents a problem, both philosophically and legally, with regard to individuating the act for which we are censuring an offender. This issue can be averted by making a weaker claim than that put forward by Smith. We need not claim that the character of a defendant can alter the nature of their past action. Rather, we need to understand that certain aspects of an individual’s behaviour and response to a past wrong can legitimately alter the way in which we view, describe and respond to that wrong.

This means that while understanding the relevant aspects of an offender’s character may help us to better understand the nature of their transgressions it cannot change the type of offence for which they are guilty. Whether an assault is viewed as having been committed in the heat of the moment and subsequently rejected, or undertaken whole-heartedly and subsequently endorsed may change the light in which we view the assault, and the way in which we should talk about it, but it cannot change the fact that the relevant crime is that of assault. This is true even if there are cases in which a subsequent apology may plausibly lessen the harm caused, and as a result lessen the criminal’s desert. Much of the harm caused by many crimes continues well beyond the date of the crime itself; the offence suffered by one subjected to racial abuse or the continuing psychological suffering of a victim of domestic abuse will not simply disappear overnight; and whilst it is plausible that an apology may reduce this ongoing suffering in many cases, it can never undo the initial offence. An apologetic criminal still committed the same initial crime.
Punishment as a communicative process relies on the state being able to effectively communicate its disapproval by blaming offenders for their actions. If blame is to be communicated successfully then we must adopt a form of character retributivism in order to ensure that we respond to crimes in the appropriate manner. Specifically, the censure directed at a remorseful defendant must be sensitive to their remorse in order to ensure that the appropriate message is communicated to them. However, character retributivism, is typically rejected in any form by retributivists. The following sections will therefore address some of the main objections which may be raised against my account.

3. Intrusiveness and the Assessment of Character

One of the primary objections raised against character retributivism is that requiring the state to make judgements about the nature of its citizens’ characters requires a level of intrusiveness which we should not allow in a liberal society. The idea that any form of character retributivism requires the state to venture beyond its rightful domain is raised in a number of places by Duff. Drawing on the work of von Hirsch, Duff argues that an offender should be censured for their crime, not for the nature of their character (Duff, 2001: 120-121). Duff argues that this is not merely a matter of fairness and proportionality but is because ‘a liberal polity should not take so coercive an interest in its citizens’ souls [as to be able to determine their inner worth]’ (Duff, 2011: 377). It has been argued that such a level of intrusion into the private lives of citizens is not something we should be prepared to accept in a liberal society (see; Smith, 2014: 149-151; Murphy, 2007). John Tasioulas raises the same objection in the following forceful terms:

[Character retributivism] 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 subconscious—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?

(Tasioulas, 2007: 504)

Arguments of this nature are sound; however, they are opposed to the pure form of character retributivism I do not wish to endorse. Attempting to make something akin to a final judgement about the goodness of an individual is both foolhardy and beyond the bounds of what can reasonably be considered to be the domain of legal punishment. As I have already claimed, it is only certain aspects of character which should rightly be considered as relevant to sentencing.

Character retributivism in the form I am advocating is not overly intrusive into the private lives of citizens. Rather it recognises that if we are to properly determine the appropriate punishment for individual wrongdoers then we have legitimate reasons to be interested in specific and limited aspects of their character. In the preceding section I outlined two criteria which must be met for an aspect of character to be relevant to sentencing: an intimate connection to the offence and relevance to the aims of the court. I have also argued that offender remorse meets these criteria. However, viewing remorse as a mitigating factor does not mean that an absence of remorse should be considered an aggravating factor. To view an absence of remorse as an aggravating factor would require an unacceptable level of intrusiveness of the part of the state.

In responding to the argument that remorse should be considered a mitigating factor, Duff poses the question of why we should not see the standard punishment as that appropriate to a repentant offender and treat those who are unrepentant more harshly. The answer, according to Duff, is that ‘a liberal polity that respects its citizens’ privacy and freedom should not inquire into the sincerity of their public performances; it should address them and require conduct of them as if they were sincere’ (2011: 373). However, inquiring into the sincerity of the public performances of defendants is something that is essential for the judicial system to function successfully. Indeed, this constitutes a great deal of their workings. Trials may hinge on the determination of which aspects of conflicting testimony are deemed to be sincere. Whether a defendant is found guilty of murder or
manslaughter may depend largely upon whether their statements in court are believed to be sincere. Given these facts, it is not apparent why we should view it as overly intrusive to question the sincerity of statements or evidence about character which are presented to the court.

However, here the cases of viewing the presence of remorse as a mitigating factor and the absence of remorse as an aggravating factor differ. A defendant who is remorseful will be motivated to provide evidence of this to the court and, if their remorse is genuine, there should be wider evidence of this in their behaviour which they are willing to have presented to the court as part of a plea in mitigation. A willingness to present this information should bring with it a willingness to have its veracity questioned. A remorseful defendant should not object to their claims being examined as, by making such a plea, they are contending that they have the evidence to back up their claims. However, this is not so obviously the case in situations whereby a defendant fails to show any remorse. Though there may be instances in which a defendant is vocally defiant, in most instances there will simply be a lack of emotion shown. Inquiring into the meaning of a defendant’s silence does raise issues of intrusiveness, for they are choosing not to present information to the court rather than presenting information which may then rightly be questioned. This means that judgements based on inquiring as to the meaning of their silence, and perhaps having to presume that it shows a lack of remorse, venture into a private sphere the defendant has not opened up to public scrutiny. An interesting parallel may be drawn here with instances in which the public may legitimately claim to have an interest in aspects of a public official’s life which may, under normal circumstances, be considered private. If a candidate running for office were to base his campaign in part upon claims about his family life, then it would seem unreasonable for him to subsequently complain if the press were to inquire into the veracity of those claims (Thompson, 1987: 134-135). Similarly, by presenting claims of remorsefulness to the court a defendant opens up that aspect of their life to reasonable scrutiny. Crucially, it is the decision to base one’s plea (or political campaign) upon otherwise private details which demonstrates a desire to make those details public.

3 This is perhaps most likely in cases of civil disobedience. The issue of how to appropriately censure such defendants is complex and important; however it goes beyond the bounds of the current chapter.
If punishment is to attempt to enter into a real dialogue with offenders then it must recognise that those who are remorseful and those who are not deserve different amounts of blame. The standard or unmitigated punishment should be that which would be appropriate to a defendant who has not expressed remorse. This does not raise privacy issues, but allows for defendants to open up certain aspects of their character to public scrutiny in cases where they have chosen to express remorse for their actions.

4. Remorse and the Reduction of Blameworthiness

4.1 Blame and Responsibility

As well as general concerns regarding character retributivism there are also potential objections related to the specific claim that remorse can reduce blameworthiness. As previously mentioned, Hannah Maslen has recently advocated a form of responsive censure which maintains that remorse should be viewed as a mitigating factor. However, Maslen distances her position from character retributivism. Maslen explicitly rejects the view that a defendant’s remorse can alter how blameworthy they are for their crimes. The claim that a defendant’s remorse can alter their blameworthiness is a form of what Maslen refers to as the Changed Person argument (2015: 38-39). Maslen firstly rejects the claim that remorse can reduce blameworthiness because, according to Maslen, the changed person argument ‘invites the suggestion that the person who becomes less blameworthy should therefore feel less bad about what he or she did. This is in tension with what is central to remorse—full acceptance of responsibility for the harm caused’ (2015: 39). Though Maslen does not go into further detail on this point, it does raise a genuine concern for the defender of character retributivism.

The objection may be in stated in the following terms: The degree of remorse one should feel about \( x \) is determined by how blameworthy one is for \( x \); remorse, according to the character retributivist, makes an individual less blameworthy for their past actions; therefore, feeling remorse about \( x \) should make an individual feel less remorse about \( x \). As Maslen observes, this seems to be in tension with the idea that remorse requires full acceptance of responsibility for the wrong done. Furthermore, the claim that feeling remorse about \( x \) should reduce the degree of
remorse felt about x may appear counterintuitive to many. Feeling remorse cannot alter the past. It is therefore not apparent how one’s current emotions should impact upon the emotions one should feel about past events. My current remorse may justify my having a more positive attitude towards my present self, but it is not immediately clear why it should change the way I ought to feel about past events. Ultimately, this also implies that the severity of the remorse a wrongdoer should feel will continually decrease over time; if feeling remorse continues to make an agent less blameworthy for their past wrongs then it appears that by feeling remorse an agent begins a process which will ultimately absolve them of blame altogether. It is when taken to this extreme that the tension highlighted by Maslen becomes clearest. Whatever restorative powers remorse may have, by perhaps leading to forgiveness and helping to repair damaged relationships, it may appear unintuitive to suggest that the very act of feeling remorse can absolve an agent of blame for the wrong they feel remorseful about. I will return to the latter of these concerns in the following section.

Firstly, however, I will address Maslen’s concern that reduced blameworthiness as a result of feeling remorse is at odds with the full acceptance of responsibility for one’s past actions. In order to do so it is necessary to make clear the relationship between blameworthiness, responsibility and remorse.

It is also important to note what is meant by the claim that a person, in Maslen’s words, ‘feels bad’ about a past action. Depending on the nature of my past actions there may a number of different ways in which I ought to feel bad about them, so that a reduction need not necessarily mean that I no longer feel bad about what has transpired. Certain situations may appropriately engender remorse whereas others may appropriately engender different feelings of shame, guilt, regret or agent-regret. Of these, it is at least plausible that there are situations in which one ought to feel shame or agent-regret but where we do not consider the relevant agent to be blameworthy. To illustrate this we can return to the case of agent-regret. Agent-regret is a form of regret 'which a person can only feel towards his own past actions' (Williams, 1976: 123). The concept of agent-regret, as described by Bernard Williams, covers voluntary and involuntary actions and is relevant to actions for which it is perhaps not appropriate to feel remorse. As discussed in Chapter 1, the classic example Williams uses to illustrate the idea of agent-regret is that of ‘the lorry driver who, through no fault of his, runs over a child’ (1976: 124). As Williams observes, the lorry driver will feel very differently from a spectator who is watching
the event, and it is entirely understandable that he feels a different sense of regret; a sense of regret that stems from his causal role in bringing about the death of a child. In this case we do not hold the driver to be blameworthy, for the death was caused by factors beyond his control, yet we do intuitively feel that he ought to feel differently from a bystander who observes the event but plays no causal role in bringing it to pass. This is due to the role the driver plays as the agent who causally brings about the death. There is an important sense in which he is responsible for the death, whilst not being blameworthy for it. Yet this does not mean that the lorry driver should not feel bad about the course of events that has transpired. It is plain that agent-regret is a ‘bad’ feeling, for one should not feel regret about an outcome which is good. It may be wrong for him to blame himself but, if we are prepared to accept that he ought to feel a sense of agent-regret then we must also accept that we believe he ought to feel bad about the situation.

However, this distinction alone is not sufficient to address the concern raised by Maslen. Though in certain circumstances an agent ought to feel bad about past events for which they are not blameworthy, this does not alleviate the concern that by feeling remorse to a lesser degree I will ultimately not feel as bad. Even if a powerful sense of agent-regret is appropriately still felt towards a past action, if it were to become the case that the agent should feel less remorse (as a result of diminished blameworthiness) then it follows that they ought to feel less bad than they previously did. It may even be the case that they still ought to feel very bad indeed, but nonetheless this will still not be as bad as they ought to have felt when they were previously more blameworthy. This would only not be the case if another negative emotion ought to increase in intensity as the appropriate degree of remorse lessens. However, there is no reason to suppose this to be the case. Nor would this address Maslen’s initial concern, for it does not address the specific claim that the agent in question ought to feel less remorse.

The tension, raised by Maslen, between feeling less bad about one’s past actions and accepting full responsibility for the harm they caused relies on the claim that acceptance of responsibility is necessary for remorse. Whilst this is the case, it is not true that acceptance of responsibility alone is sufficient for remorse; nor does accepting responsibility wholly determine the level of remorse a wrongdoer ought to feel. The level of remorse appropriate to a wrongdoer’s situation is determined by their level of blameworthiness; and a person’s blameworthiness for a past wrong
may be affected by factors other than responsibility. Two different agents may both be equally responsible for causing equivalent harms but differ in their blameworthiness due to other relevant factors. Specifically, I have claimed that elements of a wrongdoer’s character, both pre- and post-offence, can impact upon their level of blameworthiness. By making a distinction between blameworthiness and responsibility we are able to avoid the apparent tension between reduced blameworthiness and full acceptance of responsibility for one’s past actions. The degree to which one is blameworthy depends on a wider range of factors and whilst a refusal to accept responsibility may undermine claims to be remorseful, a reduction in blameworthiness does not necessarily require a corresponding reduction in responsibility (or acceptance of responsibility).

In making a distinction between blameworthiness and responsibility it is important to make clear the sense of responsibility which is being used here. I am using acceptance of responsibility to refer to an agent recognising their role as the author of a certain action. The phrase ‘take responsibility’ is also often used in a broader sense which may well imply blameworthiness. When a disgraced public official speaks of ‘taking responsibility’ for their actions they are often taken to be admitting that they should be blamed. The phrase may in fact be taken as a form of apology for those actions. This broader sense of taking responsibility is not so easily separated from blameworthiness. However, this is not an issue for my account; it is simply a difference sense of the word. For my purposes, it is sufficient to draw a distinction between blameworthiness and the narrower sense of responsibility.

Returning briefly to current legal practice, as outlined in Chapter 3, it is interesting to note that sentence reductions offered to co-operative and/or apologetic defendants in the United States are offered ‘if the defendant clearly demonstrates acceptance of responsibility for his offence’ (United States Federal Sentencing Guidelines, 2012: 265). No specific references to the relevance of the remorse of the defendant are made, other than one remark contesting the evidentiary value of expressions of remorse. Whilst I do not wish to defend the current US sentencing guidelines, the language used helps to illustrate how we may distinguish between responsibility and blameworthiness (the latter being that which should determine the degree of remorse felt by a wrongdoer). Rather than remorse, the sentencing

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4 Hereafter any references to responsibility will be to this narrower sense of the term.
guidelines consider the following considerations as being relevant to acceptance of responsibility: ‘truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable’; ‘voluntary termination or withdrawal from criminal conduct or associations’; ‘voluntary payment of restitution prior to adjudication of guilt’; ‘voluntary surrender to authorities promptly after commission of the offense’; ‘voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense’; ‘voluntary resignation from the office or position held during the commission of the offense’; ‘post offence rehabilitative efforts’; and ‘the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility’ (United States Federal Sentencing Guidelines, 2012: 265). All of these considerations are outward signs of co-operation which ought to be undertaken (where appropriate) by one who accepts responsibility for their crime.

However, we can accept that a remorseful defendant ought to co-operate in these sorts of ways even if they are less deserving of censure than they would be in the absence of remorse. A remorseful wrongdoer ought to truthfully admit the facts of their crime but this does not entail that they are just as blameworthy as they would be where they to be unremorseful. As I have previously argued, if a wrongdoer is blameworthy then this does entail that they are responsible for their past actions; but this does not mean that their level of blameworthiness is determined entirely by their level of responsibility for their past actions. As I am distinguishing the two concepts here, responsibility is set at the time of the offence whereas blameworthiness is something which may change over time. Remorse post-offence cannot absolve the offender of responsibility for their past crimes, but it can alter the degree to which they ought to be blamed or censured for those crimes. Therefore there is not necessarily a tension between a wrongdoer feeling less bad about what she did and fully accepting responsibility for her past actions.

4.2 Feeling Better Over Time

The use of the phrase ‘acceptance of responsibility’ in the United States’ sentencing guidelines is also sometimes, though not universally, taken by judges to
necessitate remorse. For instance, the United States Second Circuit court has stated that ‘acceptance of responsibility necessitates candor and remorse’ (O'Hear, 1997: 1511). Whilst this interpretation of the guidelines is not uncontroversial it serves to highlight the final concern raised by the claim that a wrongdoer who becomes less blameworthy for their actions ought to feel less remorse than they previously should have. This is the suggestion that, as a result of feeling remorse, they should progressively feel better over time, perhaps ultimately leading to their no longer being blameworthy for their past actions. Were this to occur, it would be the case that remorse should no longer be felt about the relevant past action. However, as I have distinguished responsibility and blameworthiness, it would still be the case that the agent in question should be held fully responsible for their past actions. As previously mentioned, the idea that the act of feeling remorse about a past action may ultimately absolve the remorseful person of blame for that action may initially seem peculiar to many. Yet, by looking more closely at this claim we are able to see that it is not as counterintuitive and problematic as it may first appear.

The first thing which is important to observe here is the degree to which a wrongdoer’s feeling remorse reduces their blameworthiness. Were the claim being made here that by feeling remorse a wrongdoer immediately absolves themselves of all blame for their past actions then it would clearly be incorrect. The weak-willed, though well-intentioned, wrongdoer who frequently succumbs to their worst nature, yet always feels a genuine sense of remorse for their actions, is not repeatedly absolved of all blame for their past wrongs. Nor is it wrong to blame a murderer, who having killed a family member in a fit of rage later comes to feel a profound sense of remorse, for his actions. However, the feeling of remorse in these cases does lessen the blameworthiness of the actors to some extent. The question is then: how much does feeling remorse in these instances lessen the degree of blame appropriate?

Providing a clear and succinct answer to this question is not an easy task. However, by considering cases in which a wrongdoer may plausibly come to longer be blameworthy we can see that this issue is not particularly problematic. Consider a burglar who, after having been caught and punished, has felt remorse for many years and abstained from any criminal activity. It seems that there comes a point at which it is no longer appropriate for others to blame him. It therefore seems odd to suggest that he must continually feel a sense of remorse for his actions for the duration of his
life. He still ought to feel a sense of agent-regret when considering his past wrongs, for he is still responsible for having caused harm and is still aware of that fact. However, there is a point at which his current character is so far removed his past self that he no longer ought to feel remorse for his past wrongs.

If we are prepared to accept that wrongdoers ought to feel remorse about their past actions, that remorse is the morally appropriate response, then it seems less controversial to suggest that remorse can have this therapeutic value. We can forgive others for their actions whilst still holding them responsible for them, and, equally, there is a kind of self-forgiveness which ought to occur at a certain point in the process of repentance. That is to say, for certain crimes there is a point at which the perpetrator should no longer blame themselves for what they did, even if they must still accept that they were responsible for their actions. However, it is important to remember that for many serious crimes, though remorse may still have therapeutic value, the seriousness of the initial wrong will preclude an individual ever being able to fully absolve themselves.

In this chapter I have defended a form of character retributivism alongside the more specific claim that a wrongdoer’s remorse can reduce their blameworthiness for their past actions. I have argued that communicative theories of punishment, which I take to be the best available approach to punishment, should motivate us to re-examine character retributivism. I have suggested that despite its unpopularity in the literature there is a form of character retributivism available which is both defensible and desirable. It is also an approach to punishment which fits well with many of our current practices and moral intuitions. In the course of the preceding discussion I hope to have shown that many of the concerns previously raised with character retributivism can be addressed by appropriately refining the position.
Chapter 6 – Shame

The arguments made in the previous chapter defend a weak form of character retributivism. I have argued that certain aspects of a defendant’s character (i.e. those with an intimate relationship with their past wrongs) are relevant to sentencing decisions. In light of this it seems that this may also justify the relevance of certain instances of shame to criminal sentencing. Fabrice Teroni and Otto Bruun (2011) have argued that philosophers tend to undervalue the role which shame plays in our moral lives. Teroni and Bruun contrast the role shame plays in our moral lives with the role played by guilt which, they contend, is typically viewed as a more valuable emotion. Though they do not discuss remorse as a distinct emotion, much of their discussion of the relative value of shame compared to guilt is equally applicable when comparing shame to the account of remorse detailed in Chapter 1. In the following section I will first briefly outline the most important of Teroni and Bruun’s arguments in favour of placing greater moral value on shame. I will not offer objections to these arguments but will rather consider the implications these arguments ought to have regarding the role of offender emotions in sentencing. A potential implication of Teroni and Bruun’s view is that my own arguments concerning remorse ought to be broadened to also allow for sentence reductions in cases in which a defendant feels shame as a result of their past actions. I will consider two potential arguments in favour of the view that remorse ought to be considered relevant to sentencing decisions whilst shame should not be, arguing that the latter of these gives us good reason to maintain that remorse ought to be viewed as uniquely relevant to sentencing. This remains the case even if we accept Teroni and Bruun’s arguments that we ought to place greater moral value on shame than is often currently the case.

1. The Value of Shame

Teroni and Bruun approach this topic by attacking a number of arguments which purport to show that guilt is a more valuable emotion than shame. The first argument in favour of viewing shame as a less morally valuable emotion than guilt rejected by Teroni and Bruun is the Pro-Social Argument (2011, 224). Pro-social
behaviour is defined as ‘behaviour that promotes and fosters cooperative interactions between members of a group’ (2011, 225), including actions such as helping and apologising to others. It is precisely the sort of behaviour which punishment ought to help to elicit, and create appropriate situations for. A defendant who is motivated to make amends for their past actions is motivated to act pro-socially. The Pro-Social Argument rejected by Teroni and Bruun, then, claims that guilt motivates pro-social behaviour in a way that shame does not. Further to this, the Pro-Social Argument claims that shame does not only fail to motivate pro-social behaviour but also directly motivates anti-social behaviour (2011, 225-229). This is because ‘guilt motivates amending, whereas shame motivates hiding’ (2011, 225) and, furthermore, shame is associated with ‘psychological symptoms such as depression’ (2011, 226).

Whilst this distinction is made between shame and guilt, the discussion is equally applicable to the concept of remorse outlined above. One of the key ways in which shame is differentiated from guilt is because ‘guilt is associated with other-oriented empathy, whereas shame is associated with self-oriented distress’ (2011, 226). This distinction also helps to differentiate shame and remorse.

Teroni and Bruun oppose the Pro-Social Argument by questioning its empirical basis. They offer a thorough analysis of the methodology used in psychological studies concerning guilt and shame (2011, 225-229) and make a strong case for the claim that shame will, in many cases, motivate those feeling shame to engage in pro-social behaviour. I offer no objection to these empirical claims. Indeed, for the sake of the present discussion, I will work under the assumption that they are correct in claiming that shame motivates pro-social behaviour. What is of particular interest here is the different kinds of pro-social behaviour motivated by these different emotions. That is to say, we can distinguish the differing action tendencies associated with shame and guilt even if both promote socially beneficial behaviour. When we feel guilt we are ‘moved to undo our actions by making the appropriate amends’ and when we feel shame ‘we should be moved to reform ourselves by altering those qualities seen as occasioning the shame’ (2011, 229).

In order to see how this relates to the issue of punishment, we can consider how the different action tendencies associated with shame and guilt or remorse will likely impact the future behaviour of an apologetic defendant. A remorseful thief
who has seen the error of their ways will be motivated to make amends directly for
the harm caused, perhaps by paying a fine or making reparations in some other way.
A thief who is ashamed of themselves will be motivated to reform their future
behaviour so that they are no longer the sort of person who commits theft; so that
they no longer have the qualities of which they are ashamed. Two things about these
differing cases are particularly worthy of note. The first is that, despite the fact the
action tendencies can clearly be distinguished in both cases, they will often lead the
two offenders to pursue very similar courses of action. The shamed thief may well
offer to make reparations, for in doing so they are trying to become a better person.
Equally, the guilty thief will wish to alter their future behaviour because they have
identified their past behaviour as immoral and, perhaps more selfishly, will also wish
to avoid future painful instances of guilt. This leads to the second important
similarity between the two cases: the pro-social behaviour motivated by the shamed
offender’s shame and the pro-social behaviour motivated by the remorseful
defendant’s remorse both align with the central goals of punishment (understood as a
communicative process). As suggested above, this appears to give us good reason to
consider the shame of defendants just as relevant to sentencing as their remorse.

Before moving on to consider possible reasons why we still ought to view
remorse as uniquely relevant to sentencing I wish to draw attention to another aspect
of Teroni and Bruun’s discussion which gives us further reason to pay greater heed
to the importance of shame. Teroni and Bruun question the view, which they label
the Responsibility Argument, that guilt has greater moral value than shame because
the former requires responsibility for wrongdoing whereas the latter does not.
Indeed, this is one of the distinctions made between shame and guilt (and remorse) in
Chapter 1. Teroni and Bruun state the idea as follows: ‘guilt, and not shame, is
intimately tied to the recognition of one’s moral responsibility for some wrongdoing’
(2011, 230). Even if it is the case that shame and guilt both play positive roles in our
social lives, according to the Responsibility Argument, it is the still the case that
‘there is a distinctive kind of social regulation achieved though the institution of
morality that involves a higher degree of conceptual sophistication on the part of the
actors’ and that ‘only guilt speaks essentially to these higher moral concepts of
responsibility, free will and understanding of the moral law’ (2011, 230-231).
Teroni and Bruun argue that there are two possible ways to reject the Responsibility Argument. The first of these is to ‘dispute the claim that guilt is essentially linked to responsibility for wrongdoing’ (2011, 231). This can be done by appealing to instances of guilt in which there appears to be no acceptance of responsibility for past wrongs, such as cases of survivor guilt and guilt felt for merely having bad thoughts. Teroni and Bruun’s response to such cases is broadly similar to my own, as discussed in Chapter 1. For this reason, I will not offer further discussion of these cases but simply reassert my view that rational guilt does require a belief in one’s past wrongdoing.

Rather than appeal to purported cases of non-moral guilt, Teroni and Bruun instead reject the claim that ‘shame lacks the requisite moral relevance because it has no essential link with responsibility’ (2011, 233). Though they concede that there are cases in which shame has no moral relevance (such as the paradigmatic case of shame at being seen naked), Teroni and Bruun argue that this ‘suggests at most that some cases of shame are not morally relevant, not that shame is, in itself, morally irrelevant’ (2011, 234). Drawing on John Rawls, they contend that we ought to distinguish between cases of natural and moral shame. Cases of natural shame are those concerning features of ourselves or our lives for which we cannot be considered blameworthy, whilst cases of moral shame concern instances in which we are ashamed of having failed to live up to a moral standard (2011, 233-234). This means that, despite the occurrence of non-moral shame, there are ‘central and acute cases of shame, [in which] the focus is precisely on defects in our moral agency’ (2011, 234).

2. Rawls on Shame

Rawls speaks more broadly of our having moral feelings and moral emotions on particular occasions, which are manifestations of moral sentiments (1971: 480). Sentiments, according to Rawls, may be ‘permanent ordered families of governing dispositions, such as the sense of justice and the love of mankind’ or ‘lasting attachments to particular individuals or associations that have a central place in a person’s life’ (1971: 479). This means that there are moral sentiments and, using Rawls’ terminology, natural sentiments. Natural sentiments are those which are not based on a commitment to a particular moral outlook.
Using this distinction we can see how there can be both moral and natural cases of shame. Cases of natural shame are those in which we feel ashamed with regard to attributes primarily good for ourselves such as our appearance or intelligence. These attributes are non-voluntary and, as such, we cannot be considered blameworthy for them (1971: 444). Rawls argues that ‘natural shame is aroused by blemishes in our person, or by acts and attributes indicative thereof, that manifest the loss or lack of properties that others as well as ourselves would find it rational for us to have’ (1971: 444). The reason we feel shame in such cases is because the attribute we view as shamedworthy is one which is relevant to our broader goals or projects. I will feel ashamed of my appearance if I feel it fails to live up to a standard required for me to achieve some social goal. Yet, despite the relevance of natural shame to our broader goals or projects, it is still not rooted in moral values.

Moral shame, then, refers to those cases of shame resulting from a perceived failure to live up to a moral standard. If I were to commit theft I ought to feel moral shame for my failure to live up to relevant moral standards; such as those not to steal, not to break the law, not to exploit others and so on. Teroni and Bruun use this distinction as the basis for the claim that there are ‘central and acute cases of shame, [in which] the focus is precisely on defects in our moral agency’ (2011: 17). These ‘central and acute cases’ are those in which the shamed party feels moral, as opposed to natural shame. If a community has a shared commitment to the moral principles which underpin the law, then defendants who profess to feel shame as a result of their past actions appear to be feeling moral shame stemming from a moral commitment to the same values the law is intended to uphold.

However, it is also important here to look further at Rawls’ argument in order to illustrate, not only the distinction between natural shame and moral shame, but also how he distinguishes moral shame from the other moral emotions. Given the above description of moral shame it seems that the necessary conditions for moral shame are very similar to those for guilt. What, then, is the appropriate way to distinguish moral shame from guilt? As Rawls himself puts it: ‘although both [moral shame and guilt] may be occasioned by the same action, they do not have the same explanation’ (1971: 445). A thief may feel both guilty and ashamed as a result of the same action: ‘he feels guilty because he has acted contrary to his sense of right and justice’ whilst also feeling shame ‘because his conduct shows that he has been found
unworthy of his associates upon whom he depends to confirm his sense of his own worth’ (1971: 445). Rawls explains this distinction by arguing that moral shame and guilt require us to adopt different perspectives: ‘in the one we focus on the infringement of the just claims of others and the injury we have done to them, and on their probable resentment or indignation should they discover our deed. Whereas in the other we are struck by the loss to our self-esteem and our inability to carry out our aims’ (1971: 446).

Though there are differences between the account of the moral emotions outlined in Chapter 1 and Rawls’ account, the way in which Rawls distinguishes moral shame and guilt clearly has parallels with the distinctions used as the basis for my account of remorse. Similarly to Gabrielle Taylor, Rawls talks of the focus of the emotions: moral shame being focused on a negative judgement of the agent themselves for failing to live up to a relevant moral standard, guilt being focused on the harm caused and the resentment of others. Rawls does not pay particular attention to remorse as a distinct emotion. However, the way in which he discusses remorse in relation to guilt suggests that the Rawlsian conception of guilt conflates guilt and remorse.

In order to illustrate this it is necessary to first make clear how Rawls considered the different moral emotions to be distinguished from one another. Rawls maintained that the ‘moral attitudes are not to be identified with characteristic sensations and behavioural manifestations, even if they exist’ (1971: 485). Rawls’ argument, that moral attitudes are not to be identified with characteristic sensations, is in line with the account of the moral emotions defended here. Shame, guilt and remorse are all painful emotions which involve a negative judgement regarding an agent’s actions or status. As such, they may often occur concurrently and in relation to the same past action. This means that they cannot be distinguished in light of their affective features alone. Rawls argues that the moral emotions require ‘different types of explanations’ (1971: 485) and that ‘the moral attitudes involve the acceptance of specific moral virtues; and the principles which define these virtues are used to account for the corresponding feelings’ (1971: 485).

Broadly speaking, Rawls uses the same approach to distinguishing the moral emotions used above. Shame, guilt and remorse are distinguished, not by the way
they feel, but by the judgements which they entail or, for Rawls, the explanations that can be given for their occurrence. Moral shame, guilt and remorse all require an appeal to moral standards. However, Rawls fails to note that moral shame, guilt and remorse can each be distinguished from one another. Rawls alludes to this thought in his explanation of the need for explanations of moral emotions. Rawls writes that ‘mention of harms or misadventures that have fallen upon oneself as a consequence of one’s past actions explains feelings of regret but not those of guilt, and much less those of remorse’ (1971: 481). The use of the phrase ‘much less those of remorse’ clearly implies that remorse is a deeper, more profound or more powerful emotion than that of guilt. However, it gives no detail as to why specifically this is the case. Rawls’ comment reflects the common language usage of the terms guilt and remorse, and the common language distinction is one which is undoubtedly important to capture in any account of these emotions. Justifying this distinction is crucial to distinguishing guilt and remorse as distinct emotions. I have earlier argued in defence of one belief necessary for remorse, repudiation, which is not essential to guilt. I will not defend that claim further here.

Instead, I wish to draw attention to the distinguishing feature of remorse which appears to be particularly overlooked by Rawls. This is the focus of the emotion. This does not only refer to the intentional object of the emotion but also to the perspective one takes on it. Shame and guilt can be distinguished by their focus on, respectively, the self and the rule which has been transgressed. However, the same distinction cannot be made between guilt and remorse. Both guilt and remorse are focused, not only on the self, but also on the harm done. Despite this, I defend the view that remorse is necessarily a selfless emotion, whereas guilt may often be more selfish in nature. This is to say, that a remorseful agent is primarily motivated to repair the harm done, whatever the cost to themselves, whereas a guilty agent is primarily motivated to alleviate their own guilt, by making reparations or by any other appropriate means. The partially selfish nature of guilt is inherent in Rawls’ description. In a passage quoted earlier Rawls argues that guilt is not only directed towards the infringement of others’ rights but also felt as a result of ‘their probable resentment or indignation should they discover our deed’ (1971: 446). Guilt, according to Rawls, appeals to two different moral values. Firstly, there is a selfless desire for reparations felt upon recognition of the harm one has caused. Secondly,
there is a more selfish desire not to be resented or judged. Occurrences of guilt may be more or less selfish in their nature, depending on where the predominance of the guilty party’s focus lies between these two potentially competing desires. Remorse can be distinguished as a species of guilt which, as well as requiring repudiation of one’s past actions, also necessarily requires the focus of the remorseful agent to be primarily on the harm caused.

Whilst it may not always be obvious previously where a guilty agent lies on this spectrum there is nonetheless a clear condition which can be given for their emotion to be considered genuine remorse. A remorseful agent, as distinguished from a merely guilty one, ought to be motivated to repair or make amends for the harm they have cause no matter the cost to themselves. A remorseful agent will undoubtedly wish that they no longer felt the way that they do. However, this wish can be felt alongside an acceptance that they do not deserve to feel better, and that it may be impossible for them to ever make up for their past actions. Yet, if truly remorseful they ought to wish to continue to make amends as far as is possible even if they believe that they can never truly atone for their past actions.

3. Shame and Punishment

Moving back to the issue of punishment, we can again illustrate the distinction between moral and natural shame by considering two possible defendants. First, consider the thief, described above, who feels shame as a result of his past wrongs and wishes to reform. Second, consider a thief who stands in court and feels shame, not as a result of his past actions, but because of his inability to afford a stylish suit. It seems clear that both are genuinely feeling shame but it seems equally clear that the reformed thief’s shame has a moral relevance lacking in the case of the sartorially ashamed thief. Distinguishing between the two cases, whilst perhaps difficult in real life cases with potentially dishonest defendants, is also something which the courts may reasonably try to achieve. It would simply mean that, if shame ought to be considered relevant to sentencing, we must not only ask defendants whether or not they feel shame but also ask them why it is that they feel shame.
If many instances of shame do contain a judgement of wrongdoing akin to that found in remorse then this gives us further reason to consider the view that shame is just as relevant to sentencing as remorse is. The reasons Teroni and Bruun give us to reject the Pro-Social Argument and the Responsibility Argument together lead us to an understanding of shame as an emotion which, in many instances, has pro-social action tendencies which motivate precisely the sort of behaviour we hope punishment will bring about in defendants and which demonstrates that the shameful defendant has recognised the wrongness of their past actions. Why then, should the arguments I have made concerning the relevance of remorse to sentencing not be broadened to apply equally to relevantly shameful offenders?

The first possible response is to argue that, despite the moral value of shame, it is focused on broader moral notions which are not strictly relevant to the law. Guilt and remorse, on the other hand, are focused primarily on the transgression of rules and culpable wrongdoing. This is a particular application of the Responsibility Argument to legal situations. Whilst it may be true that shame sometimes demonstrates a recognition of wrongdoing it is not essentially tied to the idea of responsibility in the same way that guilt and remorse are. As such, perhaps, it is right that the courts consider remorse to be an emotion which rightfully falls within their area of interest, whilst considering shame to belong to a different moral domain. Intuitively, this idea has some pull. However, there seems to be little principled reason to accept this argument in light of our previous rejection of the Responsibility Argument. Though it may be true that there will be more instances in which an offender feels shame for the wrong reasons than instances in which an offender feels remorse for the wrong reasons (or, more strongly, the latter may not even be possible), this does not seem good ground to dismiss the relevance of an offender’s shame if we are convinced they are feeling shame for the right reasons. Nor does it seem good reason to reject the relevance of shame entirely to sentencing, given that the above arguments show that sometimes we have precisely the same reasons to consider it relevant as we do for remorse.

This first response is also particularly problematic within the approach to punishment I am advocating. I have argued that we ought to adopt a weak form of character retributivism which allows that certain aspects of a defendant’s character are relevant to sentencing. This is because, if punishment is to achieve the goals to
which it ought to aspire, then we must recognise that remorseful and non-remorseful defendants are different in a morally significant way. Recognising the differences between the characters of offenders is required to allow for punishment to be a genuinely communicative process; one in which the state pays attention to the individuality of those it is trying to communicate with. However, in the same way that there is a clear and important difference between remorseful and non-remorseful defendants, there is also a clear difference between defendants who are ashamed of what they have done and those who are not.

Given this, it seems that advocates of communicative punishment ought to be especially concerned with broadening the scope of arguments concerning the relevance of remorse to sentencing. This, in principle, ought to be the case. The claim that remorse is relevant to sentencing necessarily rests on the broader claim that emotions are relevant to sentencing. It would be begging the question to then presume that remorse is the only relevant emotion without giving further argument for such a claim. However, there is good reason why the discussion of the role of emotion in sentencing still ought to be focused on remorse and why remorse should be considered of particular importance to sentencing decisions.

Firstly, this concerns what the intentional objects of the emotions are. That is to say, what the emotions are felt about. In the case of shame the offender is ashamed of themselves. In the case of remorse, the offender feels remorse about the harm they have caused. Whilst I have argued that character is relevant to sentencing, I have also defended a communicative approach to punishment. According to such a view, punishment is a form of dialogue between the state and offender. Central to this view is the thought that the dialogue must have a shared topic; in the case of punishment this topic is the offender’s crime. The imposition of punishment represents (a part of) the state’s response to this wrongdoing. In expressing remorse for their crime a defendant expresses their views on that wrongdoing; they are providing their input into a dialogue about a shared topic. In expressing their shame they are providing information about the way in which they view themselves. Whilst this change in their character is not morally insignificant, it is not so centrally tied to the communicative process of punishment as remorse about the particular act for which they are on trial. Remorse occupies a place in the logic of punishment which shame does not.
This can be illustrated further by considering two final examples. Firstly, consider a murderer who expresses remorse for what she has done but does not claim to feel ashamed. She recognises the harm she caused and takes full responsibility for having transgressed moral and legal rules. Yet despite this, she does not feel that she ought to feel shame because she is a different kind of person now. Therapy has helped her to understand why she did what she did in the past, but she does not feel this absolves her of blame. She believes that the painful emotional experience she is going through ought to be directed towards making amends for what she did in the past and reforming her behaviour in the future, and that she should not be focused on feeling shame for who she once was. The offender here would be a clear example of a case in which remorse is relevant to sentencing. It may be contested that she ought to also feel shame but, given the above description, I see no reason why this should be the case. It may be true that in many instances in which an individual feels remorse they also feel shame but this does not mean that those who are remorseful always ought to feel ashamed as well: her personal reform may make shame no longer an appropriate emotional response. Such a case may be unusual, but it represents a plausible and emotionally consistent scenario.

Secondly, consider the converse case: a defendant who claims to feel shame but does not express remorse for what they have done. If we accept that such an offender is genuinely ashamed of their past actions without feeling remorse then we are forced to conclude that they are not feeling shame for the ‘right’ reasons. If their shame is a result of truly understanding and accepting the moral rules underpinning the relevant laws then they ought to also feel remorse. A failure to do so means that the moral understanding which they see as basis for their shame is not that which we wish to communicate through punishment. Remorse is uniquely valuable because it reflects an understanding of the message which the state wishes to communicate through punishment. Whilst shame may sometimes be a valuable moral emotion, when it alone is felt in situations where remorse ought to be felt but is not it is not enough to justify sentence reduction. Remorse should take primacy in this discussion because any situation in which an offender feels a truly morally valuable sense of shame they ought to also feel remorse. A failure to do so indicates that they have not appreciated the harm they have caused. The converse is not true, for an offender may justifiably feel remorse for their past actions whilst no longer being ashamed.
This can be illustrated further by looking more closely at the defendant who is ashamed but not does feel remorse. Such a defendant would not only be failing to show remorse for their actions, but also presents an unrealistic psychology. Whilst the idea of remorse without shame may be unusual, it nonetheless remains a comprehensible response to one’s past wrongdoing. The ashamed but unrepentant offender, on the other hand, is morally lacking. Their lack of remorse shows a failure to recognise the relevant moral values which have been transgressed. Indeed, a defendant who expresses shame but claims to feel no remorse sounds like a character who would likely be considered to have psychopathic tendencies; that is to say, they are capable of recognising their failure to live up to the relevant moral standards but fail to see themselves as being an agent who should feel remorse for having caused harm.

To understand why this is the case it is worthwhile to consider the reasons why wrongdoers ought to feel bad. It may be contended that feeling bad, whether this be a manifestation of remorse, guilt or shame, is not the appropriate response to recognising that one has done wrong. Rudiger Bittner (1992) has argued that if has an individual has done wrong that they ought to acknowledge this fact and endeavour to make amends and correct their future behaviour. However, Bittner also argues that by feeling regret or remorse the wrongdoer is suffering needlessly; their suffering does not add anything of value to the situation (1992: 272-273). For Bittner, one can recognise the wrong and the need for reform without also suffering the painful emotions which usually accompany such beliefs. However, Bittner’s account fails for two distinct reasons. Firstly, Bittner relies on the claim that ‘regret does not in fact make doing better in the future more probable’ (1992: 267). Bittner uses the term regret to encompass a broad range of moral emotions including remorse, guilt and shame. For the purposes of his discussion of the value of regret he does not consider it significant to draw distinctions between them, for he takes his argument to apply to all such moral emotions. However, the larger problem is that the claim that regret (or remorse) does not make the likelihood of future reform greater is false. I will not defend this claim in detail here, but it will be returned to in detail in Chapter 8. Earlier discussion of the action tendencies associated with remorse also contradicts Bittner’s argument that regret does not make it more likely that an individual will do better in the future.
The second issue for Bittner’s account is more directly relevant to the current discussion. This is the fact, observed by Linda Radzik, that Bittner’s critique relies on an unrealistic psychology (Radzik, 2009: 34). Just as the defendant described above who feels shame but not remorse is unrealistic, so is the defendant who identifies the harm they have caused but feels neither. Bittner ‘asks us to imagine a wrongdoer who holds all of the proper judgements about his past act and forms all of the right intentions about the future but who does not suffer over the past (Radzik, 2009: 34). As Radzik correctly observes, this presents us with a psychology not found in the real world: ‘if one acknowledges one’s wrongful act and maintains a commitment to morality, then (as long as one is functioning normally) one will suffer’ (2009: 34). The claim that this is true for those ‘functioning normally’ echoes the claim made above that those who fail to display the appropriate emotions may be displaying psychopathic (or sociopathic) tendencies. Radzik argues that the failure of Bittner’s wrongdoer to feel remorse entails that he has either failed to come to terms with what he has done or is not genuinely committed to morality. In either case the wrongdoer is morally lacking. In cases of wrongdoing, painful moral emotions are a consequence of one’s commitment to an underlying norm or value which has been violated (Radzik, 2009: 35).

Guilt and remorse are not valuable in virtue of their painful natures, but they do indicate a valuable commitment to moral principles. Furthermore, these painful emotions are something ‘those who have committed a wrongful action are morally compelled to suffer’ ‘so long as they are morally required to acknowledge themselves to have violated a moral norm, to acknowledge that norm as legitimately authoritative over their behaviour, to be personally committed to that norm, and to acknowledge that their violation of it was neither justified nor excused’ (Radzik, 2009: 36).

In cases of serious wrongdoing, for which legal punishment is appropriate, this line of argument can be taken further to insist that genuinely apologetic or reformed offenders are morally compelled to feel remorse specifically. As I have argued above, many such individuals will also feel shame. However, it is still a plausible and coherent psychology for them to feel remorse without feeling shame. The reverse position, an offender who recognises the wrong they have done and feels shame without remorse, represents a psychology just as unrealistic as the Bittner-type case critiqued by Radzik. Just as a failure to feel any painful moral emotion
whatoever reveals either a lack of recognition of the harm caused or a lack of commitment to morality, the feeling of shame but not remorse (where a wrongdoer should be morally compelled to feel remorse) reveals either a lack of appreciation for the true nature of the harm caused or a lack of commitment to the relevant moral values. In cases of punishment the relevant moral values are those violation of which makes blame directly appropriate.

The painful emotion is characterised by Radzik as a ‘moral hangover’, a painful but necessary consequence of being committed to values one has violated. This analogy can help to further distinguish the particular relevance of remorse to the law when we consider the emotional suffering inherent to a system of punishment centred on the communication of blame. The psychological suffering brought about by punishment is not to be desired for its own sake, but is rather a ‘moral hangover’ from the goal of bringing a wrongdoer to truly appreciate the nature of their crime. Merely eliciting emotional suffering in a defendant is not the goal. Specifically, the state should not aim to bring about feelings of shame in those in punishes. Whilst Teroni and Bruun may be correct in their assertions that shame can play an important role in our moral lives, this does not mean that it is relevant to punishment. Punishment ought to be a form of dialogue with a specific act of wrongdoing and its consequences as its subject. Bringing a defendant to recognise the nature of their actions and why their past actions were wrong will mean that they suffer remorse. The suffering itself, however, is not the goal. It is a consequence of their recognising the harm caused and being committed to morality.

It will be true in many cases that the blame imposed by the state will also engender feelings of shame in a defendant. This will often simply be unavoidable, yet it still remains important that it is not perceived to be a goal of punishment. This is true even in cases of moral shame (as distinguished by Teroni and Bruun) in which shame may promote positive moral change. This is because in trying to bring about feelings of shame one must intend to communicate a message about the status of the one being shamed. If I intend to make you feel ashamed then I will find a way of telling you that you are inadequate in some way. Whatever your past actions were, to motivate into me into shaming you, my message will not be about those actions but will be about you as a person. When the state punishes it ought to be communicating blame for a specific act, not attacking the overall character of those it punishes. To do so would be to adhere to the version of pure character retributivism rejected
earlier. This, again, remains true even if in some cases bringing about feelings of shame will have positive moral consequences: analogously, even if chopping off the hand of a thief would genuinely motivate them to change their ways, this would not make such a punishment any more just.

It should be noted that the goal of making a defendant feel shame is also troubling for another reason. The most desirable result for punishment is not only to successfully communicate blame and allow an offender to make amends for their actions, but also to ultimately allow them to return to the wider moral community. Whilst many forms of punishment, notably incarceration, do unavoidably separate wrongdoers from rest of society, this separation is not intended to be permanent (excepting cases of such extreme wrongdoing that permanent separation from society is the only plausible option). Punishment should ultimately aim to allow wrongdoers to reconcile with society. Encouraging offenders to feel remorse is not at odds with this goal, for it asks them to show commitment to the moral values of society which they had previously violated. Recognising shared values is an important aspect of being a member of a moral community. Shaming offenders, on the other hand, carries with it a more troubling message. It requires the state to tell individuals that they are lacking in some way, that they *themselves* do not meet up to the standards of society. Even if this may be true in some cases, this does not make it the place of the courts to communicate this message. Doing so is likely to provide a highly exclusionary message. If it is the case that an offender ought to be compelled to feel shame then this is something they can discover from understanding the wrongness of their past actions. Moral shame will be brought about by a focus on moral principles and their violation. Punishment directly aimed at shaming offenders, however, carries with it a primarily exclusionary and potentially dehumanising message.
Chapter 7 – Mercy

Mercy, despite frequent disagreements about its appropriateness in sentencing decisions, is often viewed as being an appropriate reason to show leniency to remorseful offenders. This chapter will therefore explore the relationship between remorse and mercy in sentencing. The chapter will begin by looking at the role that mercy may have to play within a variety of approaches to punishment. Though I advocate a communicative approach to punishment, current sentencing practices justify punishment for a variety of reasons, including more traditional consequentialist and retributive ideas. For this reason it is useful to consider the relationship mercy has to these approaches to punishment. The chapter then moves on to look in more detail at the role that mercy has to play within an ideal communicative approach. Ultimately, I contend that mercy is not an appropriate justification for showing leniency to remorseful offenders. This is despite the central claim of this thesis that those who are remorseful ought to be shown leniency in sentencing. In making this argument, I contrast my account with that of Hannah Maslen, arguing that Maslen’s defence of remorse-based sentence reductions ought to be seen as similar in structure as an appeal to mercy.

The *prima facie* reason why repentance may be seen as a potential ground for merciful or lenient treatment stems from the fact that ‘it is commonly even if not universally believed that the very worst of evildoers are those who are utterly without remorse for the evil they have done’ (Murphy, 2007: 424). Conversely, repentance and remorse are the appropriate responses to one’s own wrongdoing. Further to this, it has also been argued that if mercy has a place to play within the criminal law that it is most appropriate in cases where an offender has shown sincere remorse and demonstrated in some way that they have repented for their crimes. As discussed previously, this may take the form of a verbal apology and expression of remorse, alongside more tangible evidence of a change of heart such as handing oneself into the police, co-operating with the authorities, pleading guilty and so on.

In the preceding discussion I have argued that remorse and the behaviour which accompanies it are grounds for a defendant to be shown leniency in
sentencing. However, I have argued that this is because we ought to accept a form of character retributivism and acknowledge that a defendant’s remorse can alter how blameworthy they are for their past crimes. If remorse is, on the other hand, a ground for mercy, then this would offer a competing reason to show leniency to those who are remorseful. Merciful treatment does not require a reduction in blameworthiness. Instead, it requires a judge to consider it to be appropriate for merciful reasons to impose a lesser degree of punishment than that which is typically and justly apportioned to the crime in question. If we are to have a full understanding of the role remorse ought to play in the courts then it is important to look at the relationship between remorse, leniency and mercy.

1. Mercy and Consequentialism

Strictly speaking, purely consequentialist approaches to punishment would allow no role for mercy in sentencing decisions, but only for leniency. Though mercy is always a form of leniency, it is not the case that all instances of leniency are merciful. Leniency only counts as an instance of mercy if it is shown for the appropriate reasons. A consequentialist approach justifies punishment according to the end it achieves; if punishment is intended solely as a deterrent then the form of punishment which will deter the most future criminals from breaking the law is the most justified form of punishment (though perhaps constrained by certain limits). If we consider the rights and individual interests of a criminal to be irrelevant to this determination then this leaves no role for mercy. On the other hand, if they are to be included in this determination then the just form of punishment is that which best serves the general justifying aim of punishment despite the suffering it inflicts; it cannot then play a second role beyond this initial calculation. Either way, there is no role for mercy to play according to a purely consequentialist approach to punishment (Duff, 2011b: 471). More fundamentally, mercy only has true relevance to a retributivist approach to punishment. This is because mercy requires leniency to be shown to an individual who was previously seen to be deserving of punishment (Card, 1972: 183). Despite this, it is still worthwhile to note that remorse may justify lenient treatment according to a consequentialist theory (in a manner which may colloquially be described as merciful).
It may be beneficial to special deterrence because lenient treatment may encourage an offender not to commit crimes in the future. Initially, this idea seems counter-intuitive: by treating offenders who are remorseful more leniently it seems we are likely to instil in them the thought that they have ‘got off lightly’ and that they are unlikely to be punished too severely for future crimes as long as they show remorse. However, it is important to note that by tailoring a punishment more appropriately to an individual offender, which may partly be a matter of leniency, their relationship with the state and the wider community may be improved. The importance of doing this has been stressed in the discussion of the state attempting to create a moral dialogue with offenders. Doing so also potentially has benefits from a deterrence-based perspective, by helping to improve relations and reduce feelings of hostility towards the judicial system.

It should also be noted that if preventing recidivism is considered to be one of the goals of punishment, and if those who have repented are less likely to commit crimes in the future, then it may be unnecessary to punish them as harshly as we otherwise might. This idea will be explored in more detail in chapter 8.

2. Remorse and Retributivism

The distinction between leniency and mercy also plays an important role with regard to retributives approaches to punishment. Cases can be divided into those in which remorse reduces an offender’s blameworthiness or just deserts and those in which it does not. According to the model of character retributivism I have defended, appropriately felt and expressed remorse will reduce the punishment which ought to be imposed as a direct result of reducing blameworthiness. Those who wish to reject character retributivism entirely but defend remorse-based sentence reductions may then appeal to the concept of mercy. Merciful treatment of a defendant does not require a reduction in blameworthiness. Furthermore, if a defendant ought to be treated with leniency due to reduced blameworthiness then an appeal to mercy becomes redundant. Merciful treatment requires a situation in which it would still be just to impose a harsher punishment but in which the judge, for reasons of compassion or kindness, decides to impose a lesser sentence. Though I am primarily focused on offender remorse, it should be noted that there are other reasons why mercy may be appropriate (e.g. the social background or current health of the
defendant). However, this does not include cases in which leniency is shown for reasons which do not relate to the way in which the defendant themselves ought to be treated (e.g. extreme examples such as a terrorist leader being shown leniency in order to help prevent a future attack). Mercy is essentially supererogatory; whilst it may, on the whole, be better in some way for a judge to impose a lesser sentence it would nonetheless still remain just for them to impose a harsher punishment.

Communicative theories of punishment are retributive in nature: punishment is appropriate when blame is *deserved* by an offender as a response to their past wrongdoing. Within such approaches to punishment there is a dispute as to the role that mercy ought (or ought not to) play in sentencing. Anthony Duff holds that mercy is a value which is external to the criminal law which nonetheless may sometimes rightly intrude into its domain. However, Duff argues that remorse is never an appropriate ground for it to do so. The primary opposition to this perspective comes from John Tasioulas, who argues that mercy should properly be understood as a competing value to (retributive) justice within the criminal law. Further to this, Tasioulas argues that repentance is in fact the paradigmatic and most compelling reason for mercy to be shown to wrongdoers.

In the following section I argue that it would only be appropriate for mercy to be shown to repentant offenders if it can be shown that mercy is a value internal to the criminal law. However, I also contend that this is not the case and that mercy should not be shown to remorseful offenders. I then move on look at Tasioulas’ understanding of the relationship between remorse and mercy in more detail.

Anthony Duff poses three distinct questions which need to be answered in order to make clear the relationship between mercy and repentance. These are:

1. ‘Should penal officials ever show mercy to an offender?’
2. ‘Is mercy a consideration internal to the practice of criminal law and punishment?’
3. ‘Does an offender’s repentance ever give officials reason to be merciful, or to mitigate his sentence on grounds of his reduced retributive desert?’

(Duff, 2011a: 377)

Duff answers yes to (1) and no to (2). In the section that follows I argue against this position, contending that if we reject the idea that mercy is a consideration internal to the criminal law and punishment then we must also reject the idea that penal officials should ever show mercy to an offender. I therefore argue in response to (3) that whilst an offender’s repentance does not give officials reason to be merciful it does give them reason to mitigate their sentence in light of their reduced retributive desert.

Duff, along with those such as John Tasioulas and Jeffrie Murphy who are critical of his views on mercy, believes that penal officials should sometimes show mercy to offenders. On his view, however, mercy is not granted in their official role as a sentencer, because within that role mercy is not a relevant virtue: ‘[mercy] is not a virtue of sentencers, qua sentencers; it is not a virtue internal to the role of sentencer within a system of criminal law. It is, rather, a virtue of the human beings who fill that role’ (Duff, 2007: 373). Duff contends that in her role as a sentencer a judge has a duty to impose a full punishment: ‘a sentencer who is moved to or tempted towards mercy does not face a conflict between different considerations that belong within her role as a sentencer; she faces a conflict between the demands of that role and demands that flow from other perspectives that she also occupies, as a citizen and as a fellow human being to the offender’ (2007: 381). It is her personal desire to treat others humanely that leads her to favour mercy, not a part of her judicial reasoning within the framework of the criminal law. This idea is troubling for at least two reasons. Firstly, if a judge has a specific role to play within her appointed position is it not important that she remains within the bounds of that role? By basing decisions on personal values that fall outside the scope of the criminal law is she not both overstepping her bounds and failing to fulfil her judicial obligations? Consider, for instance, another case in which a judge allows considerations of friendship or family to play a role in her deliberations, and shows leniency as a
result. Here she is acting based on her personal values, yet it is clear that these values have no justifiable role to play in a legal context. Secondly, if we are willing to concede that it is sometimes appropriate for her to act because of demands placed on her by her role as a fellow citizen rather than as a judge, how do we decide in which cases this is appropriate? Where does the boundary between her role as judge and her role as citizen lie? If we allow that it is sometimes appropriate for a judge to act in her role as a citizen rather than her role as a judge when making sentencing decisions then it becomes virtually impossible to draw clear boundaries. There are, perhaps, some extreme cases in which we can allow that a judge may act due to concerns beyond her usual role. Consider, for instance, a scenario in which a judge is aware that showing leniency to a terrorist leader will prevent a future attack and huge loss of life. In such a situation we may concede that the judge ought to act, not according to the demands of justice and the criminal law, but according to broader concerns. However, such extreme scenarios are those which require the suspension of usual rules due to immediate pragmatic considerations and do little to help inform us how more typical sentencing decisions ought to be made.

Duff contends that rather than overstepping her bounds as a judge, she is instead not acting in her capacity as judge when she shows mercy. If this is so then even if her actions on the whole are good, she is still failing to fulfil the obligations of her official role. The sentence imposed or commuted by her must be done so through the use of her judicial authority; to say that she acts in her role as a concerned citizen and not in her role as a sentencer disregards the fact that in passing sentence she must operate as a sentencer. Further to this, if her reasons for choosing to pass a lenient sentence are due to concerns which should not properly be a part of her considerations as a sentencer then it seems she is acting improperly in basing her deliberations on personal values which have no place within the criminal law. One way to solve this problem is to determine when (if ever) it is acceptable for a judge to act based on personal virtues which lie outside the bounds of the criminal law; and when it is appropriate for them to override her judicial obligations. This is the second issue raised above. Duff suggests an awareness of this problem; asking if ‘there [is] then some master role, meta-perspective—perhaps that of “citizen,” or “moral agent,” or “human being”—within which such conflicts between our different perspectives and our different particular roles can be, if not resolved, at least
negotiated?” (Duff, 2007: 381 [n.50]). Whether such a perspective does exist is a question Duff does not pursue. The closest he comes to offering a concrete answer to how we should determine which role should have the final say is to assert that a sentencer should ‘recognise that in some cases (cases that must be unusual, if the criminal law is to be possible)’ ‘that it is not appropriate for her to think and act purely from within the perspective of the criminal law’ (Duff, 2007: 373). Here we have the thought that the cases must be ‘unusual’. This tells us something about when mercy may intrude upon the criminal law, but not a great deal. Ultimately, it seems Duff holds that it is appropriate for mercy to intrude into the criminal law in cases where it is appropriate for it do so. This is circular reasoning, and there seems to be no obvious way to resolve this.

One further problem with Duff’s approach is worth noting before moving on. Drawing on the work on of Tasioulas (2004: 124-128) Duff suggests that an individual’s suffering may in some cases demand that they are shown mercy (2007: 380). Whilst I believe that this idea conflicts with the fundamentally supererogatory nature of mercy, let us concede for sake of argument that it may be true. If it is the case that mercy is in fact a moral duty in certain instances then this raises a further problem for the idea of it as something external to the criminal law. If we wish to say that a judge has a duty (even if that duty comes from outside their judicial role) to show mercy to an offender then it seems peculiar to conclude that the value of mercy should not be considered strictly relevant to the criminal law. If it can have such a bearing on it as to demand a certain type of sentence be imposed then surely it makes far greater sense to see it as a relevant consideration within the criminal law, than as an external consideration which overrides the relevant considerations of the law. For what can be more relevant to the criminal law than values which demand certain sentences be imposed?

These tensions mean that it is an ultimately untenable position to hold that mercy is a value which is external to the criminal law, yet that it is still sometimes appropriate for penal officials to show mercy to offenders. A criminal justice system

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5 Duff’s discussion here is focused on offenders who have undergone profound suffering since the time of their wrongdoing, as this is the only type of case which he sees as providing an appropriate ground for mercy. However, the broader point is still relevant to discussion of mercy on the grounds of offender remorse.
which allows (or perhaps demands) that mercy be shown, whilst holding that the showing of mercy constitutes a failure on the part of judges and other penal officials to fulfil and act according to their legal obligations is fundamentally flawed.

These problems may be avoided however if we hold that mercy is one value which should play a role within a pluralistic understanding of the criminal law, which is also concerned with the value of justice. This does not solve the conflict between mercy and justice in individual cases, nor tell us when considerations of mercy should override the demands of justice. However, it does at least permit that mercy should be considered as a relevant consideration in criminal sentencing; something which Duff’s approach fails to achieve.

3. Is Mercy an Internal Value to the Criminal Law?

The fact that some of the issues discussed above are resolved by seeing mercy as a value internal to the criminal law is not, by itself, sufficient reason to show that it should be incorporated into our understanding of the criminal law. Further argument is required to show that mercy is in fact a relevant consideration.

The reason why this is the case is characterised well by Tasioulas, who writes:

‘the intuition that motivates the internalist view of mercy is that the standard grounds for mercy in criminal punishment – repentance, grief, disadvantaged upbringing, illness – are categorically distinct not only from the considerations that bear on the level of punishment deserved under the retributive norm but also from the paradigmatically `extraneous’ considerations illustrated in the preceding paragraph [such as showing leniency in return for a guilty plea in order to avoid an expensive trial or, in the case of the South African Truth and Reconciliation Commission, hastening the transition to a stable democratic society]. Although they do not affect the punishment deserved by the wrong-doer, where this is proportioned by the gravity of
their wrong-doing, they nonetheless appear to have an intimate connection with the logic of punishment, unlike such considerations as gratitude, social stability, or democracy promotion’

(Tasioulas, 2011: 46)

Further to this Tasioulas also observes that ‘mercy is not a self-standing value, but constitutively parasitic on retributive justice’ (2011: 47). For Tasioulas, it is this intimate link to the norm of retributive justice which makes mercy a value internal to the criminal law. From a communicative perspective it is the idea of retributive justice which is most fundamental to the idea of punishment. Punishment serves as a form of justified censure for recognised wrongdoing; without a retributive core the basic justification for punishment cannot exist within a communicative framework. The close relationship between mercy and retributive justice, emphasised by the fact that mercy is dependant upon the idea of retributive justice for its existence as a coherent concept, means that mercy can be seen to lie at the centre of the values which govern legal punishment. Any attempt to extricate mercy from the central values of a criminal justice is an endeavour which is both problematic and unnecessary. As Tasioulas observes 'it is not easy to see what justifies this resistance [to hold that the 'justified censure' which is the internal aim of punishment also incorporates the value of mercy] beyond the attractions of simplicity and harmony in one's theory of punishment' (2011: 47). Tasioulas further notes that simply postulating a binary system of values which are either internal or external to the logic of punishment may well be oversimplifying the matter. Instead, it makes more sense to 'conceive of a broad spectrum of considerations, ranging from a central core to an outlying periphery' (Tasioulas, 2011: 49). Clearly, it is the notion of retributive justice which lies at the very core. However, the intimate relationship mercy has with retributive justice means that we should also see it as being a central value in determining what punishments should be imposed upon wrongdoers. In Tasioulas' own words: 'if mercy is situated near the core, then it will be a consideration that bears closely on our understanding of the justification of punishment, and one that officials within the criminal justice system should take into account in the ordinary course of doing their jobs' (2011: 49). It is this final point, that mercy should be
considered by officials 'in the ordinary course of their jobs', which is crucial here. As discussed above, the externalist view supported by Duff fails to show why mercy should ever be a valid consideration in sentencing, let alone an everyday one, thus failing to justify the thought that penal officials should ever show mercy to offenders.

4. Repentance and Lenient Treatment

Having argued that mercy should be seen as a value internal to the criminal law I will now move on to address the third question raised by Duff: 'does an offender’s repentance ever give officials reason to be merciful, or to mitigate his sentence on grounds of his reduced retributive desert?'. This question raises two distinct issues, and it is the latter half of the question which I will address first.

I have previously argued that an offender’s remorse or repentance lessens the amount of punishment they deserve to receive, and this plainly means they are deserving of more lenient treatment than they would be otherwise. Again, however, in such cases leniency does not count as mercy. Instead, an offender's remorse or repentance becomes a relevant consideration of justice.

Whilst I have defended a form of character retributivism, this is not a position endorsed by Duff. However, for different reasons to my own, Duff does hold that there are limited cases in which remorse may lessen the punishment that an individual deserves to receive. Though Duff proposes that remorse may lessen desert in certain cases; his opinion is that such cases are likely to be extremely rare and, as such, they do not form a significant part of his discussion. Nonetheless, Duff writes that remorse may affect an offender's desert 'if the offender is struck by remorseful horror at what he has done as soon as he does it' as 'an action that is so immediately repented and disowned is perhaps not as culpable as one that is not thus repented' (Duff, 2011b: 485-485). This may be the case if repentance is 'so immediately and intimately connected to the wrongdoing as to alter our understanding of the
seriousness of the wrong' (Duff, 2007: 384). On this issue Tasioulas agrees, supporting the view that in such cases repentance may impact upon desert but that such cases are rare (2011: 49-50).

This raises a further two questions. Firstly, why should remorse felt immediately after the commission of a crime have a different effect on an offender’s desert to remorse felt at a subsequent time? Secondly, why is it that Duff considers cases in which immediate repentance is ‘so immediately and intimately connected to the wrongdoing as to alter our understanding of the seriousness of the wrong’ the only cases in which remorse is relevant to desert?

Despite Duff’s claim, it is difficult to see why remorse occurring immediately after wrongdoing ought to be seen to impact differently on the level of punishment which the offender deserves to remorse felt at a subsequent time. The simple fact that it occurs after the event means that it cannot reduce how culpable someone is for their crimes if character retributivism is rejected entirely, nor can it be seen to mitigate their actions in the way prior events such as a rotten social background can. It may be the case that by immediately disowning an action an individual shows that it was deeply out of character; a misguided and rash decision which is not typical of their usual behaviour. However, unless character retributivism is accepted it is still not clear how their remorse makes them any less blameworthy for the relevant wrongdoing. Perhaps immediate remorse is more indicative of past factors which have a bearing on culpability, but this does not mean that the remorse itself is different in nature to remorse felt at a later date. An immediate show of remorse may be especially useful for legal professionals in signalling that an act was not in keeping with an offender’s past behaviour, and past behaviour is often considered a relevant factor in sentencing. However, if the value of immediately felt remorse is to be found in its highlighting of past behaviour then this does not mean that leniency is being shown as a direct response to the remorse itself; leniency in such a case would be being shown as a response to previous good behaviour and not as a form of reward for an offender’s current remorse.

The immediacy of an offender’s remorse is only relevant insofar as it makes the digression from their normal behaviour more apparent. The amount of time between an act of wrongdoing and the remorse felt for it has no bearing on the moral
value of remorse; it may be more obvious that remorse is genuine if it occurs immediately, but this does not give it greater moral weight than genuine remorse which occurs at a later time.

This means we are left with the question of whether remorse, in any situation in which it is genuine, can affect how deserving an offender is of punishment without an appeal to character retributivism. It is first worth noting that the punishment deserved by an offender is determined, in large part, by the severity of their crime and that the courts do allow events which occur after the commission of a crime to play a part in determining the seriousness of the offence. Take, for instance, the difference between murder and attempted murder. In the Sentencing Guideline Council’s sentencing guidelines for attempted murder the following information is given: ‘where the degree of harm actually caused to the victim of an attempted murder is negligible, it is inevitable that this will impact on the overall assessment of offence seriousness’; and ‘the degree or lack of physical or psychological harm suffered by a victim may generally influence sentence’ (Sentencing Guidelines Council, 2009). These factors are, at least to some extent, beyond the influence of the offender. The medical treatment received by victims alters dramatically the level of psychological and physical harm they suffer. The distinction between murder and attempted murder raises a variety of issues (and there are certainly be those who feel that the two crimes should not be treated differently by the courts). This may simply be a matter of moral luck. However, the point which I am hoping to illustrate with this example is that, in our current legal system, we do not typically take issue with allowing (some) events which occur after the commission of a crime to bear on how serious that crime is taken to be. This means that opponents of remorse-based sentencing ought not to dismiss remorse as being irrelevant to retributive desert simply because of the fact it occurs after the wrongdoing has taken place. Of course, it is still necessary to provide further argument to show that remorse can alter the seriousness of a crime; but we cannot determine that it does not do so on the basis of the temporal relationship between remorse and wrongdoing alone.

Jeffrie Murphy has argued that there are a variety of reasons beyond character retributivism which may cause remorse to impact upon retributive desert (2011). However, here I will only focus on one of the reasons discussed by Murphy,
that which depends upon a form of retributivism he refers to as grievance retributivism. As mentioned in chapter 5, Murphy’s grievance retributivism is a form of act retributivism. Murphy argues that ‘to the degree that the wrongful harm is a function of the insulting and degrading message symbolically conveyed by the criminal act, then repentance—by a withdrawal of that message—lessens the wrongful harm and thus (at least in most cases) makes the criminal deserve, not acquittal surely, but less punishment than the unrepentant criminal’ (2011: 32-33). As this thought is developed by Murphy it relies upon a communicative theory of harm and wrong which proposes that a significant part of the wrong committed through a crime is to be found in the message an offender sends to their victim(s) and to the wider community; by committing a crime an individual shows contempt for, and places themselves above, their victim. Though this understanding of crime identifies a potentially neglected aspect of the harm caused by criminal wrongdoing it also has significant problems, touched on in Chapter 4. The most pressing of which is that, with relation to many crimes, it fails to adequately and fully capture the wrong that has been done; though a physical assault, for instance, carries with it a message of contempt for both the victim and the wider community the central harm caused is the physical harm done to the victim. Further to this, there is also an issue regarding how metaphors such as criminals 'placing themselves above their victims' genuinely relate to the reality of crime. However, there are instances where the insult caused by a crime is a significant part of its 'wrongness' in a more literal sense; in such cases the thought that the wrongful harm done by a crime may be lessened by remorse does not rely upon a communicative theory of harm and wrong.

The most apparent examples of such crime are to be found in instances relating to (typically) racial or religious hatred. If an individual is prosecuted for publicly expressing racist opinions in a manner deemed impermissible by the law then it seems clear that, at the very least, a significant part of the wrong they have done is to be found in the offence that they have caused. If an offender in such a situation publicly shows remorse and repents for their crime then this may well lessen the insult their offensive actions have caused. Through remorseful apology, whether directed at the general public or at an individual victim, an offender may genuinely lessen the seriousness of the crime they have committed. Though this does not constitute a ground for merciful treatment, it does give a tangible reason why
remorse may, of itself, be a reason to impose a more lenient sentence on an offender than we otherwise would. This does not require any appeal to abstract notions of a degrading message symbolically delivered through wrongdoing nor does it require character retributivism. Rather, it observes that in certain situations remorse can directly affect the amount of harm that has been caused.

Though this provides a reason for remorse-based leniency that can be accepted by those who reject character retributivism, its scope is limited. In order to be able to generalise this idea to make it relevant to a broad range of crimes would require an approach to crime which holds that the symbolic message delivered through wrongdoing forms a significant part of the harm we wish to prevent in the majority of cases. I do not defend such a theory here, and in light of my defence of character retributivism do not consider such a project necessary to justify remorse playing a role in sentencing decisions relating to a wide range of crimes. For current purposes, it is sufficient to say that in cases where the offence caused by a crime is a significant part of the harm caused that there is an additional reason, beyond character retributivism, to consider remorse on the part of the offender relevant to sentencing.

5. The Nature of Repentance

The preceding discussion has offered an additional defence of remorse-based sentencing in limited cases. However, this again relies on a direct relationship between offender-remorse and desert. The following section returns to the question of whether an offender’s remorse can give officials reason to show mercy. A clearer answer to this question can be given by returning to look again at the nature of remorse and repentance. Similarly to my position on remorse, John Tasioulas has argued that ‘repentance is the intrinsically appropriate response to one’s moral wrongdoing’ (2007: 488). According to Tasioulas, repentance is a specific response we may have towards our past actions; ‘the appropriate object of repentance is some prior act of one’s own’ and ‘in contrast to attitudes such as regret or disappointment,
the object of one's repentance is one's wrongful act *qua* wrongful' (Tasioulas, 2007:488). For Tasioulas, the nature of this response involves a series of actions. Firstly, there are painful feelings of guilt for past wrongdoing. Secondly, there is a self-directed judgement that the wrongdoer is blameworthy. Thirdly, there is confession, sincere apology and self-condemnation; the wrongdoer disowns their past actions. Finally, the wrongdoer 'makes moral (and not just material) reparation for his wrong, which typically involves publicly accepting deserved blame, including willingly undergoing as a penance any punishment that is properly inflicted' (Tasioulas, 2007, 488-489). Tasioulas suggests this as a typical shape which repentance may take and does not claim it is a definitive, all-encompassing framework. However, it provides an analysis of repentance which corresponds closely to the account of remorse outlined in Chapter 1. Looking in more detail at the various actions Tasioulas uses to characterise repentance in turn, they can be broken down as follows:

1. Feelings of painful guilt
2. Judgement by the wrongdoer that they are deserving of blame
3. Confession, sincere apology and self-condemnation
4. a) Moral, not just material, reparation including publicly accepting deserved blame
   
   (and)

   b) Willingly undergoing any punishment that is properly inflicted

For the purpose of the current discussion, elements (1) and (2) of the framework given above can largely be addressed together. Feelings of painful guilt, or remorse, form a necessary part of repentance. It seems to make little sense to talk of someone having repented for their crimes if they do not feel remorse for them. Equally, it seems that someone must judge themselves to be deserving of blame to be able to repent for a crime. If the proper 'object of one's repentance is one's wrongful act *qua* wrongful' then it self-evidently requires a recognition that a wrong has been
committed. If one is to feel remorse and repent for that action then it also follows that it is necessary to accept that one deserves blame for this wrong. Without such a step any purported repentance is hollow. In a similar manner to the previously discussed case of an individual feeling shame but not remorse about a past wrong, if an individual claiming to be repentant could not honestly utter the phrase 'I feel remorse and accept the blame for the wrong I did' then it would be justified to deny that they were, in actuality, repentant.

The next step in Tasioulas’ framework for repentance is (3): confession, sincere apology and self-condemnation. These actions can be grouped together as a public disowning of one's past actions. Here we find elements which do not appear to be conceptually necessary to repentance. By their nature confession and apology require an audience to be meaningful; we must confess and apologise to someone. The importance of these actions is that they make public, or begin to make public, the feelings of remorse and blameworthiness which form the basis of repentance. However, to view such a step as necessary in the process of repentance requires us to hold that repentance is also necessarily public. Suggesting that it is impossible for an individual to repent for their crimes without a public system in which to do so seems troubling. Hypothetically, this would mean that an individual who had been exiled or perhaps shipwrecked on an isolated desert island would be unable to repent for any past wrongdoings in such a situation, but would be able to upon being rescued. It may be correct that in such a situation they would be unable to make amends or apologise for their past actions, but this is not the same as saying they are unable to repent for them. Though in a legal setting repentance may typically be characterised by certain public actions, it is still ultimately a process internal to the person who has previously done wrong. However, it is the legal setting with which we are primarily concerned here. We may therefore say that, in such a context, confession and public apology are necessary for us to accept repentance as genuine. So whilst confession, sincere apology and self-condemnation may not be conceptually necessary to repentance they are necessary to our being able to accept repentance in a legal context. This is perhaps made clearer by looking at the same argument from an alternative perspective; if an individual refuses to confess or apologise for their crimes then it becomes extremely difficult to treat them as repentant. Indeed, it is for
this very reason that a number of appeals for clemency in capital cases in the US have been denied (Murphy, 2007: 424-425).

This leaves us with the final step in Tasioulas' framework. This is (4a) moral, not just material, reparation including publicly accepting deserved blame and (4b) willingly undergoing any punishment that is properly inflicted. I will address the two halves of this step in turn.

(4a) appears at first to be open to the same objection raised when discussing (3); it makes repentance a necessarily public process. However, this problem can be addressed with a slight modification. If we reformulate (4a) as 'a genuine attempt to make moral, not just material, reparations and a willingness to publicly accept deserved blame' then it does not mean that repentance requires any kind of public system to be realised. Instead, it requires an individual to be willing to publicly accept blame if the appropriate situation arises. Nor does a genuine attempt to provide reparations for one's past wrongdoing require any public apparatus. It is perfectly conceivable that the way in which an individual feels they are best able to make amends for their past wrongs is through, for instance, private prayer. We must now determine whether the elements of (4a) are necessary to the process of repentance. A willingness to publicly accept blame is a necessary part of repentance, because lacking such an attitude shows that an individual has not come to fully disown and reject their past actions as wrong. An attempt to make amends for past wrongdoing poses a more difficult problem. This is because, by holding that it is a necessary part of repentance we are committing to the view that repentance is not only an attitude but also requires some form of action. However, I believe this action is crucial in defining repentance as it is, at least in part, what separates it from the emotion of remorse. As previously discussed, remorse brings with it action tendencies which motivate an individual to apologise and make amends for their past actions. The realisation of these actions is a component of the process of repentance. Attempting to make moral and material amends for past wrongdoing shows that an individual not only feels remorse for their past actions but that they have undergone change and that they wish to alter their future actions in line with this change. This fundamentally important step distinguishes the process of repentance from the emotion of remorse.
This leaves us with the final step of Tasioulas’ framework (4b): willingly undergoing any punishment that is properly inflicted. In line with the previous section, I also maintain that it is a willingness to undergo deserved punishment rather than the actual undergoing of punishment itself that is necessary to repentance. An offender who is truly repentant will see their own punishment as deserved, and may even feel a desire to 'serve their time' either as a form of secular penance or to publicly advertise their attitude towards their past crimes. This means a truly repentant offender may not desire lenient treatment, and may even request not to be treated mercifully.

By willingly going undergoing the hard treatment imposed on them an offender is able to serve a secular form of penance and demonstrate that their remorse is genuine. On this view, the hard treatment forms an intrinsic part of an individual's repentance; and so it is premature to see repentance as having been fully realised at the sentencing stage. If this is the case then it seems that repentance is not a justifiable ground for mercy, as by showing leniency we hinder the process of repentance; merciful treatment, intended as an act of kindness would instead prevent an individual being able to truly repent for their crimes. However, we again ought to focus not on the undergoing of hard treatment itself, but on a willingness to do so. This willingness is the most which an offender can be responsible for themselves; the further step that they must also undergo punishment requires that there is someone present to punish them in order to allow them to repent. As I have previously suggested, an offender willingly suffering hard treatment can be an aspect of their individual process of repenting, but it is not a necessary condition of repentance itself. If leniency is shown then this will alter the way in which an individual is able to repent for their crimes. It is important to note here than leniency does not mean the mitigation of punishment entirely, but rather the imposition of a shorter or different form of punishment. A remorseful offender who, for instance, has their custodial sentence lessened to community service still has a way to suffer some degree of punishment as one aspect of their repentance.

However, despite the fact that showing leniency does not prevent an offender repenting for their crimes there is still a more fundamental issue, mentioned above, with doing so for merciful reasons. This is that a remorseful individual ought to want
to, or at least be prepared to, undergo the punishment they deserve for their crime. If leniency is shown for merciful reasons then this is not possible as the punishment they receive will be less than that which they deserve. The same is not true if their remorse has an impact on their desert. If feeling remorse lessens criminal desert then there is no tension in showing leniency, as the punishment imposed is that which the offender deserves at the time that they are sentenced.

Anthony Duff also concludes that remorse does not provide a ground for mercy within his communicative approach, though he arrives at this conclusion for different reasons. Duff argues that punishment must provide a structure through which an offender can show his repentance to his victims and to the wider public, and that 'punishment should be a two-way communicative process through which the polity communicates to the offender the censure that his crime deserves, and the offender can communicate back to the polity his own recognition of the wrong he has done' (2011b: 486-487). Duff contends that while repentance may reduce the need for the first half of the process, the latter half of it must still take place in order for punishment to be able to fulfil its communicative purpose. For Duff, this a sufficient reason to reject repentance as a ground for mercy. However, I have rejected this claim by focusing on the willingness of an offender to undergo deserved punishment we can see reason to reject this view. If we hold that the offender's part in this two way process can be fulfilled through public apology, confession and self-condemnation during trial then there is no need to reject repentance as a ground for mercy. Despite this, leniency should still not be shown as an act of mercy for the reasons discussed above. This view contrasts with the conclusion arrived at by Tasioulas, who holds that while the retributive norm is fundamental in 'determining what is justified as censure' '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 countervailing reason of charity to inflict a milder punishment on them that which could be imposed as deserved' (2007: 499-500). On my view this argument is redundant, as offender-remorse generates a demand for leniency according to the demands of justice by reducing retributive desert.
6. Maslen and Mercy

As discussed in Chapter 5, Hannah Maslen has argued in favour of remorse-based sentencing on the grounds of what she terms Responsive Censure. Maslen rejects the argument that remorseful offenders should be shown mercy for similar reasons to my own, in particular because she maintains that Responsive Censure makes an appeal to mercy redundant (2015: 119-135). However, in the section that follows I argue that Maslen fails to sufficiently distance her account from mercy-based arguments and that her defence of remorse-based leniency is subject to the issues raised in the preceding section.

To recap, Maslen’s central claim is that censure works better when it recognises a defendant’s remorse: ‘If censure is not responsive then it assumes no moral transformation and speaks to the remorseful offender as if he is yet to be convinced of the wrongfulness of his conduct. However, censure that communicates modified disapprobation, in response to the offender’s remorse, has greater communicative and moral force’ (2015: 101). Though this claim mirrors my own claims in Chapters 4 and 5 regarding the necessity of recognising remorse in order to communicate with offenders, Maslen’s argument differs in its rejection of character retributivism. Maslen rejects the Changed Person argument and holds character retributivism to be an untenable position (2015: 21-40). Maslen relies on the claim that we can distinguish blameworthiness and deserved blame: ‘if, as I have suggested, blameworthiness and deserved blame are related but distinguishable, it would be possible that two offenders could be equally blameworthy for their respective offences, but that they might not deserve blame of equal severity’ (2015: 94). This distinction depends upon the thought that the social situation surrounding an instance of blaming may alter the amount of blame it is appropriate for an individual or the state to impose, whilst not altering how blameworthy a wrongdoer is for their actions (2015: 91-94).

Maslen stresses that this is not for consequentialist reasons. That is to say, the conditions which affect the amount of deserved blame do not reduce the amount of blame that should be imposed because of the future consequences of showing leniency. This is in contrast to Steven Tudor (Tudor & Proeve, 2010), who argues that ‘the value of recognising the offender’s remorse lies in the psychological effects
of, using his [Tudor’s] language, recognising her self-conception… …recognising the offender’s remorse fosters psychological harmony, as it confirms the offender’s self-conception, and consequently helps to shape her future conduct in relation to this self-conception’ (Maslen, 2015: 100 n.34). This means that, for Tudor, the value of acknowledging this self-conception must be weighed against the value of justice. In contrast, Maslen contends that her view ‘makes mitigation on the grounds of remorse integral to correctly delivering censure. Less severe censure becomes deserved’ (2015: 100 n.34).

Again, correctly delivering censure here is key because the adoption of a communicative approach to punishment ought to commit us to trying to achieve the best possible dialogue with offenders, and a responsive dialogical model is superior to an ‘unresponsive, unidirectional penal communication’ (Maslen, 2015: 101). However, Maslen fails to adequately distinguish her account from both consequentialism and mercy-based arguments. Maslen argues that a dialogue works better with a remorseful defendant because their remorse has helped to ‘repair a moral relationship or facilitated reacceptance into the political community’ (2015: 94) but maintains that this argument is not consequentialist. As previously mentioned, she instead relies on a distinction between deserved blame and blameworthiness. However, this distinction does not do the work Maslen’s argument requires it to do.

Maslen maintains that we ought to reject the Changed Person argument because it commits us to character retributivism (which Maslen rejects) (2015: 38-39). This rejection of character retributivism, alongside an acceptance of Maslen’s model of responsive censure, forces us into a position in which the appropriate punishment for a remorseful defendant is different to that which is deemed appropriate according to the retributive idea on which our theory of punishment is centrally based. This would not be an issue if the reason for recognising the role of remorse in sentencing is accepted as being at odds with justice (i.e. for consequentialist or externally merciful reasons), yet these are both positions which Maslen explicitly distances herself from. Equally, they are positions I also argue do not justify remorse playing a central role in sentencing decisions.
The same conflict does not arise if we recognise that the reason the dialogue of punishment ought to be different in the case of the remorseful defendant is because the interlocutor has changed in a way which must be recognised for the dialogue to take place effectively. This commits us to a form of character retributivism (defended in Chapter 5). Responsive censure is responsive precisely because it responds to the fact that the other party in the dialogue has changed in a meaningful way.

Character retributivism allows it to be a matter of justice that the remorseful defendant be treated differently. The same is not true of Maslen’s responsive censure model. According to Maslen’s model of responsive censure, a judge’s decision to treat a remorseful offender leniently may be better in some way (the message may be communicated more effectively) but it is still supererogatory; if the defendant is still just as blameworthy then why would it be unjust for the judge to impose the full sentence? This issue means that Maslen’s argument ultimately becomes similar in structure to the argument from mercy. To illustrate this, contrast the case of a remorseful offender with that of a terminally ill or grieving defendant. It is just as true of the latter cases, as it is in the case of offender remorse, that punishment will require modulation in order to best achieve a dialogue with the offender. Whilst it may also true that grieving or terminally ill defendants may be changed people, the reasons for this change is not directly related to their crime. There has been a change in their circumstances which is unrelated to their crimes. This means any decision to show leniency requires either a decision to show mercy (i.e. it would be unnecessarily cruel to punish them) or a simple appeal to prudential reasons (i.e. there is perhaps no need to incarcerate a man who is about to die). In the case of the remorseful defendant, on the other hand, the change is one which ought to have taken place and which has occurred as a direct response to their past wrongdoing. This means that no appeal to mercy is necessary in the case of remorse, so long as we accept a weak form of character retributivism.
Chapter 8 – Remorse and Recidivism

This chapter will explore the relationship between remorse and recidivism, ultimately arguing that the reduced likelihood of recidivism amongst remorseful offenders offers us a further reason to show a degree of leniency to remorseful offenders.

Remorse plays an influential role in sentencing decisions in most, if not all, Western judiciary systems. This is despite an unsettled, and hotly debated, ethical question regarding whether it is appropriate for it to do so. A variety of reasons have been proposed why it may (see, for instance; Murphy, 1997; Tudor, 2008), or may not (see, for instance; Ward, 2006; Bagaric & Amarasekara, 2001), be appropriate to show leniency to those who are remorseful. However, much of this debate has come, in a sense, after the fact. The role that remorse has evolved to play in Western judicial systems (a role which is broadly similar across a number of countries including the US, UK and Australia) has predominantly been due to the deliberations and personal opinions of individual judges rather than as a result of academic or scholarly debate on the nature and value of remorse (for a useful, though highly opinionated discussion of the historical role of remorse in the courts see; Ward, 2006: 137-140). Judgements made regarding remorse have been motivated by a variety of different reasons: ‘Some judges say that the remorseful offender has a better character than does the unremorseful one. Others say that he is more likely to be rehabilitated, or that he is less hardened, or simply that he deserves less punishment. Whatever the precise language, the judges’ point is that the remorseful offender is in some way changed, or likely to change’ (Bibas & Bierschbach, 2004: 94-95). Many judgements reflect the seemingly natural thought that a remorseful offender is less likely to reoffend in the future than a non-remorseful offender. This idea, that there is a link between remorse and reduced recidivism, potentially provides a justifiable ground for showing some degree of leniency towards those who express remorse about their past actions.

Whether such a justification is plausible is tied inexorably to the reasons we use to justify punishment. A link between remorse and reduced rates of recidivism would be of especial importance according to a deterrence based theory of
punishment. However, I have rejected such approaches in favour of a communicative theory of punishment. Reduced recidivism is relevant to a communicative theory because it provides evidence to support claims made regarding the effectiveness of the action tendencies associated with remorse. If it is true that remorse leads to reduced recidivism then this gives us good reason to accept the argument that remorse effectively motivates wrongdoers to apologise and attempt to make amends for their past actions. Despite this being the primary importance of a correlation between remorse and reduced recidivism within my approach to punishment, it is uncontroversial to suggest that in modern Western societies preventing recidivism is at least one purpose of our judicial and penal systems. Therefore, if it can be shown that remorseful offenders are less likely to reoffend then this provides a powerful argument in favour of showing them some degree of leniency. This justification is leant further weight by pragmatic concerns. In jurisdictions where prison systems are already under great strain, a link between remorse and reduced recidivism provides a practical reason to show leniency to those who are remorseful. Whilst this motivation may be not completely ‘pure’ it is nonetheless important, and it should be noted that there are already ways in which sentences are automatically reduced (i.e. in return for a guilty plea and cooperation with authorities) which are motivated largely by practical considerations.

This obviously leads us to the question of whether there is any evidence for such a link. In this chapter I will argue that despite the limited empirical evidence there is still good reason to think that there is a causal link between remorse and recidivism. The chapter will be divided into three main areas. Firstly, I will offer a philosophical argument proposing that the intrinsic nature of remorse is sufficient to cause remorseful defendants to be less likely to reoffend. If there is a causal link between remorse and reduced recidivism then this indicates that there should be an observable correlation between the two in real life cases. The second section of the chapter will therefore discuss the limited empirical data available in this area. In the third section of the chapter I will discuss how the claims about remorse made earlier in the chapter relate to sentencing. Ultimately I contend that remorse should be viewed as a mitigating factor in some criminal cases and that judicial discretion is vital in determining its relevance to individual cases.
1. Direct Evidence

Initially, it appears that there is little empirical evidence to support the claim that there is a link between remorse and reduced rates of recidivism: 'As of yet, psychology, psychiatry, sociology, and criminology have not empirically linked expressions of remorse and apology to a decreased need for specific deterrence of particular offenders' (Bibas & Bierschbach. 2004: 106). The lack of conclusive evidence has been taken by some as an indication that further research is required and not as indication that no such link exists. Steven Tudor asserts that 'this is clearly an area where there is a great need for good empirical research. In the meantime, particularly in the absence of positive disproof of it, it can be argued that the common sense assumption that remorse normally reduces the risk of recidivism is still legitimate to work with, albeit somewhat tentatively, and that the onus lies on those who would disprove it to advance the relevant evidence' (Tudor, 2008: 244). In contrast to this, those who are more cynical of the claim that remorse is relevant to the criminal law have taken the absence of clear empirical evidence as indicative of the absence of any link between remorse and recidivism. Brian Ward has argued that 'courts routinely fail to provide any substantive evidence that remorse or its absence can be affirmatively correlated with any type of future conduct by the defendant' and that as such claims regarding a link between remorse and recidivism should not be considered relevant to the criminal law (Ward, 2006: 140). Some commentators have made stronger claims that there is in fact no link between remorse and reduced rates of recidivism (Bagaric & Amaresekara, 2001: 371-372).

In defending this claim Bagaric and Amaresekara cite evidence provided by Proeve, Smith and Niblo (1999). The data discussed by Proeve, Smith and Niblo did show an association between contrition and adjustment to probation, especially in cases where a high level of contrition was expressed by the defendant. However, the same study also found no significant links between expressions of contrition and reduced recidivism rates (Proeve, Smith and Niblo, 1999: 23-24). This is based on a study of 76 offenders who had been granted probation, examining the 'relationship of expressions of contrition [made prior to probation being granted] with adjustment to probation and and recidivism' (Proeve, Smith and Niblo, 1999: 23). Whilst this is clearly evidence against the claim that there is a link between remorse and reduced
rates of recidivism it is far from being conclusive. It is based upon a relatively small sample size and it is difficult to further evaluate the data provided as it drawn from an unpublished doctoral dissertation. Whilst this does not mean it should be dismissed, it does mean that it cannot be considered sufficient to show that there is no link between remorse and recidivism.

Beyond this extremely limited data there is very little direct empirical evidence available. However, one related area in which further data is available is in relation to youth justice conferencing in Australia and New Zealand. Though there is some variation in the exact procedure youth justice conferences follow a fairly standard process. Following a referral from the police or the courts a young person who has admitted a specific offence meets with 'his or her parents or caregivers, the victim and his or her supporters, any other relevant parties to the offense, a police officer and a conference facilitator' (Hayes & Daly, 2003: 726). During this meeting the offence in question is discussed widely, including discussion of the details of the case and the impact to victims. The conference then aims to reach a consensus between the participants as to what should happen next and decide upon an appropriate way for the young person to make up for their past actions. Commonly, an apology to the victim constitutes a part of this plan (Hayes & Daly, 2003: 726-727).

Maxwell and Morris undertook detailed analysis of the effectiveness of such conferences in New Zealand (1993). Their study indicated that 'those offenders who failed to apologise to victims were 3 times more likely to be reconvicted than those who had apologised' (Maxwell & Morris, 1997: 131). It is of course important to note that Morris and Maxwell's study refers to apology, and apologies (especially those which are given as a result of being instructed to apologise) do not necessarily indicate the presence of remorse. Even insincere apologies are likely to have an impact upon the future behaviour of those making them (Bibas & Bierschbach, 2004: 143). Despite this, there is still a close link between remorse and sincere apology as detailed in Chapter 2. As such, evidence that apologetic offenders are less likely to re-offend than non-apologetic offenders may provide an indication of a link between remorse and recidivism. The strong link between apology and decreased recidivism has led one commentator to argue that this provides a powerful incentive to further research the relationship, ultimately concluding that 'the next task will be to
determine whether it is apology or some other closely related variable that is associated or causally linked with reduced recidivism' (Petrucci, 2002: 359-360).

Hayes and Daly have conducted similar research into the effectiveness of youth conferencing in Australia. They explicitly state that their findings are similar to those of Maxwell and Morris's in New Zealand (Hayes & Daly, 2003: 756). This adds weight to the value of both studies. However, Hayes and Daly's study also provides analysis of the specific relationship between remorse and reoffending. Using evidence from the South Australia Juvenile Justice (SAJJ) project they considered the relationship between a wide range of variables and future conduct in cases where the offences were 'personal crimes of violence and property offenses that involved personal victims or “community victims” (such as schools, churches, or housing trusts)' (Hayes & Daly, 2003: 737). The observations which form the basis of the study are the result of interviews and observations made by a SAJJ researcher both during and after the relevant conferences. This data was further supported by surveys completed by the police office and facilitator involved in each conference. The variables which were considered included offender-related variables (e.g. racial-ethnic identity, number of addresses, previous offences); offence-related variables (e.g. type of offence, relationship to victim, type of victim); conference-related variables (e.g. who was present, attitude towards the process); measures of procedural justice (i.e. how fair and just the process was viewed to be); and measures of restorativeness (e.g. offender gave a clear story, offender accepted responsibility, offender was remorseful, offender assured victim offence wouldn't happen again, victim effectively described impact of offence) (Hayes & Daly, 2003: 738-740). Amongst these variables the presence of remorse proved to be one of the strongest indicators of reduced reoffending: 'both the SAJJ project and Maxwell and Morris found that conference-specific factors, particularly offenders' remorse and involvement in decision making, are indicative of reduced reoffending' (Hayes & Daly, 2003: 756-757). Indeed, the SAJJ study found that remorse was the most accurate indicator of a reduced risk of future offending amongst all of the post-offence variables (Hayes & Daly, 2003: 738-740). In other words, those offenders who expressed remorse were significantly less likely to reoffend than those who did not express remorse.
These studies provide valuable evidence of a link between remorse and reduced recidivism. However, there are a number of issues which must be considered when attempting to generalise from this evidence. Firstly, this data concerns youth justice conferences. The relationship between remorse and reduced recidivism indicated in the studies discussed does not necessarily imply that a similar link would be found in fully mature offenders. Secondly, it is important to remember that the youth justice conferences being discussed stand (very deliberately) in stark contrast to traditional trials. It may be the case that the link shown here is a result of variables which are unique to justice conferences. For instance, if eliciting a remorseful apology is seen as a central aim of the process then it may be that those cases in which remorse was judged to be present may reflect those in which the process as a whole had been successful. This means that the specific features of the cases in which remorse was expressed, especially the attitudes of those involved and the relationships between them, may be responsible for both bringing about expressions of remorse and for decreasing the likelihood of future offences. Plausibly, the reduced rate of recidivism observed in cases where the offender was remorseful may not be a result of that remorse. Instead, the expression of remorse and the reduced rate of recidivism may both be caused by a third factor.

Despite this, the relationship between remorse and recidivism indicated in these studies is too strong to be ignored. As previously mentioned, the SAJJ study found remorse to be one of the most influential variables in determining future behaviour. However, the differences between youth justice conferences and traditional legal processes means that it is problematic to generalise from these results to conclusions about the relationship between remorse and recidivism in a other settings. The evidence provided here should instead be seen as a powerful reason to drive future research into the relationship between remorse and reduced recidivism in other legal contexts.

It should be noted, however, that direct empirical evidence for a link between remorse and reduced recidivism may always be somewhat limited due to practical concerns. Methodological difficulties such as determining the length of time over which studies should be conducted and deciding what should be considered relevant reoffending pose difficult problems. The familiar epistemic problem of determining whether expressions of remorse are genuine is also a major consideration. A study
into recidivism rates amongst remorseful offenders could be seriously compromised by the inclusion of only a few participants whose remorse had been feigned remorse at trial. Whilst it seems plausible that genuine remorse may be easier to identify at a date subsequent to the trial, as there will be a greater body of evidence to work with in each individual case (Murphy, 2007: 444-446), it is not obvious how this could be easily incorporated into statistical studies. Studies are likely to rely upon whether an offender was deemed remorseful at the time of their trial (as in the study cited by Proeve, Smith & Niblo, 1999) and so the epistemic problem remains. However, these should not be seen as reasons to refrain from conducting future research. Instead, they mean that a great deal of further research is required in order to achieve (hopefully) consistent results and to overcome the methodological difficulties as fully as is possible.

Further to this statistical evidence, there is also some psychological evidence to support the claim that those who are remorseful are less likely to reoffend.

2. An Intuitive Example

This chapter began with the claim that there is an inclination for both judges and layman to treat wrongdoers who express remorse for their past actions with a greater degree of leniency than they otherwise would. As previously mentioned, this inclination seems to stem (at least in part) from an intuition or belief that remorseful offenders are less likely to reoffend than non-remorseful ones. In order to further analyse this point consider the following example.

Jones is a respectable citizen with a good job and no history of criminal behaviour. On a Saturday afternoon he is watching a football match with some friends in a bar. After the game Jones and his friends get into a heated argument with a rival group of fans. During the course of this argument Jones punches one of the rival fans. The blow causes serious physical damage to Jones’ victim, ultimately causing him to be blinded in one eye. Shortly afterwards the police arrive and Jones is arrested. In due course he is charged with inflicting grievous bodily harm. During his trial, he makes a sincere apology, explaining the anguish and regret he feels and describing how he wishes he could undo his past actions.
Now consider the case of Smith. Smith is identical to Jones, except for the fact that he does not express any remorse for his actions. He accepts that he is responsible for the crime and pleads guilty. However, he does not offer an apology. He makes no comment indicating that he recognises the true gravity of the harm done to his victim but nonetheless admits that has broken the law and accepts that he may reasonably be punished as a result.

For the sake of this discussion we can assume that Jones’s expression of remorse is genuine, whilst Smith’s silence reflects an absence of such emotion in his case. Given the cases as they have been set out, I now wish to ask whether (we believe) Jones or Smith would be more likely to reoffend at a later date. A comparison between the two cases leaves us with four plausible options. Firstly, we may believe Jones is more likely to reoffend. Secondly, we may believe that Smith is more likely to reoffend. Thirdly, we may believe they are equally likely to reoffend. Fourthly, we may believe that we have not been provided with enough (or any) relevant information with which to answer the question.

It seems to me that there is a powerful intuition to say that the remorseful Jones is less likely to reoffend that the unrepentant Smith. Even in the absence of any statistical evidence to support this claim directly, the intuition is powerful enough to merit further consideration and investigation. One potential source of which evidence may be drawn is to be found by looking at one seemingly natural response to Jones/Smith case outlined above; this is the response that Smith may be exhibiting signs of being a psychopath. The relationship between remorse, psychopathy and recidivism will be explored in the section below.

3. Remorse, Psychopathy and Recidivism

In everyday language it may be acceptable to describe Smith as being a psychopath, for he has committed a serious, violent crime for which he has not offered any kind of apology. However, clinically speaking we have not been given enough evidence to make such a claim and, indeed, have been given some evidence

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6 A somewhat implausible variation on this option would be to suggest that we are either certain that they will both reoffend, or certain that neither will. However, there is not sufficient evidence in the examples given to support either of these conclusions.
to the contrary. There are a variety of measures for psychopathy in existence; however, here I will focus on the Hare Psychopathy Checklist-Revised (PCL-R) (Hare, 1991). This is because it is the most widely accepted measure available and, as such, is the most commonly referred to in the psychopathy literature. The PCL-R provides a 20 item list for which each item is scored either 0, 1 or 2 according to the extent to which it applies to the relevant individual. These scores are given on the basis of interviews and case-history. This results in a total score between 0-40; the higher the score the more closely the individual in question is considered to match the prototypic psychopathic individual. A score above 30 is typically taken to indicate that an individual should be classified as psychopathic (Hare & Neumann, 2010: 94-96). The components of the 20 item list can be divided into two broad correlated factors. Factor 1 (F1) refers to those items which reflect 'the interpersonal and affective components of the disorder'. Factor 2 (F2) refers to those items which reflect a socially deviant lifestyle. There are also two components of the list (Promiscuous sexual behaviour and Many short-term relationships) which do not fall neatly into either category (Hare & Neumann, 2010: 97). F1 contains the following items: glibness/superficial charm, grandiose sense of self-worth, pathological lying, conning/manipulative, lack of remorse or guilt, shallow affect, callous/lack of empathy and failure to accept responsibility. F2 contains the following items: need for stimulation, parasitic lifestyle, lack of realistic long-term goals, impulsivity, irresponsibility, poor behavioural controls, early behavioural problems, juvenile delinquency, revocation of conditional release and criminal versatility (Hare, 1991).

Psychopathy, in contrast to remorse, has been the subject of a great deal of empirical research: 'its significance as a robust risk factor for institutional problems, for recidivism in general, and for violence in particular, is now well established' (Hare & Neumann, 2010: 105). This suggests that remorse, as one of the components of psychopathy, may be relevant to predicting future behaviour is criminal contexts. It is unclear, however, exactly how remorse relates to the other components of the psychopathy concept. What is clear is that remorse is only one of twenty factors and is therefore only a relatively small part of a larger concept. Indeed, the PCL-R will allow for an individual who feels and expresses remorse to still be classified as psychopathic in the light of other factors. Accordingly, evidence that psychopaths are more likely to reoffend in future can at best be taken as tentative evidence in
favour of a correlative relationship between remorse and recidivism. Furthermore, a large-scale meta-analysis of the relationship between psychopathy and antisocial conduct which concluded that psychopathy is linked to recidivism also found that the relationship with antisocial behaviour was weaker for F1 variables than for F2 variables (Lestico, Salekin, Decoster & Rogers, 2008: 38-39). This means that the affective components of the psychopathy construct were less useful in predicting future behaviour than the components which relate to lifestyle and past behaviour.

Despite this, a lack of remorse is nonetheless considered a component of psychopathy and psychopathy is generally accepted as indicating an increased likelihood of recidivism. Whilst this does not offer powerful evidence for the distinct claim that those who are remorseful are less likely to reoffend it at least gestures in that direction. It must be considered cautiously, but the evidence related to psychopathy provides, at the very least, further justification for continued research into the relationship between remorse and recidivism more widely. It may also help to partially explain the intuition from which this discussion started. If a lack of remorse is typically associated with psychopathy (and related concepts such as Antisocial Personality Disorder (American Psychiatric Association, 2000: 706)) which are closely associated with criminal behaviour then this may help to explain why the presence of remorse is naturally associated with refraining from such behaviour. Our intuitions may be further explained by returning to look at the nature of remorse, and this will be the subject of the following section.

4. Remorse and Repudiation

Consider again the example outlined above concerning Jones and Smith. Even in the absence of empirical evidence to support the claim that those who are similar to Jones will be less likely to reoffend than those who are similar to Smith, we may still feel that something intrinsic to remorse is sufficient to explain why Jones is (or seems to be) less likely than Smith to reoffend. I believe the key factor here lies in the claim, made in Chapter 1, that remorse requires an individual to repudiate their past actions. This means that 'proper and genuine remorse is always accompanied by the conviction that the immoral actions in question should never be
repeated' (de Wijze, 2005: 460). If repudiation is necessary for remorse then it seems at first glance that those who are remorseful will be less likely to reoffend than those who are not remorseful.

However, it may be contended that this is simply a more refined version of the intuition with which I started and that, even if it is more argumentatively persuasive, it still requires empirical evidence to support it. Strictly speaking, all that repudiation necessitates is that the remorseful offender would not want to commit an identical crime in an identical situation. It does not necessarily entail that the same would apply in different, even if only slightly different, circumstances so long as the individual in question viewed the change in circumstances as morally relevant. Even more importantly, it also does not show that the offender's desire not to repeat their actions is sufficient to prevent them doing so. An individual may feel motivated not to reoffend as a consequence of feeling remorse but nonetheless succumb to competing emotions or reasons when making future decisions. Think, for instance, of an alcoholic offender who is genuinely remorseful for his past crimes but nonetheless continues to offend as a result of his addiction.

Despite these concerns, I still hold that a desire that one's past actions should never be repeated must have at least some impact on future conduct and that the only plausible way it can do so is by reducing the probability of committing a similar offence again in the future. To say it would have no impact whatsoever on future action suggests a misunderstanding of the nature of remorse, whilst to hold that it would make an individual more likely to commit a similar offence in future seems absurd. However, those who are cynical of the value of remorse will likely say that this is simply falling back on the same assumption without offering proof. It is true that the argument I have just outlined, even if it is sound, does not by itself show that remorse has a powerful enough impact on future conduct to be considered a relevant consideration in sentencing decisions generally. However, I do believe it opens the door to the possibility that remorse will be a relevant consideration in at least some cases. The fact that some of those who are remorseful may continue to reoffend does not undermine the fact that there will also be some people who, motivated by remorse, choose not to reoffend as a result. With regard to the criminal law, the argument I have just outlined will not be sufficient to silence those who hold that
remorse is not a relevant factor in sentencing. However, it again adds weight to the claim that further research should be conducted in this area.

5. How this relates to the law

In the United States when a reduced sentence is imposed due to offender remorse it is typically done so on the basis of §3E1.1 of the Federal Sentencing Guidelines. §3E1.1 states that ‘if the defendant clearly demonstrates acceptance of responsibility for his offense, [the judge should] decrease the offense level by 2 levels’ (2012). The explicitly non-exclusive list of appropriate considerations does not mention remorse, instead listing factors such ‘voluntary termination or withdrawal from criminal conduct or associations’ and ‘post-offense rehabilitative efforts’. Despite this, §3E1.1 is routinely taken by many judges to be a mechanism through which they can reward expressions of remorse (O’Hear, 1997: 1524-1526). It should be noted, however, that the section is also used in a separate manner by some judges, who view it as a mechanism to reward cooperation with the authorities irrespective of whether the defendant was deemed to be sufficiently contrite (O’Hear, 1997: 1515-1522). This second interpretation of §3E1.1 can be left to one side for the purposes of the current discussion. What is important for our purposes is the fact that expressions of remorse are often taken into account in US sentencing decisions and that when this occurs it happens in relation to §3E1.1 of the Federal Sentencing Guidelines. This means that, on occasions where a defendant is deemed by a judge to be appropriately remorseful, they receive an automatic reduction of two sentence levels. In real terms this can equate to a custodial sentence being shortened by several years (Federal Sentencing Guidelines, 2012: 394).

This can be contrasted with the mechanisms through which expressions of remorse are rewarded in the United Kingdom, which differ significantly in their implementation. In the UK a judge may, largely at their own discretion, choose to impose a lesser sentence than they otherwise would on the basis of a variety of mitigating factors. Broadly speaking these factors can be divided into two main groups; those which relate to the offence and those which relate to the offender. Mitigating factors which relate to the offender rather than the offence itself are
referred to as forms of personal mitigation. Though, it should of course be noted that the line between the two groups is not always as clear cut as this simple division suggests. Remorse falls under the heading of personal mitigation, with the Sentencing Guidelines Council’s guidelines on seriousness stating that ‘the issue of remorse should be taken into account as a form of personal mitigation’ (2004: §1.27). This is reinforced in the guidelines for sentencing in cases of death by driving where it is stated that ‘whilst it can be expected that anyone who has caused death by driving would be expected to feel remorseful, this cannot undermine its importance for sentencing purposes’ (2008: §28). The exact reduction in sentence which should be given is not stated and is left to the discretion of individual judges, varying on a case by case basis.

The lack of a specified reduction means that the peculiarities of a case and the views of the judge presiding over it will influence what level of reduction, if any, is offered in return for a defendant’s remorse. This means that in some instances remorse will be seen as insufficient to provoke a reduction in sentence. For instance, in relation cases of death by dangerous driving Jacobson and Hough cite one judge as dismissing the significance of remorse, quoting her as saying ‘it may sound harsh, but I’d expect her to feel intense remorse’ (2007: 24). Though, when considering this example, it is interesting to note that it seems to be directly at odds with the (then yet to be published) sentencing guidelines. On the other hand, in some circumstances judges may see remorse as sufficient grounds not to impose a custodial sentence that would have otherwise been handed down for the offence in question. Here, Jacobson and Hough again provide an illuminating example in which ‘a judge described a striking example of demonstrated [as opposed to only verbally expressed] remorse on the part of a street robber’. In this case the ‘defendant had been arrested when he went into a police station to confess that, the day before he had knocked over an old woman and stolen her handbag to get money for drugs. Such an offence merited three to four years’ custody; however, the judge passed a drug treatment and testing order, which in time the defendant completed successfully’ (Jacobson and Hough, 2007: 24). Though, it may appear that the judge was also rewarding the defendant’s cooperation with police, it is important to remember that this example is one

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7 For more detail on the role of personal mitigation in UK sentencing decisions see Jacobson and Hough (2007).
provided by the judge, who determined the sentence, as an example of when he was influenced by a defendant’s remorse. This is sufficient ground to view remorse as the crucial factor in causing the judge’s leniency.

In comparing these two models one may first be inclined to favour the US model, as it appears to offer a greater degree of consistency. Consistency in sentencing is widely, and correctly, viewed as an important aspect of the judicial process. Indeed, sentencing guidelines exist largely to help achieve this. Whilst there may still be some inconsistency in the US model, in determining whether it is appropriate for a discount to be given in any specific case, it still offers a greater level of consistency than the UK model; if two distinct defendants are both considered to be sufficiently remorseful for their crimes then neither of them will receive a greater or lesser reduction than the other. However, the case I have put forward in this chapter does not lend support to this sense of consistency. Instead, it lends greater support to a system such as the UK model; one which places greater emphasis on the individual characteristics of specific cases rather than on uniformity. This is because, though the presence of remorse will make a defendant less likely to reoffend in the future there is no evidence that it will reduce the risk of recidivism to the same degree in all cases. If anything, it is clear that it is extremely difficult to quantify, in general terms, the effect that remorse has on the likelihood of reoffending. Instead, it should be left to the discretion of judges to determine how influential the presence of remorse on a defendant’s future behaviour will be in any given case.

To illustrate this point, consider the following modification to the example discussed earlier. Jones’ is identical to Jones in all respects except for the fact that he does have a history of criminal behaviour. In the past Jones’ has committed a number of similar offences, all whilst out drinking with friends and always directed towards rival fans. After the commission of each of these crimes Jones’ expressed remorse for what he had done. The natural reaction to this example might be simply to say that Jones’ was not genuinely remorseful in these cases. However, if this were the case then the example would not be particularly philosophically interesting, at least in

\[8\] A vast majority (84.4%) of US defendants do receive a reduction under §3E1.1 (O’Hear, 1997: 1510). However, as the section is also used to reward cooperation, often in return for a guilty plea, it is unclear how many of these cases are examples of sentences being reduced as a result of a defendant’s remorse.
relation to the current discussion. If Jones’ was lying about his remorse then this does
not threaten the claim that those who are remorseful are less likely to reoffend, as he
was never truly remorseful. It may highlight epistemological issues but it does not
bear directly on the current discussion. It is only interesting so far as the fact that
saying ‘Jones’ was never genuinely remorseful’ feels like a natural response to the
situation further highlights our natural intuition that those who are remorseful will be
less likely to commit relevantly similar offences again.

The more interesting case is where we accept that Jones’ genuinely does feel
remorse, and has done on previous occasions. An objector may wish to reject this
example by saying that it simply cannot be the case that Jones’ felt remorse or he
would not have continued to reoffend. However, this claim is too strong. Remorse
will decrease the likelihood of an offender committing future offences but it is
implausible to suggest that it makes it impossible9. Though remorse will affect the
remorseful agent’s future actions it is clearly not the only thing which will do so.
Indeed, this is what is centrally at stake here: whether the motivation not to reoffend
prompted by feelings of remorse is sufficient to prevent future crimes. This is why
there is a need for empirical, and not just philosophical, evidence.

However, it is clear that there is currently not sufficient evidence to show that
this is true of all, or even most, cases and, indeed, there is some evidence to the
contrary. Despite this, it will be true of some cases that remorse is sufficient to
prevent reoffending or, at the very least, make it significantly less likely. It is for this
reason that judicial discretion is vital. It would be perfectly consistent for a judge to
decide that Jones’ did genuinely feel remorse but that, in his case, this was not
sufficient to show that he was unlikely to reoffend. In his case, there is a body of
evidence to suggest that (assuming for the sake of argument his remorse is, and
always was genuine) other pressures or motivations will overcome his remorse-
prompted desire to refrain from criminal behaviour. Exactly what these competing
pressures or motivations are is not centrally important; it does not matter whether it
is peer-pressure, an inability to behave lawfully when under the influence of alcohol,
a combination of the two or something else entirely. What matters is that there is

9 It is also troubling to suggest that future events can determine whether an expression of remorse
was genuine. Future offences may be taken as evidence that a prior expression of remorse was
disingenuous but they do not make it so. If it is true that an individual feels remorse here-and-now
then that remains the case irrelevant of their future actions.
sufficient evidence to allow the judge not to consider the remorse expressed by Jones’ a mitigating factor; his past failure to avoid offending, despite having felt remorse about even earlier offences, shows that it is reasonable to assume that his future behaviour is unlikely to be lawful as a result of his current emotional state. Importantly, this does not mean that the remorse expressed by Jones should not be considered a mitigating factor in his case. In his case there is no such evidence. Instead, all we have is the general assertion that remorse will motivate one not to commit relevantly similar offences in the future. It should then be up to the judge to determine how effective a motivation this will be in his case and consider this in light of the differing goals of sentencing. Such deliberation forms a different, and potentially concurrent, factor to be taken into account alongside the potential reduction in blameworthiness resulting from offender-remorse. Indeed, it offers a further argument in favour of remorse-based sentencing which is acceptable to those who are not prepared to accept any form of character retributivism playing a role in sentencing decisions.

Ultimately, this means that at present judicial discretion is vital in determining both when leniency should be shown in response to expressions of remorse and in determining why it is that leniency is being shown. By looking at the particular details of any given case and the behaviour of the defendant the judge should be in a position to determine what relevance remorse has as a mitigating factor in any given case. It may be that in some cases, such as that of the street robber mentioned earlier, that a judge determines the presence of remorse to be a significant enough factor to entirely mitigate the need for a custodial sentence. In other cases a judge may be unsure as to how likely a defendant’s remorse is to effectively influence their future behaviour but still believe it will have some positive impact. Here, it would still be appropriate for a judge to offer a reduction in sentence but to mitigate a custodial sentence entirely (where it would otherwise be appropriate) would seem to be too strong a reaction.
Conclusion

This thesis has looked at a variety of issues relating to remorse and the role it ought to play in the sentencing of criminals. Chapter 1 offered an analysis of remorse which outlined the necessary components of remorse, distinguishing it from related emotions such as shame. The most important of these are the focus of the emotion on the harm done, rather than on the wrongdoer themselves, and the action tendencies associated with remorse. A remorseful wrongdoer will repudiate their actions and feel a powerful desire to make amends for them. The ways in which they will do so vary. However, there are certain forms of behaviour which it is reasonable to expect from a remorseful offender. In particular, a remorseful offender will want to apologise for their past actions. Chapter 2 outlined conditions for an act to count as, firstly, an instance of apology and, more importantly, to count as a good or full apology. A full apology, of the kind we ought to expect from those who have committed serious wrongs, must be sincere and motivated by remorse. Though insincere apologies can perform an effective social function, they do not have the same moral weight as sincere apologies. From this base I then moved on to look at the role of remorse and apology within the criminal law.

Chapter 3 provided an overview of the role that remorse currently plays in Western judicial systems, with an emphasis on showing the issues with the current situation. There is a lack of clarity and consistency regarding the role that remorse plays in sentencing decisions. Chapter 3 also highlighted epistemological issues regarding remorse and the courts, arguing that these concerns do not mean we should attempt to extricate remorse from the courts so long as it can be shown that remorse has an intimate role in the logic of punishment. Chapter 4, therefore, moved on to the issue of justifying punishment itself. I reject consequentialist and traditional retributive arguments in favour of a communicative approach following in the tradition of Anthony Duff. Chapter 4 concluded by arguing that Duff’s theory of punishment needs to be altered to take account of offender-remorse, if it is to offer a model of punishment which genuinely attempts to create a moral dialogue between the state and those who it punishes.
Chapter 5 offers the central unique argument of the thesis, by defending remorse-based sentencing with an appeal to weak character retributivism. I argue that the traditional debate between character and act retributivism is based on a false dichotomy between two extreme positions. I draw on the recent work of Nick Smith, who has defended dialectical retributivism as a middle ground between these two positions. Smith’s position, however, struggles with issues of backward causation. This is because Smith does not wish his account of dialectical retributivism to involve judgements about character, but rather the ‘character of the act’. I offer an alternative middle ground, arguing that we ought simply to recognise that we do judge the character of defendants and that this is acceptable so long as there are clear limits about what aspects of character are relevant to sentencing. Specifically, I contend that any aspect of character which is taken into account must be tied intimately to the relevant crime and to the overall justification of punishment. Remorse fulfils both these criteria. I also argue that remorse ought to be considered a mitigating factor, but that an absence of remorse should not be considered an aggravating factor. This is because a defendant who expresses their remorse is opening up those claims to public scrutiny, whereas the courts should not inquire into private aspects of an offender’s inner life that they have not willingly presented to the court.

Chapter 6 returned to the emotion of shame, previously discussed in Chapter 1, looking at whether it fulfilled the criteria from the previous chapter regarding relevance to sentencing. Looking in greater detail at the nature and value of shame, I argued that though there are cases of moral shame which may have a positive social impact there are nonetheless reasons not to allow shame to play the same role in sentencing as remorse. This is firstly because it is reasonable to expect (though not demand) offenders to feel remorse for their actions but the same cannot be said of shame. Shame, even in cases of moral shame, is still focused on the offender themselves, rather than the harm they have caused and, as such, lacks the connection to the goals of punishment remorse has. Furthermore, shaming individuals is not the purpose of punishment. To do so would have an exclusionary and dehumanising impact on those being punished.

Chapter 7 moved on to discuss a competing argument in favour of showing leniency to remorseful offenders: mercy. Looking at the role mercy ought to play
within a communicative approach to punishment; I argued that mercy can only plausibly justify lenient treatment of those who are remorseful if it can be shown to be a value internal to the logic of the criminal law. However, even if this is the case I argue that remorse should not be seen as grounds for leniency. This is because those who are remorseful ought to be prepared (or even willing) to undergo the punishment they deserve. Furthermore, it is problematic to have an approach to punishment which allows that an offender ought to receive a different level of punishment than that which they deserve (an issue that is resolved if we accept that remorse reduces blameworthiness). The chapter concluded by picking up discussion of Hannah Maslen started in Chapter 5, arguing that Maslen’s recent defence of remorse-based leniency fails on account of her failure to sufficiently distance her argument from an appeal to mercy.

Chapter 8 concluded the thesis by moving on to discuss another issue relating to the role of remorse in sentencing: recidivism. Looking both at empirical data and the nature of remorse I argue that there is some evidence to suggest a link between remorse and reduced recidivism, and this evidence is at least enough to provide an impetus for further research to be conducted into the topic, from within a range of fields including philosophy, psychology and sociology. A correlation between remorse and reduced recidivism has a twofold relevance. Firstly, within the approach to punishment I am advocating it provides supporting evidence for the value of the action tendencies associated with remorse. Secondly, it provides an additional consequentialist and pragmatic justification for remorse-based leniency that is relevant to a broad range of approaches to punishment and to current sentencing practices.

Ultimately, I have offered a unique defence of the claim that remorse ought to be considered a mitigating factor in sentencing decisions. Though I have offered additional reasons, this is primarily because of the claim that we ought to adopt a weak form of character retributivism. Though much of this discussion is theoretical, it has direct practical implications for legal practice.

Firstly, sentencing guidelines (alongside other relevant legal documents) need to use a consistent and clearly defined concept of remorse. I have offered one philosophical analysis of remorse and the action tendencies associated with it. If
there is to be consistency in sentencing then legal documentation and judges must be made more aware of such analyses, from both philosophy and psychology. There needs to be clarity as to the kinds of behaviour which can be taken as evidence for remorse and, crucially, there must be clarification within sentencing guidelines as to the specific reasons why certain kinds of behaviour or aspects of character are being rewarded. The current situation is unacceptable.

Secondly, this means that greater scrutiny needs to be applied to cases in which leniency is shown to remorseful offenders. I have highlighted some of the epistemological concerns relating to remorse, however, given the intimate connection remorse has to punishment, these issues do not mean that remorse should be removed from sentencing decisions. Rather, it means that further psychological and philosophical research is required to help the courts in determining the veracity of expressed remorse. It also means that remorse-based leniency ought to be shown in fewer cases than it currently is. As I have described remorse, it is a powerful emotion and we can reasonably expect those who are truly remorseful to make a considerable effort to make amends for their actions and demonstrate a willingness to undergo punishment if it is deemed appropriate. This means that the courts ought to not take all claims of offender remorse at face value, but rather apply greater scrutiny to those aspects of a defendant’s character which are willingly presented as relevant to sentencing.
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