

Sentencing Based on Remorse: A Flawed Approach Raises Concerns



by Theodore Dalrymple

A judge in Minnesota, Peter Cahill, has passed a longer sentence on Tou Thao, one of the policemen involved in the events leading to George Floyd's death, than expected because the accused expressed no remorse. The judge said, "After three years of reflection, I was hoping for a little more remorse."

But the judge should have been hoping for no such thing, and in any case, it shouldn't have affected his sentencing decision.

Remorse for what you have done wrong is, of course, an excellent thing. Possibly, though not certainly, it acts as a brake on future wrongdoing. You remember with shame what you did and resolve not to do it again in similar circumstances.

But remorse is far from infallible: Except for the saints among us, we all have bad habits that we resolve to break but do not do so. Our remorse is sincere: We really feel it. "I regret having eaten or drunk too much last night and will never do it again"; "I am sorry I lost my temper and will not do so again"—in both cases, until the next time.

As revenge is a dish best eaten cold, so remorse is an emotion that should bring no tangible reward—such as a reduced prison sentence. Indeed, in conditions in which expressions of remorse are rewarded, not to express remorse could be taken as a sign of truthfulness and probity.

Mr. Thao didn't believe himself to be guilty, and therefore any expression of remorse on his part would have been insincere, in essence, a lie. I don't go here into the question of whether he was guilty and therefore ought to have felt remorse; rather, I point to the principle that it should have been irrelevant to his sentencing.

When it comes to the expression of remorse by an accused or convicted criminal at his trial, there are four possibilities:

He expresses remorse that he genuinely feels.

He expresses remorse that he doesn't feel.

He fails to express remorse that he does feel.

He doesn't express remorse because he feels none.

The judge in Mr. Thao's case must have believed that he could distinguish between true and bogus remorse. He can hardly have wished for a convincing piece of acting on the part of the convicted person without any accompanying real internal feeling: and it would be a foolish person who thought that no one could ever fool him into taking for real what was actually feigned. I wouldn't count myself as especially naïve, but I couldn't say that, when I worked in a prison, I was never

taken in by protestations of innocence. The judge in this case had no special instrument to distinguish true from fake remorse.

It's inevitable that some convictions are mistaken: No system, no matter how scrupulous, can avoid sometimes convicting the innocent. If failure to express remorse adds to a prison sentence, it puts pressure on the innocent person accused of a crime to admit to what he didn't do, and then express remorse for it. If he doesn't express such remorse, he could end up being more severely punished than the genuinely guilty.

The judge probably also thought that the expression of remorse has some kind of prognostic value. In this case, such prognostication is absurd: Even in the worst possible view of what Mr. Thao did, or failed to do, it's all but impossible that he will ever be in a position to repeat it; therefore, it can't possibly be true that an increased sentence improves his prognosis.

These considerations demonstrate the dishonesty and absurdity of using prognostication in sentencing decisions.

A thought experiment will establish this.

Suppose that some abominable political criminal—Pol Pot, say—claimed to be repentant after the overthrow of his regime and his capture. His ability to repeat what he did would be nil: the Khmer Rouge couldn't, like a democratically elected president, have two periods in power. Thus, Pol Pot would present (from the prognosis point of view) no danger at all, and, furthermore, he was now, *ex hypothesi*, repentant, realizing that what he did was very wrong. In his case, there would then be no need for, or justification of, punishment as a kind of therapeutic reform.

But would we go on to say that he should at once be set free and not punished, because punishment could serve no practical purpose? If he were set free on those grounds, our sense of

justice would surely be deeply offended. Nothing could persuade us that such a man shouldn't be punished to the maximum permissible in a civilized society.

The justification of his punishment from deterrence would hardly work, either. The Pol Pots of this world are relatively few, but it beggars belief that they should take the prospect of legal retribution into account in what they do. Since the Nuremberg tribunals, we have seen Mao Zedong, Pol Pot, Macías Nguema, Idi Amin, the genocidal leaders in Rwanda, Abimael Guzmán, and many other lesser lights in the field of human massacre. Of course, it's possible that there are people who decide not to commit genocide because of the fear of legal retribution—I can't prove the contrary—but it seems to me hardly likely.

Thus, even if no future Pol Pots were deterred by his punishment, it would still be just to punish Pol Pot and unjust not to punish him.

Speculation as to what a person will do in the future in deciding his sentence is against the rule of law, which punishes a man for what he has done beyond reasonable doubt. Therefore, even if remorse were an infallible indication of future behavior (which it isn't), it should be irrelevant to sentencing. It's true that a man who has burgled 10 houses is likely (though not certain) to burgle an 11th, but even he will stop at some time in the future. Ten burglaries is quite enough to justify a long sentence that will probably take him past the burgling age.

It seems to me that the sentencing judge in Mr. Thao's case didn't understand the rule of law. Failure to express remorse isn't a crime, though it may be a moral fault or psychologically unattractive. Moreover, for a judge to demand expression of remorse (or else!) from a man who believes himself innocent is to demand to be told lies. Perjury pays.

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