

Sorry Seems to be the Hardest Word


THE VEXED QUESTION OF REMORSE IN CRIMINAL SENTENCING

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Overview



1. HOW REMORSE IS RELEVANT TO SENTENCING
2. CAN REMORSE BE RELIABLY ASSESSED?
3. WHY IS REMORSE SUCH A COMPELLING CONCEPT IN SENTENCING?



THERE IS NO PERSON SO SEVERELY
PUNISHED, AS THOSE WHO SUBJECT
THEMSELVES TO THE WHIP OF THEIR
OWN REMORSE

- LUCIUS ANNAEUS SENECA

How Remorse is relevant to Sentencing

- WHAT IS REMORSE?

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- WHAT IS REMORSE?

'REMORSE' IS DEFINED IN, RESPECTIVELY, THE NEW SHORTER OXFORD DICTIONARY AND THE MACQUARIE DICTIONARY AS 'DEEP REGRET AND REPENTANCE FOR A WRONG COMMITTED' AND 'DEEP AND PAINFUL REGRET FOR WRONGDOING; COMPUNCTION'. THE WORD 'COMPUNCTION' IN TURN IS DEFINED IN THOSE TWO WORKS, AGAIN RESPECTIVELY, AS 'PRICKING OR STINGING OF CONSCIENCE OR THE HEART; UNEASINESS OF MIND AFTER WRONGDOING; REMORSE' AND 'UNEASINESS OF CONSCIENCE OR FEELINGS; REGRET FOR WRONGDOING OR GIVING PAIN TO ANOTHER; CONTRITION'.

How Remorse is relevant to Sentencing

- WHAT IS REMORSE?

“GENUINE REMORSE” = REMORSEFUL BEHAVIOUR
PERFORMED WITH AN APPROPRIATELY CONTRITE
MOTIVATION

How Remorse is relevant to Sentencing

- WHAT DOES THE PRESENCE OF REMORSE DEMONSTRATE?

SPECIFIC DETERRENCE WILL BE LESS SIGNIFICANT WHERE AN OFFENDER IS GENUINELY REMORSEFUL FOR THEIR ACTIONS AS IT DEMONSTRATES AN INCREASED LIKELIHOOD OF REHABILITATION AND APPRECIATION FOR THE WRONGFULNESS OF THEIR CONDUCT.

BARBARO V THE QUEEN (2012) 226 A CRIM R 354, 365 [39]

How Remorse is relevant to Sentencing

- WHAT DOES THE PRESENCE OF REMORSE DEMONSTRATE?

AN OFFENDER'S GUILTY PLEA MADE APPRECIATING THE WRONGFULNESS OF THEIR CONDUCT, ITS IMPACT ON THE VICTIM, AND WISHING TO REPAIR ANY HARM OUT OF A WISH TO CLEAR THEIR CONSCIENCE ALSO CALLS FOR AN EXERCISE OF MERCY IN THE FORM OF A SIGNIFICANT SENTENCE REDUCTION BEYOND THAT GIVEN TO ALL GUILTY PLEAS FOR THEIR UTILITARIAN VALUE.

PHILLIPS V THE QUEEN (2012) 37 VR 594, 614 [68]–[69]

How Remorse is relevant to Sentencing

- WHAT DOES THE PRESENCE OF REMORSE DEMONSTRATE?

'CONTRITION, REPENTANCE AND REMORSE AFTER THE OFFENCE ARE MITIGATING FACTORS LEADING IN A PROPER CASE TO SOME, PERHAPS CONSIDERABLE, REDUCTION OF THE NORMAL SENTENCE'

NEAL V THE QUEEN (1982) 149 CLR 305, 314

How Remorse is relevant to Sentencing

- THE SIGNIFICANCE OF THE ABSENCE OF REMORSE?

COURTS SHOULD BE CAREFUL IN THEIR CONCLUSIONS WHERE REMORSE IS ABSENT , LEST THEY SENTENCE 'REMORSELESS' OFFENDERS ERRONEOUSLY.

Cultural factors;

Non-psychopathic empathy deficits eg autism spectrum disorders;

Ongoing presence of mental illness that impacts on emotional range;

Offending committed while acutely mentally ill, not amounting to mental impairment; and

Intellectually disabled offenders.

Can Remorse Be Assessed?

FOR THE PRINCIPLE OF EQUAL JUSTICE TO BE MET, ONE WOULD EXPECT THAT REMORSE WOULD BE CAPABLE OF BEING ASSESSED IN A SOMEWHAT OBJECTIVE FASHION: TO BE ABLE TO ASSESS PEOPLE DEMONSTRATING SIMILAR BEHAVIOUR AND COME TO SIMILAR CONCLUSIONS.

QUERY WHETHER YOU CAN ACCURATELY ASSESS THEIR MOTIVATION

Can Remorse Be Assessed?

ARE JUDGES ANY GOOD AT ASSESSING REMORSE?

IN ASSESSING REMORSE, JUDGES MAY HAVE ACCESS TO A VARIETY OF SOURCES OF EVIDENCE:

Conduct at the time of the commission of the offence eg administering first aid, calling for help.

Admissions to police.

Timing of a plea of guilty.

Statements made to assessing professionals;

Efforts at rehabilitation;

Apologies and restitution; and

Conduct of the offender in the presence of the Judge.

Can Remorse Be Assessed?

ARE JUDGES ANY GOOD AT ASSESSING REMORSE?

IF, FOR EXAMPLE, REMORSE CANNOT BE DISTINGUISHED FROM BACKWARD LOOKING REGRET, THEN Demeanor OFFERS NO PREDICTION ABOUT FUTURE BEHAVIOUR. IT IS AN EVEN GREATER PROBLEM IF REMORSE CANNOT BE DISTINGUISHED FROM SHAME BECAUSE THERE IS EVIDENCE THAT SHAME IS ASSOCIATED WITH INCREASED RECIDIVISM.

REMORSE (PROEVE AND TAYLOR)

Can Remorse Be Assessed?

ARE JUDGES ANY GOOD AT ASSESSING REMORSE?

IF REMORSE IS AN ONGOING PROCESS THAT INVOLVES COMING TO TERMS WITH THE HARM ONE HAS DONE, VOWING TO REFORM ONE'S OWN BEHAVIOUR GOING FORWARD AND SEEKING TO ATONE FOR THE WRONG, IT IS PROBLEMATIC TO EXPECT THIS TO BE COMPLETED BY THE TIME OF THE TRIAL AND ANY CONSEQUENT PLEA HEARING

(DUNCAN "*SO YOUNG AND SO UNTENDER*": REMORSELESS CHILDREN AND THE EXPECTATIONS OF THE LAW', COLUMBIA LAW REVIEW 102 (2002) AT 1490)

Can Remorse Be Assessed?

CAN ANYONE ASSESS IF REMORSE IS GENUINE?

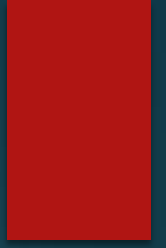
EXCEPTING THE *DORAN* DISCOUNT SITUATION...

NO.

REMORSE, LIKE THE CRIMINAL JUSTICE SYSTEM, IS A PROCESS. GENUINE CONTRITION, SITUATIONAL ANGUISH AND SELF-SERVING DESIRE FOR THE BEST OUTCOME CAN ALL BE PRESENT IN THE SAME INDIVIDUAL AT THE SAME OR DIFFERENT TIMES.

Why is Remorse Such a Compelling Concept?

SENTENCING AS A MECHANISM



Why is Remorse Such a Compelling Concept?

SENTENCING AS A MECHANISM

- STATUTORY FACTORS
- ASSESSMENTS OF ASPECTS OF THE INSTANT CASE
- INTUITIVE SYNTHESIS
- DEFINED AND UNDERSTANDABLE OUTCOME

Why is Remorse Such a Compelling Concept?

SENTENCING AS A MECHANISM

SENTENCING AS A MEANINGFUL SOCIAL RITUAL

- VALUES AND BELIEFS
- THE HOW OF THE PROCESS NOT THE WHAT OF THE OUTCOME
- MAKING SOCIETY WHOLE AFTER THE COMMISSION OF A WRONG

TL;DR

REMORSE HAS A ROLE TO PLAY IN THE RITUAL OF THE SENTENCING PROCESS AND CONFIRMS WHAT WE COLLECTIVELY HAVE A STRONG DESIRE TO SEE: THAT PEOPLE WHO HAVE DONE THE WRONG THING FEEL BAD ABOUT IT

IT IS ENTIRELY UNSUITED AS A MEANINGFUL PREDICTOR OF FUTURE RISK DUE TO THE THE VIRTUAL IMPOSSIBILITY OF IT BEING RELIABLY ASSESSED, AND THE POOR EVIDENCE LINKING REMORSE TO A LOWER LIKELIHOOD OF FURUE OFFENDING.

TL;DR



TL;DR

QUESTIONS?

