

ARTICLES

“SO YOUNG AND SO UNTENDER”: REMORSELESS CHILDREN AND THE EXPECTATIONS OF THE LAW

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A nine-year-old speaks with apparent callousness as he walks by the body of the girl he has killed. A fourteen-year-old jokes about “body parts in her pocket” after bashing in her mother’s head with a candlestick holder. And a fifteen-year-old laughingly names his accomplice “Homicide” after participating in a robbery that culminated in the victim’s death. Seemingly remorseless acts such as these can have a crucial impact on the way a child or adolescent fares in the juvenile justice or criminal system. Yet, when one looks closely at what the courts interpret as indicators of remorselessness—taking into account psychological findings about the developmental stages, sociological theories about the code of the street, and literary portrayals of the paradoxes of the human mind—these indicators often appear ambiguous, the courts’ interpretations problematic.

This Article employs psychology, sociology, and literature to investigate the expectation of remorse in the juvenile and criminal justice systems. More specifically, it presents seven in-depth case studies of juveniles who were charged with murder or attempted murder and whose apparent lack of remorse played a salient role in the legal process. Through these case studies, the Article challenges the law’s assumption that any decent, redeemable person, regardless of age, will exhibit sorrow and contrition after committing a heinous crime.

Beyond challenging the courts’ ability to interpret the emotional state of a juvenile, the Article questions the validity of remorse as a predictor of future character. Drawing on Biblical and literary examples and the psychoanalytic theory of the superego, the Article suggests that remorse, as the most agonizing form of guilt, may actually undermine the ability to “turn one’s life around” and begin anew.

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[A] broken and a contrite heart,
O God, thou wilt not despise.
Psalms 51:17 (King James)

[T]here is no hell but remorse.
Bishop Joseph Hall¹

INTRODUCTION

The morning after my father's suicide, I went to my classes at Columbia University as usual, wearing a hot-pink, summery top and a pink and white floral skirt. In the elevator of the International House where I lived, a friend who had been with me when I received the news looked at me curiously. No doubt he wondered why I was still in New York and on my way to school—why I showed no signs of grief.

Actually, I *showed* no grief because I *felt* none, and did not for a long time. It was a year before I cried over my father's death, four years before I began, in therapy, to talk to someone about it. When I did begin to cry, I could not stop. It was as if I were fulfilling a prophecy quoted in Martha Wolfenstein's *Death of a Parent and Death of a President*.² Elaborating on what might happen if someone could not bear a loss, a nine-year-old boy forecast:

[T]hey would cry and cry. They would cry for a month and not forget it. They could cry every night and dream about it, and the tears would roll down their eyes and they wouldn't know it. And they would be thinking about it and tears just running down their eyes at night while they were dreaming.³

So it was with me, both alone and in psychotherapy: I engaged in long bouts of paroxysmal sobbing that would not be comforted. At last, my therapist was prompted to say: "The solution is not in crying. You could cry forever."

Fortunately, no legal ramifications flowed from my earlier failure to exhibit sadness, for I stood accused of no crime. But this experience of being unable to show or even feel "appropriate" sorrow over my father's death has resonated for me with many legal cases. It inspired my interest in, and doubts about, the uses of remorse in juvenile and criminal law.

Remorse, a rich, ancient concept with roots lying deep in Judaism and Christianity,⁴ has long played a role in the Anglo-American criminal

1. Joseph Hall, *The Shaking of the Olive-Tree: The Remaining Works Of that Incomparable Prelate Joseph Hall, D.D. Late Lord Bishop of Norwich* 162 (London, F. Cadwel 1660).

2. Martha Wolfenstein, *Death of a Parent and Death of a President: Children's Reactions to Two Kinds of Loss*, in *Children and the Death of a President* 70 (Martha Wolfenstein & Gilbert Kliman eds., 1969) [hereinafter *Wolfenstein, Death of a Parent and Death of a President*].

3. *Id.* at 77.

4. See generally Harvey Cox, *Repentance and Forgiveness: A Christian Perspective*, in *Repentance: A Comparative Perspective* 21, 24 (Amitai Etzioni & David E. Carney eds.,

system. At sentencing, remorse may be considered in the defendant's favor, whereas lack of remorse may result in a harsher punishment.⁵ In capital cases, in particular, failure to show remorse may increase the odds of a defendant's being put to death.⁶ Besides its role in the sentencing phase of the adult system, remorse also figures in juvenile law, especially at waiver or transfer: the decision whether to retain jurisdiction in Juvenile Court or send the child up to be treated as an adult. In many jurisdictions, the presence of contrition is a legitimate argument for retaining juvenile jurisdiction, whereas its absence militates in favor of "binding the child over" to the criminal system.⁷

At first blush, it seems fitting that the law should reward the contrite offender and penalize the remorseless one. The person who commits a dastardly deed and shows no remorse comes across as scarcely human,

1997) [hereinafter Repentance] (summarizing the Christian theology of repentance, which includes remorse as one of its "essential components"); Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 Fordham Urb. L.J. 1677 (2000) (exploring the concept of *teshuvah*, which involves repentance, remorse, and atonement, in Jewish law and philosophy).

5. See, e.g., *Hall v. State*, 496 S.E.2d 475, 478 (Ga. Ct. App. 1998) ("The absence of any showing of remorse is a legitimate consideration at sentencing."); *State v. Richardson*, 923 S.W.2d 301, 322 (Mo. 1996) (en banc) ("Appellant's lack of remorse . . . was clearly relevant to his sentencing. . . ."); *In re Caldwell*, 666 N.E.2d 1367, 1370 (Ohio 1996) (listing "remorse shown by the juvenile" as a factor courts should consider in deciding whether to impose consecutive terms); *State v. Williams*, 519 S.E.2d 835, 842 (W. Va. 1999) (distinguishing *Williams*, where defendant's expression of remorse was not believed, from another case where remorse was a factor in sentencing). In some cases, courts have adduced the presence or absence of remorse as the justification for sentencing codefendants differently from each other. For discussion of these cases, see *infra* text accompanying notes 133–139.

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In contrast to the above examples, some courts have held that the juvenile's privilege against self-incrimination was violated where lack of remorse was a factor in transfer or sentencing. See, e.g., *In re Appeal in Pima County*, 679 P.2d 92, 95–96 (Ariz. Ct. App. 1984) (holding juvenile's privilege against self-incrimination was violated when failure to cooperate in mental evaluation and lack of remorse were factors in transfer); *K.Y.L. & N.L. v. State*, 685 So.2d 1380, 1381 (Fla. Dist. Ct. App. 1997) ("[L]ack of contrition or remorse is a constitutionally impermissible consideration in imposing sentence.").

6. For a good summary of how remorse comes into the statutory schema in capital cases, see Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1604–07 (1998). While not focused on juveniles, this study included all South Carolina capital cases brought by the state; it thus would have encompassed any juvenile offender sentenced as an adult where the state sought the death penalty during the period covered. See *id.* For discussion of the role of remorselessness in juries' decisions to inflict the death penalty, see *infra* text accompanying notes 131–132; see also Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1560 (1998) ("The interviews of jurors . . . strongly corroborated earlier findings that the defendant's degree of remorse significantly influences a jury's decision to impose the death penalty.").

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7. See Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. Contemp. Legal Issues 299, 310–11 (1999) (citing relevant cases and summarizing ways that remorse or its absence can bear on the criteria for transfer).

beyond the pale. As one scholar has suggested, it is as if the remorseless criminal had committed the same offense twice, once by doing it and again by not being sorry.⁸ I will seek to show, however, that the law betrays a psychological naiveté in viewing remorse as the only “human” response to having committed a serious crime. For such a view fails to recognize that remorse itself is a form of terrible suffering; it is, in Nathaniel Hawthorne’s graphic phrase, a “gnawing from the inmost heart.”⁹ The word *remorse* derives from the Latin *remordere*, “to bite again,”¹⁰ and thus describes a deep, torturing anguish over past wrongdoing,¹¹ akin to being bitten repeatedly by one’s own conscience.

Human beings, by nature, seek to avoid the anguish caused by acknowledging our complicity in evil; as the Psalmist admitted long ago: “When I thought to know this, it was too painful for me.”¹² In our efforts not to know that which will cause us pain, we sometimes resort to the defense mechanism of denial: the disavowal of an unpleasant fact or truth about the world.¹³ When we do, we appear to others as lacking remorse and hence, as heinous, but in fact, our bland, unflinching facade may be but the external manifestation of an inner struggle to avoid the knowledge we feel we cannot bear.

If the law’s view of remorse is problematic with respect to adults, it is, I will argue, even more questionable with regard to juveniles. In young defendants, the child’s “short sadness span”¹⁴ may render a prolonged display of regret unlikely. In a homicide case, a child who does not appreciate the finality of death¹⁵ will communicate less remorse than au-

8. Cf. Amitai Etzioni, Introduction to Repentance, *in* Repentance, *supra* note 4, at 1, 9 (“[T]hose who are not remorseful are viewed as if they offended the community twice: once in whatever offense they have committed and, second, in their refusal to acknowledge that mores were violated.”).

9. Nathaniel Hawthorne, *The Scarlet Letter* 182 (Sculley Bradley et al. eds., W.W. Norton & Co. 2d. ed. 1978) (1850).

10. Webster’s New International Dictionary of the English Language 2108 (2d ed. 1947) [hereinafter Webster’s New International Dictionary].

11. Cf. Webster’s New World Dictionary of the American Language 1231 (college ed. 1968) (defining *remorse* as “a deep, torturing sense of guilt felt for one’s actions”).

12. Psalms 73:16 (King James).

13. For the seminal discussion of denial, see Anna Freud, *The Ego and the Mechanisms of Defense* 67–92 (Cecil Baine trans., rev. ed. 1966) [hereinafter A. Freud, *The Ego and the Mechanisms*].

14. Wolfenstein, *Death of a Parent and Death of a President*, *supra* note 2, at 77 (describing “short sadness span” of children as inability to endure a painful emotion for more than a “brief space of time, after which [children] . . . ward it off by various defenses”).

15. For general discussions of children’s understanding of death, see Phyllis Rolfe Silverman, *Never too Young to Know: Death in Children’s Lives* 47–48 (2000) (explaining that it is not until early adolescence that an individual acquires an understanding of causality and inevitability of death); Sandor B. Brent et al., *The Development of the Concept of Death Among Chinese and U.S. Children 3–17 Years of Age: From Binary to “Fuzzy” Concepts?*, 33 *Omega* 67, 68 (1996) [hereinafter Brent et al., *The Development of the Concept of Death*] (finding that most children do not achieve mature understanding

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thorities expect. And even adolescents, having only recently passed out of childhood, manifest a fear of regression and consequent inhibition of crying;¹⁶ for developmental reasons, they too may show less grief than the system demands.¹⁷

This Article investigates the law's expectation of remorse in children and adolescents who have committed serious crimes. More specifically, it presents seven in-depth case studies in which a juvenile's ostensible lack of contrition played a significant role in the waiver decision or disposition. Drawing on psychology, sociology, and literature, I will challenge the law's view of remorse as an emotional state that any decent, redeemable person—regardless of age—would exhibit after committing a heinous offense.¹⁸

The Article develops in three parts. Part One sets the stage by presenting a fresh analysis of three cases of juveniles—one nine-year-old and two teenagers—who were charged with murder and who behaved in

of all three components of death—universality, irreversibility, and nonfunctionality—until at least age ten). For further discussion of the ages at which children comprehend death, see *infra* notes 45–51 and accompanying text.

16. Benjamin Garber, *Mourning in Adolescence: Normal and Pathological*, 12 *Adolescent Psychiatry* 371, 384 (1985).

17. Though not identical, grief and remorse are closely related emotional states. See *The American Heritage Dictionary of the English Language* 796, 1527 (3d ed. 1992) (defining *grief* as “[d]eep mental anguish, as that arising from bereavement”; and *remorse* as “[m]oral anguish arising from repentance for past misdeeds”). Thus, anguish is central to both emotional states, and it seems likely that an inhibition of the expression of anguish in grief would tend to inhibit the expression of anguish in remorse as well.

18. In recent years, remorse and related concepts have attracted the attention of prominent scholars, but none have focused on the special issues involving juveniles. Among these contemporary thinkers, some have argued that remorse plays a legitimate role in criminal law. See, e.g., Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in *Repentance*, *supra* note 4, at 143, 143–70 (discussing the relationship between repentance and the purposes of punishment); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, in *The Passions of Law* 168, 184 (Susan A. Bandes ed., 1999) (arguing that remorse “remains an important factor in popular culture” and analyzing the theme of remorse in the film *Dead Man Walking*); Robert Wuthnow, *Repentance in Criminal Procedure: The Ritual Affirmation of Community*, in *Repentance*, *supra* note 4, at 171, 171–86 (making an argument for rituals of repentance).

Closer to my own point of view are those analyses that have highlighted the ambiguities and difficulties that arise from using remorse in sentencing. For example, Judge Richard Posner has posited a dilemma the criminal faces under the “Acceptance of Responsibility” provision of the Federal Sentencing Guidelines. Posner describes a “conundrum” in which the defendant who offers excuses for his crime is viewed scornfully, but the defendant who takes full responsibility is “unable to point to anything that might mitigate his criminality.” *United States v. Beserra*, 967 F.2d 254, 255–56 (7th Cir. 1992); see also Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines, 91 *Nw. U. L. Rev.* 1507, 1510–12, 1560–65 (1997) (interpreting the “Acceptance of Responsibility” provision in terms of two paradigms: “remorse” and “cooperation,” and questioning the continued use of the “remorse paradigm”). The Federal Sentencing Guidelines do not apply to juveniles; thus, these scholars do not address many of the topics I discuss here.

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unrepentant ways after the crime. Through these case studies, I seek to disrupt the usual extrapolation from callous behavior to dangerous character. At the end of this Part, I address the issue of representativeness by relating my cases to nearly two hundred published juvenile cases that mention remorse.

Part Two ventures into more difficult terrain. It reinforces my argument by analyzing four cases involving adolescents whose crimes and subsequent behavior render them particularly unsympathetic; they are the classic “Other” who evoke, in most people, a response of righteous horror. In this Part, I endeavor to show that even the most egregious forms of callousness—raucous laughter, stony-faced silence, and insolent displays of pride in one’s crime—all lend themselves to alternative interpretations when scrutinized through an interdisciplinary lens.

The lens I employ throughout the case studies is a humanistic one. It is imbued with the theories and findings of three disciplines: psychology, with its developmental stages and defense mechanisms; sociology, with its sophisticated analyses of the delinquent subculture; and literature, with its fine-tuned appreciation of the nuances of the human mind.¹⁹

Part Three draws on an additional discipline, theology, as it broadens our inquiry to consider two questions: (1) whether lack of remorse—apart from the problem of our capacity to assess it—is an accurate predictor of chronic criminal behavior; and (2) whether remorse, in turn, is a valid proxy for goodness, a marker of amenability to rehabilitation. As to the first question, the Article argues that in an individual under age eighteen, lack of remorse is a poor predictor. As to the second, the answer

19. The use of literature to illustrate precise vicissitudes of mental and emotional functioning has ample precedent in psychology, psychiatry, and psychoanalysis. See, e.g., Sigmund Freud, *Some Character-Types Met With in Psycho-Analytic Work* (1916) [hereinafter *S. Freud, Character-Types*], reprinted in 14 *The Standard Edition of the Complete Psychological Works of Sigmund Freud* 309, 318–31 (James Strachey ed., The Hogarth Press 1957) (discussing Shakespeare’s *Lady Macbeth* and Ibsen’s *Rebecca West* as examples of “those wrecked by success”); Arnold Rothstein, *The Narcissistic Pursuit of Perfection* 121–274 (2d rev. ed. 1984) (examining characters in novels by Tolstoy and John Fowles to illustrate types of narcissism); Leonard Shengold, *Soul Murder* 12–13 (1989) (analyzing stories by Kipling, Orwell, and Dickens to illustrate psychodynamics of abuse and neglect).

Legal scholars, likewise, have employed fiction to illuminate life. See, e.g., Richard A. Posner, *Law and Literature* 49–71 (rev. ed. 1998) (drawing on literature to illuminate nature of revenge as substitute for law); Richard H. Weisberg, *The Failure of the Word* 4–8 (1984) (examining works by Dostoevsky, Flaubert, Camus, and Melville to explore law’s passivity in the face of injustice); James Boyd White, *Heraclitus’ Bow* 168–91 (1985) (employing *Oresteia* and *Noon Wine* to illuminate meanings and limits of law); Martha Grace Duncan, “Cradled on the Sea”: Positive Images of Prison and Theories of Punishment, 76 *Cal. L. Rev.* 1201, 1202–04 (1988) (analyzing literary images of prison to draw implications for different justifications of punishment); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka* and Richard Posner, 99 *Harv. L. Rev.* 384, 386 (1985) (drawing on Kafka’s fiction to challenge Posner’s assumptions about human motivation).

may depend on the form it takes: whether "worldly grief" or "godly grief,"²⁰ whether condemnation of the evil act or agony over the evil person. In some of its vicissitudes, the Article suggests, remorse may actually interfere with the offender's capacity to "dry up the spring of evil in [his] soul,"²¹ for the benefit of society or of himself.

Before embarking on the case studies, I will briefly explain how remorse fits into the overall structure of the juvenile and criminal justice systems.

I. LOOKING INTO ANOTHER'S SOUL: ARCHETYPAL CASES

Interpretation cannot approach the emotions directly, but must wait until they are clothed in some representation or statement. . . . The interpreter may understand too narrowly or crudely.

Philip Rieff²²

Prologue

From its beginnings in the late nineteenth and early twentieth centuries, the juvenile justice system has been based on different assumptions and purposes than the criminal system. Rather than assuming free will and individual accountability, it has presupposed determinism.²³ Rather than viewing character as relatively fixed, it has seen character as malleable.²⁴ And rather than seeking to punish, it has endeavored to treat or rehabilitate.²⁵

The dividing line between these two systems has traditionally been set on the basis of age; however, juvenile courts have long had authority to "waive" or "transfer" jurisdiction over a particular youthful offender to the criminal system. In recent years, thanks to a perceived increase in juvenile crime and more pessimistic attitudes about reforming young offenders, legislatures in numerous jurisdictions have enacted statutes making such transfers easier.²⁶ In addition, where the juvenile is charged

20. 10 The Interpreter's Bible 359-60 (George Arthur Buttrick et al. eds., 23d prt. 1980) (1953); see also *infra* notes 351-352 and accompanying text.

21. Heinrich Oppenheimer, *The Rationale of Punishment* 242 (Patterson Smith 1975) (1913). For the full quotation, see *infra* note 342.

22. Philip Rieff, *Freud: The Mind of the Moralist* 117, 152 (Anchor Books 1961).

23. See Frederic L. Faust, *A Perspective on the Dilemma of Free Will and Determinism in Juvenile Justice*, in *Juvenile Justice Philosophy* 405, 405 (Frederic L. Faust & Paul J. Brantingham eds., 2d ed. 1979) [hereinafter *Juvenile Justice Philosophy*]; Barry C. Feld, *Cases and Materials on Juvenile Justice Administration* 2-4 (2000).

24. Cf. Introduction to *Juvenile Justice Philosophy*, *supra* note 23, at 1, 9-10 ("Further, the founders of the juvenile court believed that . . . the older a pauper or criminal was, the less chance for cure. A troublesome child was only newly infected with the illness of crime and was therefore the easiest patient to cure.")

25. See *In re Gault*, 387 U.S. 1, 15-16 (1967).

26. For discussions of the recent legislative changes making it easier to prosecute juveniles as adults, see Feld, *supra* note 23, at 401-02; Wayne A. Logan, *Proportionality*

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with a particularly serious offense, states have passed laws placing the child or adolescent under criminal jurisdiction from the start, either with or without the possibility of being transferred back to Juvenile Court.²⁷

Remorse or its absence comes into play in such transfer decisions because of the Juvenile Court's historic mission of rehabilitation. Courts and legislatures have assumed that contrition for past wrongdoing augurs well for rehabilitation. Conversely, they have taken for granted that the failure to show repentance bodes ill for treatment and argues in favor of treating the child as an adult.²⁸

If the juvenile is transferred into the criminal system and convicted of a crime, remorse may again play a role. As was mentioned above, in many states, remorse and remorselessness have been held relevant to sentencing.²⁹ In capital cases, specifically, remorse may be taken into account as a mitigating factor, whereas lack of remorse may constitute the aggravating factor needed to put the defendant to death.³⁰

A. *Avoiding Painful Knowledge: The Cameron Kocher Case*

When I thought to know this, it was too painful for me.
Psalms 73:16 (King James)

Minutes after shooting Jessica Ann Carr with a rifle, nine-year-old Cameron Kocher walked by the living room on his way to play Nintendo. As he passed the dying girl, he spoke to a playmate in words that would prove all too quotable in the months ahead: "If you don't think about it, you won't be sad."³¹

It was a Monday, March 6, 1989. In the Pocono Mountains of northeastern Pennsylvania, heavy snow had fallen, causing authorities to close the schools in the rural village where the Kochers lived. Cameron Kocher's parents, a laborer and a factory worker, were obliged to report for work, so they left their son with neighbors, Mr. and Mrs. Richard Ratti. As it happened, the Rattis were also hosting another child: Jessica Ann Carr, seven years old.³²

During the early part of the day, the children remained inside, playing Nintendo. While they played, Jessica bragged about being better at the game than Cameron: "Now I can get further than you," she said. "I beat the dragon."³³ At some point, Mr. Ratti discovered that the children

and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 687-89 (1998).

27. See Logan, *supra* note 26, at 688-89.

28. See Slobogin, *supra* note 7, at 310.

29. See cases cited *supra* note 5.

30. See Eisenberg, *supra* note 6, at 1606-33; Sundby, *supra* note 6, at 1560.

31. *Commonwealth v. Kocher*, 602 A.2d 1308, 1312 (Pa. 1992).

32. See Anthony DePalma, *Grieving for Dead Girl, Town Asks: Should Boy, 10, Face Murder Charge?*, N.Y. Times, Aug. 26, 1989, at A6.

33. George Esper, *Children Who Kill: Girl's Death Raises Issue of What to Do with 11-Year-Old in Murder Case*, L.A. Times, Aug. 19, 1990, at A6.

had made a mess in the kitchen, leaving dirty cups and bowls strewn about. As punishment, he required them to stop playing the game. Cameron then became annoyed; he complained that he had not made a mess and should not be punished with the others.³⁴

Thereafter, some of the children went outside and began riding snowmobiles, but Cameron returned to his own house, where he climbed the stairs and entered his parents' second-story bedroom. After unlocking his father's gun cabinet, he took out a hunting rifle and loaded it with bullets. He then opened the bedroom window, removed the screen, and pointed the gun outside, in the direction of the playing children. The rifle discharged, fatally wounding Jessica Ann Carr. A few minutes later, Cameron returned to the neighbors' residence, where he made the remark quoted above.³⁵

1. *The Image of a Cold, Uncaring Child.* — Under Pennsylvania law, in any case in which a murder is alleged, jurisdiction vests in the criminal court,³⁶ and so it was that when Cameron Kocher was charged with murder he came under the jurisdiction of the adult system. However, thanks to an amendment passed in 1972, a juvenile charged with murder may petition for transfer to the juvenile court. In deciding on such a petition, the criminal court shall, in its discretion, consider "whether the child [charged with murder] is amenable to treatment, supervision or rehabilitation" under the juvenile court.³⁷

In this instance, the Court of Common Pleas denied Cameron's petition for transfer, and Cameron appealed to the Pennsylvania Supreme Court. In its opinion, the Supreme Court reviewed the factors the lower court had considered unfavorable to the transfer. Concluding a brief list, the Court said: "He appeared to show no remorse for the crime. The petitioner was quoted as saying, 'If you don't think about it, you won't be sad,' to one of the neighbors' children as the victim lay dying in the Rattis' home. These factors weighed heavily against [his] petition for transfer."³⁸ Without explicitly saying so, the Supreme Court here seemed to concur in the lower court's interpretation of Cameron's remark as indicative of a cold, uncaring child.

In the end, the Pennsylvania Supreme Court reversed the denial of the petition, holding that the lower court had abused its discretion; however, it did not base its holding on the court's treatment of remorselessness. Rather, it found that the Court of Common Pleas had wrongly interpreted the transfer provision of the Juvenile Act.³⁹

34. See *Kocher*, 602 A.2d at 1309; *Esper*, supra note 33.

35. See *Kocher*, 602 A.2d at 1309–10, 1312.

36. Juvenile Act, 42 Pa. Cons. Stat. Ann. §§ 6302, 6322, 6355 (2000).

37. *Id.* §§ 6322, 6355(a)(4)(iii)(G).

38. *Kocher*, 602 A.2d at 1312.

39. The lower court had required Kocher to show that a mental illness or defect had caused him to kill in order to demonstrate "that he is amenable to treatment, supervision,

Judge Larsen dissented from the Supreme Court's opinion. In so doing, he, like the Court of Common Pleas, and like the majority of his own court, emphasized the nine-year-old's lack of remorse. Similar to the other interpreters, he based his inference on Cameron's apparent indifference while walking by the body moments after the crime. In addition, he highlighted Cameron's improper behavior in resuming a game as the girl lay dying. In the judge's words: "When [Cameron] returned to his neighbor's residence where the victim had been taken after the shooting, he exhibited no emotion on viewing her moribund body and proceeded to play Nintendo as if nothing were amiss."⁴⁰

Before the case could be remanded for proceedings in accordance with the Pennsylvania Supreme Court's opinion, Cameron pleaded guilty to involuntary manslaughter. He was placed on probation until the age of twenty-one.⁴¹

2. *Dwelling in the Realm of Fantasy.* — In *Commonwealth v. Kocher*, a defendant's inability to show "appropriate" grief and regret played a critical role in the legal proceedings. More specifically, two levels of the Pennsylvania state judiciary viewed this child as unrepentant because he glibly expressed his intention of controlling his thoughts to prevent sadness. The courts' inference is open to question because children are especially likely to employ the defense mechanism of denial. Children are less under the sway of the reality principle, more under that of the pleasure principle; to a greater extent than adults, they dwell in the realm of fantasy. As psychologist Ruth Munroe explains:

During the magical years of childhood, denial of reality is much easier

. . . .

As the ego matures in its reality function and the inner life takes on more structure, such a solution must be discarded as a major defense. . . . [O]nly in very grave pathology—e.g., in psychotic delusions—can the adult so override the dictates of common sense as to deny directly an important fact.⁴²

Besides their greater tendency to use denial, children's short sadness span may also cause them to seem remorseless. Children have a lower tolerance for depressive moods than adults; in the face of troubling circumstances, they exhibit a "desperate effort to recapture pleasurable feel-

and rehabilitation under the juvenile system." *Id.* at 1313. The Pennsylvania Supreme Court held that this was too narrow a construction of the statute. See *id.* at 1313–14.

40. *Id.* at 1316–17 (Larsen, J., dissenting).

41. A. J. Hostetler, *Boy Convicted of Manslaughter in Death of Playmate*, 7, *Harrisburg Patriot*, Sept. 3, 1992, at B1.

42. Ruth L. Munroe, *Schools of Psychoanalytic Thought* 258–59 (Theodore M. Newcomb ed., 1955) (emphasis omitted); see also Freud, *The Ego and the Mechanisms*, *supra* note 13, at 83 ("For some years the infantile ego is free to get rid of unwelcome facts by denying them, while retaining its faculty of reality testing unimpaired.")

ings."⁴³ Their success in doing so shores up the defense against ugly realities, for "if one does not feel bad, then nothing bad has happened."⁴⁴

In cases involving homicide, still another factor militates against the straightforward interpretation of a child's seeming remorselessness—namely, the child's weaker grasp of death. As examined in a vast psychological literature, the understanding of death can be broken down into three aspects:

Universality, the understanding that *all* living things must die; *Irreversibility*, the understanding that once a living thing dies, its physical body cannot ever be made alive again—i.e., that the death of the body is *unconditionally* irreversible; and *Nonfunctionality*, the understanding that once a person's body is dead it cannot do *any* of the things it did when it was alive (e.g., eating, breathing, loving, learning).⁴⁵

Researchers have not yet reached a definitive answer as to the age when most children comprehend death in these three senses.⁴⁶ When studies have focused on each of the three components of death separately, they have found that the majority of children understand that specific component by age seven.⁴⁷ Nevertheless, when studies have focused on all three components, taken together, they have concluded that "a mature understanding of death . . . probably does not occur for most children until at least age ten."⁴⁸ In an additional complication, researchers report that comprehension of death may not develop in linear fashion, correlated with age.⁴⁹ In one study, for example, a higher percentage of third graders than second graders thought that a dead person might come back to life, and that dead people might be able to do the same things they did while alive.⁵⁰ Of course, all these studies present their conclusions in terms of the majority of a given age. There are always some children whose comprehension is less developed than most in

43. Martha Wolfenstein, *How Is Mourning Possible?*, in 21 *The Psychoanalytic Study of the Child* 93, 101 (Ruth S. Eissler et al. eds., 1966) [hereinafter Wolfenstein, *Mourning*].

44. *Id.*

45. Brent et al., *The Development of the Concept of Death*, *supra* note 15, at 68.

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46. For a discussion of the "slow progress in this area, despite the number of studies it has generated," see Mark W. Speece & Sandor B. Brent, *The Development of Children's Understanding of Death*, in *Handbook of Childhood Death and Bereavement* 29, 29–30 (Charles A. Corr & Donna M. Corr eds., 1996).

47. See Mark W. Speece & Sandor B. Brent, *The Acquisition of a Mature Understanding of Three Components of the Concept of Death*, 16 *Death Stud.* 211, 212 (1992) [hereinafter Speece & Brent, *The Acquisition of a Mature Understanding*].

48. *Id.* at 225.

49. See Silverman, *supra* note 15, at 48 ("[A] child's view of death may not move in a simple straight trajectory . . ."); Maria Cuddy-Casey & Helen Orvaschel, *Children's Understanding of Death in Relation to Child Suicidality and Homicidality*, 17 *Clinical Psychol. Rev.* 33, 38 (1997) (citing studies whose findings "challenge the assumption that children develop their concepts of death in a linear, sequential pattern and as a function of age, alone").

50. See Speece & Brent, *The Acquisition of a Mature Understanding*, *supra* note 47, at 225.

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their age group. As one child psychiatrist remarked to me: “These things are very individual.”⁵¹

If, because of his developmental stage, Cameron Kocher employed denial more easily than adults, had a shorter sadness span, or lacked a mature comprehension of death, then it was unreasonable to expect him to show, or even feel, the “gnawing from the inmost heart” that is remorse.

B. *A Time to Weep and a Time to Laugh: The Gina Grant Case*

To every thing there is a season
A time to weep, and a time to laugh
Ecclesiastes 3:1–4 (King James)

In the early morning hours of September 13, 1990, in Lexington, South Carolina, a fourteen-year-old girl killed her mother by bashing her head over and over with a heavy crystal candlestick. Attractive and bright, Gina Grant was an honor student who had been the first female president of the student body at Lexington Middle School. To all appearances, she exuded success and promise; however, in the privacy of her home, her life was troubled. Her father had died of lung cancer when she was eleven years old. Her mother was an alcoholic given to uncontrolled rages. She had reputedly threatened to kill Gina in the weeks prior to the crime.⁵²

Following the discovery of her mother’s body, Gina first blamed intruders for the crime.⁵³ Then she changed her story, describing a fight that culminated in her mother’s suicide.⁵⁴ The investigators found this tale improbable. When they searched the house, they found incriminating evidence in Gina’s bedroom closet: bloody towels and a crystal candlestick inside a black garbage bag. At that point, Gina was charged with murder.⁵⁵

1. *A “Sociopath with No Conscience”?* — A few hours after her mother’s death, an incident occurred that, like Cameron Kocher’s remark, would have a lasting impact on perceptions of the youthful offender’s character. Gina was entering the ladies’ room in the company of a female police officer when she quipped: “Don’t worry, I don’t have body parts in my pocket.”⁵⁶ Word of this incident reached James R. Metts, Sheriff of Lex-

51. Telephone Interview with Shannon Croft, M.D., Assistant Professor of Psychiatry & Behavioral Sciences, Emory University (May 3, 2000).

52. Jane Mayer, *Rejecting Gina*, *New Yorker*, June 5, 1995, at 43, 43–48.

53. Fox Butterfield, *After Rejection by Harvard, Questions in Mother’s Death*, *N.Y. Times*, Apr. 25, 1995, at A12 [hereinafter *Butterfield, After Rejection by Harvard*].

54. Mayer, *supra* note 52, at 44–45.

55. *Id.*

56. *Id.* at 47.

ington County, who concluded that she was a "sociopath with no conscience";⁵⁷ it was a diagnosis he would often repeat in the years ahead.⁵⁸

Despite a law against revealing the identity of a juvenile offender, Sheriff Metts released Gina's name to the media the next day. But the loss of her anonymity helped as much as hurt the girl. As news of her crime spread, so also did news of the abuse—both physical and emotional—that Gina had endured. Physically, she was believed to have been the object of her mother's battering. Although there had been no witnesses, Gina's numerous injuries, poorly explained, were recalled after her mother's death. Emotionally, she was the victim of her mother's rages, belittling denunciations, and neglect. After her father's death, her mother forbade her to keep a photograph of him in the home. On one occasion, Gina was left alone at age eleven with the corpse of her mother's male friend, who had died during the night. Many people in Lexington knew Gina personally; they harbored sympathy and guilt over what she had suffered.⁵⁹

Because of this sympathy, and because of the self-defense aspect of the case, the prosecutor feared an acquittal in the event the case went to trial. For its part, the defense team feared that Gina's coverup and contradictory stories might lead to a conviction. For their respective reasons, then, both sides allowed Gina to plead no contest to voluntary manslaughter. Following the plea bargain, the Family Court Judge, Marc Westbrook, sentenced Gina to about a year in prison, taking into account her time served in pretrial detention. In September 1991, he released her into the custody of her aunt and uncle in Massachusetts, with the understanding that they would place her in a treatment center for girls considered dangerous to themselves or others.⁶⁰ In so doing, Judge Westbrook overruled the unanimous decision of the South Carolina parole board that Gina should not be released because she had demonstrated no repentance.⁶¹

2. *The Ongoing Stigma.* — Three years later, Gina Grant again came into the national spotlight after Harvard University admitted her into its freshman class. Following Harvard's decision, the *Boston Globe Magazine* included Gina in a story about young people who had succeeded in life despite great obstacles.⁶² Based on an interview with the young woman herself, the article presented her as an orphan, but made no mention of her role in her mother's death.⁶³ The day after the story appeared, the Harvard Admissions Office received a bundle of newspaper clippings

57. *Id.*

58. William H. Honan, For Student Who Killed Her Mother, Acceptance, N.Y. Times, June 11, 1995, at A34.

59. Mayer, *supra* note 52, at 45–47.

60. *Id.* at 49.

61. Butterfield, After Rejection by Harvard, *supra* note 53.

62. Maria Karagianis, Beating the Odds, B. Globe Mag., Apr. 2, 1995, at 28.

63. *Id.* at 28, 49.

from an anonymous source, detailing Gina's crime. Soon Harvard, followed by Columbia and Barnard, rescinded its admission.⁶⁴

In the national debate that ensued, a central topic was Gina's alleged failure to express remorse. A headline in the *Boston Herald* read: "Prosecutors: Grant had no remorse over killing."⁶⁵ The article quoted the prosecutor in the original case as saying: "We never . . . had any question whatsoever about her mind. . . . We had a tremendous question about her heart. Because I don't see where she showed any remorse whatsoever."⁶⁶ On an episode of the television show *Crossfire*, Robert Novak, one of the hosts of the program, commented: "[W]hen I read that Miss Grant . . . never showed any remorse over the beating the brains out of her mother, I just wondered maybe—if I were at Harvard, maybe I would consider, 'Is that the kind of person I want at my university?'"⁶⁷

In response to all the controversy surrounding her, Gina herself has said: "I've had a lot of problems showing how sorry I am."⁶⁸

3. *Of Silence and Levity.*

a. *Problems Showing Sorrow.* — How could it be that someone would have "problems showing sorrow?" If she was truly sorrowful, why would showing it be difficult? And why, in the flippant remark about body parts, did Gina express herself with a levity that, to some observers, reflected the exact opposite of remorse?

Before addressing the developmental aspects of the case, I would emphasize that even adults do not always express their deepest feelings in a socially approved way. Arthur Miller's play *The Crucible* beautifully illustrates this point toward the middle of Act Four, when John Proctor's execution is fast approaching. Seeking to save him, Judge Danforth and Reverend Hale implore Elizabeth Proctor, herself imprisoned as a witch, to prevail upon her husband to confess his witchcraft. As the play continues:

[Danforth:] *She is silent.* Are you stone? I tell you true, woman, had I no other proof of your unnatural life, your dry eyes now would be sufficient evidence that you delivered up your soul to Hell! A very ape would weep at such calamity! Have the devil dried up any tear of pity in you? *She is silent.*⁶⁹

We, the readers and viewers of the play, know, of course, that it is not in Elizabeth's nature to show emotion, even in private. We know, too, that she has her husband's deepest interest at heart—an interest greater

64. Honan, *supra* note 58.

65. Jules Crittenden, Prosecutors: Grant Had No Remorse Over Killing, *B. Herald*, Apr. 9, 1995, at 7.

66. *Id.*

67. *Crossfire* (CNN television broadcast, Apr. 12, 1995).

68. Fox Butterfield, Student Whose Acceptance to Harvard Was Rescinded Because of Killing Faces New Charges, *N.Y. Times*, Apr. 14, 1995, at A6.

69. Arthur Miller, *The Crucible*, in *The Crucible: Text and Criticism* 1, 132–33 (Gerald Weales ed., 1971).

than survival—when she refuses to urge his false confession. Nevertheless, the court, similar to many observers of Gina Grant, assumes that Elizabeth's silence bespeaks an unnatural evil, for as Judge Danforth says, in such circumstances, "[a] very ape would weep."

If adults sometimes resist showing emotion publicly, especially when pressed to do so by authorities, how much more is this true of adolescents. Consider the reaction of King Lear's youngest daughter, Cordelia, when her father insists she compete with her sisters in proclaiming her love:

Lear: [W]hat can you say to draw
A third more opulent [property] than your sisters'? Speak.
Cordelia: Nothing, my lord. . . .
Lear: Nothing will come of nothing. Speak again.⁷⁰

But Cordelia, put off by her sisters' extravagant claims of devotion, resists his plea:

Unhappy that I am, I cannot heave
My heart into my mouth.⁷¹

No more, perhaps, could Gina. Of course, in Gina's case, we are not dealing with a fictional girl who merely refuses to humor her aging parent's narcissism, but with a flesh and blood teenager who killed her parent and then could not, or would not, say she was sorry. What light can developmental psychology shed on her silence?

At the time of her crime, Gina Grant was at the stage that psychologists call "middle" or even "early" adolescence. As a point of reference, she was about the age of Juliet Capulet in Shakespeare's *Romeo and Juliet* or Anne Frank in the middle of the *Diary*. Adolescents are, to be sure, more developmentally advanced than children; however, relative to adults, they still use denial more frequently and have a weaker grasp of the concept of death. They also have other characteristics that would affect their ability to feel or show remorse. For example, precisely because they have just passed out of childhood, they exhibit an "ever-present fear of regression [that] may manifest itself in . . . an inhibition of crying."⁷²

As a complicating factor in Gina's case, we are dealing with the death of a *parent*. Relationships with parents are frequently characterized by

70. William Shakespeare, King Lear act 1, sc. 1, ll. 85–87, 90, in *The Complete Works of Shakespeare* 1172, 1173 (David M. Bevington ed., 4th ed. 1997) [hereinafter *The Complete Works*].

71. *Id.* act 1, sc. 1, ll. 91–92, in *The Complete Works*, supra note 70, at 1172, 1173. Later in the same exchange, King Lear utters the words I have adopted for my title. *Id.* l. 107.

72. Garber, supra note 16, at 384.

alternating feelings of love and hate, or ambivalence,⁷³ and ambivalence renders the experience of grief especially difficult.⁷⁴

Still another reason for the adolescent's failure to mourn is that doing so would mean acknowledging that the loss is irrevocable. "If I cry, then she really is dead."⁷⁵ Thus, a failure to weep reinforces the wish-fulfilling denial of a painful loss. In her seminal essay, *How is Mourning Possible?*, Martha Wolfenstein describes the case of fifteen-year-old Ruth: "Shortly after her mother's funeral Ruth found herself no longer able to cry. She felt an inner emptiness, and as if a glass wall separated her from what was going on around her. She was distressed by this affectlessness" ⁷⁶ In a similar vein, Gina's rueful statement about her problems showing sorrow may reflect guilt over her lack of feeling. As Robert J. Lifton writes of the survivors of Hiroshima: "Psychic closing-off . . . has its own cost in the currency of guilt and shame."⁷⁷

Of course, in Gina's case, where her mother was severely abusive, and even caused her daughter to fear for her life, it may be unreasonable to expect mourning of the death itself. Perhaps it would be more likely that she would mourn her former self,⁷⁸ her loss of innocence, and the maternal nurturing she never had.

b. *Gina's Joke*. — Let us turn now to the other basis of Gina's "remorselessness," the sardonic comment she made to the female police officer: "Don't worry, I don't have body parts in my pocket." It is easy to understand why the sheriff reacted so strongly to Gina's remark. First, the observation conveys a disrespectful levity, an irreverence, which probably suggested to him that the girl did not recognize the seriousness of her crime. Second, the easy reference to "body parts" may have given him the impression that Gina was exceptionally depraved. Her expression brings to mind the crime of mayhem, one of the original felonies at common law, which today refers to any type of dismemberment or disfig-

73. See Charles Brenner, *An Elementary Textbook of Psychoanalysis* 106, 109–10 (rev. ed. Anchor Books 1974) (1955) (explaining Freud's belief that ambivalence toward one's parents is common and persists throughout life); see also Alexander Mitscherlich, *Society Without the Father: A Contribution to Social Psychology* 173–74 (Eric Mosbacher trans., HarperPerennial 1993) (1963) (discussing children's natural ambivalence toward their parents).

74. See Wolfenstein, *Death of a Parent and Death of a President*, supra note 2, at 81 ("[C]onflicting feelings toward the lost object may interfere with a grief reaction."); cf. Robert Jay Lifton, *Preface to Alexander & Margarete Mitscherlich, The Inability to Mourn: Principles of Collective Behavior* vii, vii (1975) ("But what if one discovers evil in what one has lost[?] . . . Is it then possible to mourn?").

75. Cf. Wolfenstein, *Death of a Parent and Death of a President*, supra note 2, at 81 ("If one begins to weep for the lost person it is a step toward acknowledging the reality of the loss.").

76. Wolfenstein, *Mourning*, supra note 43, at 100.

77. Robert J. Lifton, *Death in Life: Survivors of Hiroshima* 35 (1967). Lifton describes survivors who, confronted with horrific scenes of death and destruction, "ceased to feel," id. at 31, and later reproached themselves for their "pitiless" attitude, id. at 35–36.

78. See id. at 484.

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urement. Often considered an aggravating factor for purposes of sentencing, mayhem is viewed as an indicator of moral turpitude.

Nevertheless, more charitable interpretations of the remark are possible; for example, Gina may have blurted out the joke from a need to release tension in a strange, frightening situation. Humor is, after all, a defense mechanism, which may serve to ward off painful emotions such as fear and anxiety.⁷⁹ Alternatively, Gina may have been trying to put the officer at ease. On some level, it must have occurred to both of them that they were replicating the situation of the original crime, as Gina and the officer, an older female, entered a place of relative seclusion. Finally, Gina must have been in a state of shock. In one night, she had gone from being a respected honor student and popular leader to being a matricide. In her mind, perhaps, she continued to see herself as the witty, playful girl she was before—having not yet caught up with the person she had become.

But whatever the motivation of Gina's joke, its negative reception reminds us that remorse has to do with propriety and etiquette as well as with inner feelings. If the expression of remorse is acquired behavior, then we should be especially troubled about demanding remorse in juvenile offenders. They have had fewer years to learn that there is "a time to weep and a time to laugh."

C. *Sleep as Evidence of Depravity: The Christopher Thomas Case*

"You could sleep, too, couldn't you? . . . The mark of a true killer."

Joseph L. Mankiewicz, *All About Eve*⁸⁰

Sleep is a death; O, make me try,
By sleeping, what it is to die;
Sir Thomas Browne⁸¹

Years later, when awaiting execution on death row, Chris Thomas would muse over the fact that he, an essentially peaceful person, had murdered two people in the throes of an adolescent passion.⁸² Seventeen years old at the time, he had been living with his aunt and uncle in Middlesex County, Virginia. While there, he became romantically involved with a fourteen-year-old neighbor, Jessica Wiseman. In the

79. See W.W. Meissner et al., *Classical Psychoanalysis*, in 1 *Comprehensive Textbook of Psychiatry* II 482, 536 (Alfred M. Freedman et al. eds., 2d ed. 1975) (categorizing humor as a defense mechanism and describing wit, specifically, as involving "distraction or displacement away from the affective issue").

80. Joseph L. Mankiewicz, *All About Eve* (screenplay), in *More About All About Eve* 111, 326 (1951).

81. Sir Thomas Browne, *Religio Medici* (1643), reprinted in *Browne's Religio Medici* 85 (Ernest Rhys ed., *Everyman's Library* 1906).

82. See Patti Rosenberg, *Man Executed for Murders Committed at 17: Gilmore, High Court Say No to Appeals*, *Daily Press* (Newport News, Va.), Jan. 11, 2000, at A1 [hereinafter *Rosenberg, Man Executed for Murders*].

months before the shootings, Jessica's parents, J.B. and Kathy Wiseman, had been threatening to end their daughter's relationship with Chris. Already, Mrs. Wiseman had obliged her daughter to return Chris's class ring.⁸³

According to his confession, Chris did not want to kill the Wisemans, but after much discussion, in the early morning hours of November 10, 1990, he acceded to Jessica's wishes. He said that he shot at both victims from the doorway of their bedroom without really being able to see them. When Kathy Wiseman, despite her injuries, managed to rise and walk to her daughter's bedroom, he shot her again at Jessica's frantic urging.⁸⁴

1. *A Jury Assesses Vileness.* — Chris Thomas pled guilty to the murder of J.B. Wiseman and not guilty to the capital murder of Kathy Wiseman. After waiving his right to a transfer hearing, Chris was tried as an adult for the murder of Kathy Wiseman.⁸⁵ The jury found him guilty. At the sentencing phase of the trial, Chris's uncle testified that he arrived home between 7:00 and 7:30 AM to find Chris and Jessica "close together" on the sofa, asleep.⁸⁶ When the defense counsel objected that this testimony was irrelevant, the Commonwealth's Attorney replied that "the fact 'these two . . . right after the murder . . . were there just lying on the sofa asleep' was evidence of Thomas's lack of remorse sufficient to support a finding of 'future dangerousness or vileness.'"⁸⁷ Based on the aggravating factor of "vileness," the jury sentenced Chris to death.⁸⁸

On appeal, Chris's attorneys argued that the prosecutor's statement about Chris's lack of remorse was irrelevant and inflammatory. Rejecting this argument, the Virginia Supreme Court held that lack of remorse was properly considered by the jury in a capital case because of its relevance to the determination of two aggravating factors, at least one of which is required to sentence a defendant to death.⁸⁹ These factors are: (1) "whether the defendant 'would in all probability commit criminal acts of violence in the future,'"⁹⁰ and (2) whether the defendant exhibited "vileness."⁹¹ The Virginia Code explains "vileness" as involving "torture, depravity of mind or an aggravated battery to the victim."⁹²

After completing its review of the facts, the Virginia Supreme Court upheld the death sentence, stating: "Only a person of depraved mind could plan and commit the execution-style killings this record reveals yet

83. *Thomas v. Commonwealth*, 419 S.E.2d 606, 608 (Va. 1992).

84. *Id.* at 613.

85. *Id.* at 608–09.

86. *Id.* at 619.

87. *Id.*

88. *Id.*

89. Va. Code Ann. § 19.2-264.2 (Michie 1950).

90. *Thomas*, 419 S.E. 2d at 619 (quoting *Clark v. Commonwealth*, 257 S.E.2d 784, 790 (Va. 1979)).

91. *Id.* (citing *Bunch v. Commonwealth*, 304 S.E.2d 271, 282 (Va. 1983)).

92. *Id.* (citing Va. Code Ann. § 19.2-264.2).

show no remorse or regret for his actions."⁹³ All appeals and pleas for clemency having been denied, Chris Thomas was put to death on January 10, 2000.⁹⁴

2. *Challenging the Court's Interpretations.*

a. *The Many Meanings of Sleep.* — In *Thomas v. Commonwealth*, the prosecutor, trial court, and Virginia Supreme Court all associated the capacity to sleep on the morning after a murder with an absence of remorse over the crime. It is no mystery where this association comes from; it pervades our culture through common sayings such as, "I don't know how his conscience lets him sleep at night." Literary classics likewise suggest that sleep is sinful when the sleeper thereby avoids a moral duty. For example, in John Bunyan's *The Pilgrim's Progress*, Christian stops to take a nap on his way to the Celestial City.⁹⁵ Upon resuming his journey, he finds that he has lost his "roll," which he must present to gain admission at the Celestial Gate.⁹⁶ Then he exclaims: "O wretched man that I am, that I should sleep in the day-time, that I should sleep in the midst of difficulty, that I should so indulge the flesh as to use that rest for ease to my flesh."⁹⁷ So also Jesus rebuked the disciples when they fell asleep at Gethsemane on his last night alive. "What, could ye not watch with me one hour?" he asked. "[T]he spirit indeed is willing, but the flesh is weak."⁹⁸

While these examples reflect the general association between moral weakness and sleep, more directly relevant to our theme is Shakespeare's tragedy *Macbeth*, in which murder, remorse, and sleeplessness are as deeply entwined as anywhere in literature.⁹⁹ Immediately after killing King Duncan, Macbeth tells his wife:

Methought I heard a voice cry "Sleep no more!
Macbeth does murder sleep," the innocent sleep,
Macbeth shall sleep no more.¹⁰⁰

As time passes, Lady Macbeth, who before the murder of Duncan had been utterly lacking in scruples, becomes increasingly consumed with guilt. Her remorse surfaces in her obsessive hand-washing motions

93. *Id.* at 620.

94. Rosenberg, *Man Executed for Murders*, supra note 82. As for Jessica Wiseman, the law precluded trying her as an adult because she was only fourteen at the time of the crime. She received the maximum sentence the law allowed: confinement in a juvenile facility until age twenty-one. *Id.*

95. John Bunyan, *The Pilgrim's Progress* 37 (E.W. Walters ed., Cokesbury Press n.d.) (1678).

96. *Id.*

97. *Id.*

98. Matthew 26:40–41 (King James).

99. William Shakespeare, *Macbeth* act 2, sc. 2, in *The Complete Works*, supra note 70, at 1219, 1231–32.

100. *Id.* act 2, sc. 2, ll. 39–40, 47, in *The Complete Works*, supra note 70, at 1219, 1232.

and her “slumbery agitation”:¹⁰¹ sleepwalking. When Macbeth inquires about his wife’s condition, the doctor replies:

Not so sick, my lord,
As she is troubled with thick-coming fancies
That keep her from her rest.¹⁰²

If Lady Macbeth exemplifies the remorse-*stricken* conscience that prevents peaceful sleep, Eve Harrington, in the movie *All About Eve*, exemplifies the remorseless conscience that permits repose despite the sleeper’s deceitful and injurious acts.¹⁰³ An aspiring actress, ambitious to a fault, Eve betrays and lies to the very people who help her most. She has managed to steal the theatrical part of one woman, and expects to steal the husband of another. On the afternoon of her opening night, the culmination of her many traitorous acts, the cynical drama critic, Addison DeWitt, observes that Eve is planning to nap and says:

You could sleep, too, couldn’t you? . . . The mark of a true killer.¹⁰⁴

Literature thus provides support for the Virginia courts’ seemingly facile equation of sleep with remorselessness. But many literary works also resonate with a different view: to wit, that sleep may signify a regressive escape from those “thick-coming fancies,”¹⁰⁵ the “perilous stuff [w]hich weighs upon the heart.”¹⁰⁶ Consider, for example, Shelley’s poem:

I could lie down like a tired child,
And weep away the life of care
Which I have borne and yet must bear,
Till death like sleep might steal on me.¹⁰⁷

In a similar vein, Hamlet’s soliloquy employs sleep as a metaphor for death, the ultimate relief from life’s sufferings:

To die, to sleep—
No more—and by a sleep to say we end
The heartache and the thousand natural shocks
That flesh is heir to. ‘Tis a consummation
Devoutly to be wished.¹⁰⁸

More than a regressive defense against an unbearable reality, sleep may manifest a yearning to be caught and punished for a crime, as we see

101. *Id.* act 5, sc. 1, l. 10, in *The Complete Works*, supra note 70, at 1219, 1249.

102. *Id.* act 5, sc. 3, ll. 39–41, in *The Complete Works*, supra note 70, at 1219, 1251.

103. Mankiewicz, supra note 80.

104. *Id.* at 326.

105. William Shakespeare, *Macbeth* act 5, sc. 3, l. 40, in *The Complete Works*, supra note 70, at 1219, 1251.

106. *Id.* act 5, sc. 3, ll. 46–47, in *The Complete Works*, supra note 70, at 1219, 1251.

107. Percy Bysshe Shelley, *Stanzas Written in Dejection, Near Naples*, stanza 4, in *The Poetical Works of Shelley* 373, 373 (Newell F. Ford ed., Houghton Mifflin Co. 1975) (1824).

108. William Shakespeare, *Hamlet, Prince of Denmark* act 3, sc. 1, ll. 61–65, in *The Complete Works*, supra note 70, at 1060, 1087.

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in Dostoevsky's *Crime and Punishment*.¹⁰⁹ Near the beginning of the novel, the lapsed law student, Rodya Raskolnikov, murders the old pawnbroker and her sister Lizaveta, then returns to his room, where he lies down and eventually falls asleep. Upon waking, he realizes with amazement that incriminating evidence is lying about but cannot keep himself from falling asleep again.¹¹⁰ When he awakes, he exclaims: "How could I have fallen asleep again, when nothing has been done!"¹¹¹ Later, after dozing off once more and being awakened by the maid, he sees that "in his right hand [are] the cut-off pieces of [blood-stained] fringe, the [blood-soaked] sock, and the [stained] scraps of the torn-out pocket. He had slept with them like that."¹¹² This is the reader's first indication that Raskolnikov has not been able to commit the perfect crime, that he is not, after all, a Nietzschean superman with no conscience. His act of falling asleep when it was inexpedient to do so makes him seem more deeply human and foreshadows his ultimate redemption.

Falling asleep as an unconscious expression of the wish to be caught can also be seen in actual prison memoirs, such as Malcolm Braly's *False Starts: A Memoir of San Quentin and Other Prisons*.¹¹³ In an early phase of his criminal career, seventeen-year-old Braly goes out to play pool wearing a gabardine topcoat he has stolen. In the pool hall, the original owner recognizes the coat and confronts him. They go together to the police station, where Braly makes up a false story and leaves. Describing his actions from that moment, Braly writes: "I went back to the hotel. My suitcases were full of stolen clothes, some still in the laundry wrappers. I considered getting rid of them. I considered leaving town, heading north into the woods and the logging camps. Right then. Instead I went to sleep."¹¹⁴ The next morning the sheriff awakes him, and Braly realizes that he himself "stood aside and allowed [his] arrest."¹¹⁵ This story highlights that the act of sleeping, like any other act, has multiple and opposed meanings. Far from bespeaking an absence of conscience in every case, it may, in some individuals, reflect a profound sense of guilt.

b. *Developmental Aspects of Chris Thomas's "Remorselessness."* — Thus far, I have not used the theory of developmental stages to inform my interpretation of Chris's "lack of remorse." Age may not explain the fact that Chris fell asleep, but it may illuminate other aspects of his remorselessness. For instance, Chris's deeply romantic attitude toward love, which is especially characteristic of adolescents, may shed light on his ap-

109. Fyodor Dostoevsky, *Crime and Punishment* (Richard Pevear & Larissa Volokhonsky trans., Alfred A. Knopf 1992) (1866).

110. Id. at 89–90.

111. Id. at 90.

112. Id. at 92–93.

113. Malcolm Braly, *False Starts: A Memoir of San Quentin and Other Prisons* 35 (1976).

114. Id.

115. Id. at 39.

parent indifference in the aftermath of his crime.¹¹⁶ A romantic concept of love is common to all ages; less so the determination to hold onto an impossible love. As Ethel Spector Person writes in *Dreams of Love and Fateful Encounters*: “[O]nce past adolescence, most of us give way to the yearnings for impossible love only while watching movies or reading novels . . . or in bouts of nostalgia for past love.”¹¹⁷ The kind of romantic fatalism Dr. Person describes may have affected Chris’s failure to express regret after the crime. Given his belief in the uniqueness of his love for Jessica, he may have felt that he had no choice but to follow her wishes and kill her parents. It can be difficult to experience guilt when you believe that you had no alternative.

Another adolescent characteristic that may have caused Chris to seem unrepentant is loyalty to peers. By all accounts, Chris’s fourteen-year-old sweetheart, Jessica, was the mastermind of the murders. It was she who cried out, when her mother showed up alive in the bedroom door: “Oh God Chris please shoot her again.”¹¹⁸ Chris’s seeming remorselessness stemmed in part from his refusal to take the stand on his own behalf. Insofar as this refusal reflected his commitment to protect his girlfriend,¹¹⁹ his apparent lack of remorse may have flowed from a belief in “honor among thieves”—a belief especially typical of his developmental stage.¹²⁰

Finally, the adolescent’s temporal perspective, shorter than that of adults, may have caused Chris to seem remorseless.¹²¹ Sometimes an adult offender appears contrite because he is overwhelmed by an awful awareness of what he has done to his own life. The law cannot always distinguish this kind of contrition from regret over the crime itself. But a seventeen-year-old would be less likely to manifest regret based on the

116. As Dr. Henry O. Gwaltney, the psychologist who testified for the prosecution, stated later: “I feel that he was just doing what he thought he should do as a young man in love.” Patti Rosenberg, *Thomas Execution Nearing: Juvenile Case Getting National Attention*, Daily Press (Newport News, Va.), Jan. 7, 2000, at A1 [hereinafter Rosenberg, *Thomas Execution Nearing*].

117. Ethel Spector Person, *Dreams of Love and Fateful Encounters: The Power of Romantic Passion* 106 (1988).

118. *Thomas v. Commonwealth*, 419 S.E.2d 606, 613 (Va. 1992) (punctuation follows the original).

119. See Patti Rosenberg, *Thomas is Granted Stay of Execution*, Daily Press (Newport News, Va.), June 17, 1999, at A1 (restating comments of Lisa O’Donnell, one of Thomas’s attorneys on appeal, to the effect that he had not taken the stand partly to protect Jessica).

120. See Richard Frankel, *The Adolescent Psyche: Jungian and Winnicottian Perspectives* 119 (1998) (describing adolescents’ tendency to protect each other, as intimacy shifts from family to peer group).

121. For a discussion of adolescents’ temporal perspective, see Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim L. & Criminology 137, 164 (1997).

infinity of his sentence. As a child psychologist put it to me: "A seven-year-old does not know 'forever.'"¹²²

For all these reasons, then, the seeming remorselessness of Chris Thomas, like that of Gina Grant and Cameron Kocher, may have reflected not his viciousness or depravity, or even his low potential for rehabilitation, but only his age.

D. *Interpreting Remorselessness: Legal and Psychological Approaches*

And has he uttered a word of regret for his most odious crime? Not one word, gentlemen. Not once in the course of these proceedings did this man show the least contrition.
Albert Camus, *The Stranger* (the prosecutor's closing speech to the jury)¹²³

As in the fictional trial of Meursault, the defendant's supposed lack of remorse in each of the preceding cases played a salient role in the legal process. It is now time to ask what common themes we find in the way the legal system handled "remorselessness" in these cases.

One of the most striking common denominators is the courts' tendency to scan for sorrow in the first few hours or even moments after the crime. This practice implies a concept of remorse as an automatic reaction, not something that may be achieved over time. Such a notion is troubling because the juvenile would very likely be in shock during this period, especially after a homicide. Moreover, the expectation of "same-day contrition" makes little sense in view of the defense mechanisms that may interfere with awareness of reality and its concomitant pain.

In contrast to the law's expectation that remorse will manifest itself soon after the crime or not at all, mental health professionals describe children who exhibited no contrition for a long time, but finally showed themselves capable of it. For example, a distinguished psychiatrist tells of a child he encountered in his psychiatric residency, an otherwise "sweet, cherubic little boy" who had killed another child and showed no regret. He was put into the hospital for study, and after many months, the remorse "came bursting through like a volcano."¹²⁴

Another noteworthy feature of our three cases is that judges and other legal personnel often adopted a single statement or act as indicative of the child's lack of contrition. Some interpreters seemed unable to

122. Interview with Lora Heims Tessman, Ph.D., child psychologist and psychoanalyst in private practice, in Weston, Mass. (Mar. 14, 2000); see also Scott & Grisso, *supra* note 121, at 164 ("Adolescents seem to discount the future more than adults do It may simply be harder for an adolescent than for an adult to contemplate the meaning of a consequence that will have an impact ten or fifteen years into the future.").

123. Albert Camus, *The Stranger* 126 (Stuart Gilbert trans., Vintage Books 1954) (1944).

124. Telephone Interview with Martin Silverman, M.D., child psychiatrist and psychoanalyst in private practice in Maplewood, N.J. and President, Association for Child Psychoanalysis (July 13, 1999).

see beyond an especially haunting image or phrase; one thinks of the sheriff's reaction to Gina Grant's remark about the body parts, and the judges who referred repeatedly to Cameron Kocher's demeanor and words as he walked by the body on his way to play Nintendo. Particular scenes indelibly etched themselves on the minds of observers, with lasting impact.

By contrast, mental health experts usually require a cluster of behavior before imagining they know what is in someone's heart. Thus, a specialist in psychopathy observed to me: "As a psychologist, I'm dubious about using single indicators of behavior to make inferences about complex and multifaceted underlying constructs. We know from the psychological literature that single indicators are often misleading."¹²⁵ As to the presence of remorse in particular, he said: "It's *very* hard to assess these things. . . . A constellation of traits is usually a more reliable indicator of psychopathy."¹²⁶

Beyond the tendency to focus on a single indicator, the legal system often made conventional assumptions about the *meaning* of that indicator. For example, it assumed that playing a game or joking bespeaks lightheartedness; sleeping, a clear conscience. Confident of their ability to infer the inner state from the outer behavior, participants in the legal system showed little appreciation of the ambiguities that may attend a given act or statement.

Finally, in determining that a juvenile lacked remorse, the courts rarely acknowledged the child's age and the ways it might affect the ability to feel or express certain emotions. This is surprising because the very rationale of a separate juvenile justice system has always been that children are different. It is also deeply problematic because, as we have seen: "There are all sorts of developmental achievements that would make the expression of adult-like remorse unlikely in kids."¹²⁷

1. *Methodological Issues.* — The question arises whether the cases we have examined are merely anecdotal: isolated examples that say little about the juvenile justice system generally. To assess the typicality of these cases, it will be helpful to know, in the first place, how often remorse comes up in juvenile law. According to my research, the word *remorse* has been mentioned in nearly two hundred cases involving the

125. Telephone Interview with Scott Lilienfeld, Ph.D., Associate Professor of Psychology, Emory University (July 14, 1999).

126. *Id.* Another expert responded in a similar vein when asked whether lack of remorse, by itself, would be a good predictor of future criminality: "It's a single-sign thing. You'd need to know more about boundaries—intrapsychic and interpersonal; identity; ability to control impulses and emotions; thought disorders; moral development; [and] ego development." Interview with Stuart Hauser, Ph.D., M.D., President of Judge Baker Children's Center, Boston, Mass., and Professor of Psychiatry, Harvard University, in New York, N.Y. (Dec. 15, 2000).

127. Telephone Interview with Shannon Croft, M.D., child psychiatrist and candidate in psychoanalytic training at Emory University (May 3, 2000).

transfer or sentencing of juveniles.¹²⁸ Since this count largely excludes cases that were unpublished,¹²⁹ as well as cases in which the opinion used synonyms for *remorse* and *remorselessness*, but not the words themselves, this number almost certainly understates the concept we seek to assess.

Beyond the number of cases in which remorse appears, one would also wish to know whether the judicial opinions considered here are particularly egregious in their approach to remorselessness. Do many other courts interpret lack of remorse in subjective and psychologically naïve ways, without regard for defense mechanisms, developmental stages, or the ambiguity that inheres in human behavior? This question cannot be answered fully here; however, the basis on which I selected cases for in-depth treatment may provide some reassurance that we are not merely focusing on the worst examples. The criterion I employed in choosing cases for in-depth analysis was that they afford a clear picture of the reasons the child was considered remorseless. By contrast, in most of the opinions in which *remorse* appeared, it was unexplained; thus, if anything, my selections may exemplify those legal cases that handled the issue of remorse with unusual thoughtfulness.

But how much impact does remorse or its absence actually have on the outcome, even in those cases where it is featured? It must be acknowledged that remorse is typically only one of several factors determining the waiver decision or sentence in any given case. Moreover, because we cannot see inside the judge or juror's head, we cannot be sure that remorse is the true basis for a decision, rather than mere window dressing for a decision based primarily on the crime itself. But if we take the decisionmakers' words at face value, there is ample reason to believe that a defendant's expression of contrition after the crime has a bearing on the case's disposition.

Studies about remorse, though sparse, corroborate the importance of this subjective factor in waiver and sentencing. For example, a report partly sponsored by the American Bar Association Juvenile Justice Center recommends that in a transfer hearing, counsel should "describe the young person's moral development and remorse."¹³⁰ Studies of remorse in sentencing have focused on capital cases in the adult criminal system, but they too suggest that remorse or its absence can have a significant impact. For instance, an empirical study of juries in South Carolina found that lack of remorse was the third most powerful aggravating factor causing jurors to sentence a defendant to death.¹³¹ As the authors of the

128. A list of these cases, culled from the Westlaw database, can be found at <http://www.law.emory.edu/faculty/duncan/appendix.html> (last visited Aug. 5, 2002) (on file with the *Columbia Law Review*).

129. Included in my list is a small number of cases published only on Westlaw.

130. See Patricia Puritz et al., *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 35 (1995).

131. Eisenberg et al., *supra* note 6, at 1633; see William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death*

study interpreted: “[I]f jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death.”¹³²

In noncapital cases, as well, lack of remorse has often weighed heavily in the outcome. The four cases that will be presented in Part Two are instances in which lack of remorse appears to have been a significant factor in the waiver decision and at noncapital sentencing. In addition, my research has turned up a number of judicial opinions that highlight the impact of remorselessness in the court’s decision but fail to reveal the reasons the defendant was found to be remorseless. To provide an idea of the range of cases in which lack of remorse has been featured prominently, I will summarize these examples briefly here.

My first illustration is *People v. Denton*, in which the Appellate Court of Illinois affirmed the sentence of a fourteen-year-old convicted of murder.¹³³ Denton argued that the trial court had abused its discretion by sentencing him to forty years while his codefendant, McElrathby, received only twenty-five years. McElrathby was a few months younger than Denton—a fact that may have influenced the court. All the same, the disparity was striking because McElrathby had a prior conviction for armed robbery, whereas Denton himself had no prior convictions. In ruling against Denton, the court relied heavily on the finding that McElrathby was “sincerely remorseful,”¹³⁴ whereas the “trial court did not believe defendant’s expression of remorse.”¹³⁵

Remorse also played a major role in *People v. Mendez*, a case concerning a sixteen-year-old boy recruited by an adult to burn down a Puerto Rican social club in the Bronx.¹³⁶ Mendez, together with another youth, splashed the stairs and wall of the club with gasoline, which the other boy ignited. In the ensuing blaze, twenty-five people died.¹³⁷ Mendez was convicted of murder. On appeal, he argued that his sentence constituted an abuse of discretion because his codefendants—including the adult who solicited the crime—received lighter terms.

In upholding Mendez’s sentence, the court emphasized the youth’s previous offenses, his profit motive for engaging in the crime, and most

Penalty Cases, 15 Am. J. Crim. L. 1, 16–17 (1987–1988) (reporting that jurors cited demeanor of defendant, including indications of remorselessness, as an important factor in their decision to recommend a death sentence); see also *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring) (“In a capital sentencing proceeding, assessments of . . . remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.”).

132. Eisenberg et al., *supra* note 6, at 1633.

133. *People v. Denton*, 628 N.E.2d 900, 900 (Ill. App. Ct. 1993).

134. *Id.* at 907.

135. *Id.*

136. *People v. Mendez*, 75 A.D.2d 400, 406 (N.Y. App. Div. 1980).

137. *Id.* at 401.

significantly, his lack of remorse.¹³⁸ Highlighting the last factor, the court wrote:

Most importantly, . . . this defendant, until this very date, does not have any feelings of guilt as he "didn't do anything." His complete lack of any sense of remorse or guilt clearly indicates that the sentence imposed was not only appropriate, but in no manner could it be considered an abuse of discretion.¹³⁹

As a final illustration, consider a case involving a fifteen-year-old run-away boy accused of killing two people in a Minnesota cornfield.¹⁴⁰ In the boy's version of the facts, which the court decided was inconsistent with the medical examiner's findings, one victim had died during a struggle, the other by accident. The district court certified the boy to stand trial as an adult, and he appealed. Denying the appeal, the Court of Appeals of Minnesota adduced the boy's prior record, his escalating offenses, and the latitude enjoyed by the district court. The court also emphasized the boy's lack of remorse; in fact, in an opinion just over three pages long, the majority referred to his remorselessness *six* times.¹⁴¹

II. "SONGS ABOUT SHOOTING" AND OTHER HARD CASES

Hard:

Obdurate; unsympathetic; unfeeling; as, a hard heart; a hard nature; a hard judge . . . Difficult, mentally or judiciously . . . as, a hard problem . . . "The hard causes they brought unto Moses."

*Webster's New International Dictionary of the English Language*¹⁴²

The way of transgressors is hard.
Proverbs 13:15 (King James)

Prologue

Hard is one of those richly ambiguous words that means something different to everyone. I use it here because the cases in Part Two seem to me somewhat less sympathetic and less intuitively persuasive for my argument than the three cases we have already considered. The typical reader of law reviews can, I believe, empathize with the innocence of a nine-year-old child, the fear and rage of an abused daughter, or the desperation of a teenage boy in love. But such a reader may have difficulty identifying with a teenager who shoots a slight acquaintance in the back, engages in armed robbery for a lark, or commits murder out of a yearning to be in a wedding party. The crimes of the juveniles in Part Two, then, seem less

138. *Id.* at 405–06.

139. *Id.* at 406.

140. *In re Welfare of D.T.H.*, 572 N.W.2d 742, 743 (Minn. Ct. App. 1997).

141. *Id.* at 742–46.

142. *Webster's New International Dictionary*, *supra* note 10, at 1137.

motivated, more random and vicious than those of the juveniles in Part One. Moreover, the behavior that the courts interpret as lack of contrition appears to be, in most of these cases, a more deliberate, ostentatious stance than in our earlier examples. For instance, we will encounter a boy who claimed the hospital killed his victim, another boy who bragged that his accomplice was named "Homicide," and a girl who boasted that she had been read her rights "hundreds of times."

But while the upcoming cases may be "hard," close scrutiny will show that they too are far more complex and ambiguous than they first appear. In particular, the interpretation of remorselessness in these juveniles will seem problematic once we have examined the facts through our interdisciplinary lens.

A. "Countenance Cannot Lie":¹⁴³ *The Sherard Martin Case*

The face is the mirror of the soul, and eyes, though silent,
reveal the secrets of the heart.

Saint Jerome¹⁴⁴

[T]he human face is where emotion and affection are visible
if not deliberately concealed.

John T. Noonan, Jr., *Persons and Masks of the
Law*¹⁴⁵

The events leading up to the shooting of Fred Harper by fourteen-year-old Sherard Martin are complex and resistant to summary,¹⁴⁶ like those in Camus's novel, *The Stranger*.¹⁴⁷ Here too, there were multiple encounters, all vaguely ominous, on the day of the homicide, and here too, the person who committed the crime—though not meeting the legal requirements for self-defense—seems to have felt himself in danger from his victim.¹⁴⁸

It was the evening of May 9, 1992, in a neighborhood of mixed residential and commercial use outside Chicago. Nineteen-year-old Fred Harper and his friend, Vascoe Zimmerman, were outside Zimmerman's house when they noticed some broken windows in a car parked on the

143. Matthew Royden, An Elegie, or friends passion, for his Astrophill, in *The Phoenix Nest* 1, 4 (Hyder Edward Rollins ed., 1931) (1593). With language modernized, the complete line reads:

I trust that countenance cannot lie
Whose thoughts are legible in the eye.

Id.

144. Saint Jérôme, 3 *Lettres* 35–36 (letter #54) (Jérôme Labourt trans., *Les Belles Lettres* ed. 1953). English translation by Martha Grace Duncan.

145. John T. Noonan, Jr., *Persons and Masks of the Law* 20 (1976).

146. *People v. Martin*, 674 N.E.2d 90, 92–93 (Ill. App. Ct. 1996).

147. See Camus, *supra* note 123, at 59–76.

148. Thomas F. Geraghty, lead counsel for the defense, believes that Sherard was afraid of Harper and shot him partly to deter his return. Telephone Interview with Thomas F. Geraghty, lead counsel for the defense (Oct. 12, 2000).

street. As they were investigating the vandalism, Harper and Zinnerman crossed paths with four boys, one of whom was Sherard Martin.¹⁴⁹

Sherard and Fred Harper had already "exchanged words"¹⁵⁰ earlier that evening, when Harper and Zinnerman were riding their bicycles. In a written statement, Sherard explained that Harper had accused Sherard of calling him a "hype," a slang word for drug dealer. He had threatened to beat up the fourteen-year-old and then ridden away.¹⁵¹

Following this encounter, Sherard and his friend Reginald retrieved a gun—a ".38 special"—from a garage. Some time later, Sherard, Reginald, and two other boys walked to a McDonald's restaurant, passing Zinnerman's house and the car with the broken windows on their way. While Sherard and his companions were in the restaurant, Fred Harper came in, looked at the group, and left.¹⁵²

When Sherard and his friends emerged from McDonald's, they saw Harper and Zinnerman about twenty feet away. As they watched, Harper took a beer bottle out of a trash can and held it under his jacket. Then Sherard said that Harper "accused him of breaking the car windows," but that he had not done it. Sherard pulled out his gun and held it at his side. Zinnerman began to walk away. It is disputed whether Harper likewise walked off immediately or waited a moment or two before turning and moving away.¹⁵³ It is undisputed, however, that he was leaving the scene when Sherard shot him in the back. One month and a day later, Harper died in the hospital as a consequence of the injuries he sustained in the shooting. About a week after Harper's death, Sherard was arrested and charged with murder.¹⁵⁴

1. *An Impassive Face and a Rationalization.* — Following Sherard's arrest, the state of Illinois moved that Sherard be transferred from the juvenile court to the criminal division.¹⁵⁵ Under Illinois law, the juvenile court was required to take seven factors into account in deciding whether to order the transfer.¹⁵⁶ Of these seven, two were the subject of extensive commentary by the court: "the treatment and rehabilitation of the minor"; and "whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority."¹⁵⁷

149. *Martin*, 674 N.E.2d at 92.

150. *Id.*

151. *Id.*

152. *Id.*

153. According to the defendant, Harper "continued to stand there for about a minute or two." *Id.* at 92–93. However, the State's witnesses, as paraphrased in the opinion, describe Harper as turning "to walk away" after the exchange of words and before Sherard pulled out his gun. *Id.* at 92.

154. *Id.* at 92–93.

155. *Id.*

156. Juvenile Court Act of 1987, 705 Ill. Comp. Stat. Ann. 405/5–4(3)(b) (West 1992) (repealed 1999).

157. *Id.* § 405/5–4(3)(b)(v)–(iv).

In an effort to determine whether these two factors weighed in favor of Sherard's transfer or against it, the juvenile court considered testimony from numerous witnesses, including the defendant's psychiatrist, Dr. Derrick Miller. Miller testified that Sherard, though "amoral" at the time of the shooting,¹⁵⁸ had not meant to kill Harper, but only to shoot him in the buttocks.¹⁵⁹ He further testified to his belief that Sherard "did not enjoy violence" and could be taught other means of handling his fear.¹⁶⁰ As to the defendant's feelings after the crime, the psychiatrist stated that Sherard lacked remorse, "based upon a belief that he shot Harper but that the hospital caused Harper's death."¹⁶¹ Nonetheless, Miller opined that Sherard was treatable within the juvenile system; indeed, he feared that the boy would "lose motivation if he knew he would be transferred to the adult system."¹⁶²

The other individuals who testified at the transfer hearing included Sherard's teacher, social worker, counselor, case manager, and probation officer. With the exception of the probation officer, who emphasized Sherard's "rule violations" early in his detention,¹⁶³ all spoke favorably of the boy. They praised, for example, Sherard's straight-A record in school,¹⁶⁴ his courteous manner,¹⁶⁵ and his respectful treatment of classmates and teachers.¹⁶⁶ Sherard's teacher, in particular, spoke warmly of the defendant, describing him as "an excellent student" who "does exactly what he is asked to do" and "attends to the class assignments without distractions and with enthusiasm."¹⁶⁷ He ventured the opinion that Sherard could go to college.¹⁶⁸

All this affirmative testimony carried little weight with the judge, who disparaged the credibility of the positive witnesses by saying that they were not psychiatrists and lacked complete knowledge of the defendant's rule violations.¹⁶⁹ In contrast, the judge weighed heavily his own perception of the boy's lack of remorse, based partly on his scrutiny of Sherard's face. As described later in the appellate opinion: "[T]he court noted its personal observations of the defendant and the lack of any expression of emotion or remorse shown by him. The court stated that the defendant's

158. *Martin*, 674 N.E.2d at 101.

159. *Id.* at 94 (unpublished portion of opinion available within Westlaw version of case).

160. *Id.*

161. *Id.* at 100.

162. *Id.* at 94 (unpublished portion of opinion available within Westlaw version of case).

163. *Id.* at 93.

164. See *id.* at 95 (unpublished portion of opinion available within Westlaw version of case) (referring to Sherard's academic performance at the detention center).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 100.

face was 'impassive' and that he was 'amoral,' perhaps because he was not 'exposed to any love and tenderness and kindness.'¹⁷⁰

Besides the boy's demeanor, the judge emphasized the negative aspects of Dr. Miller's testimony. In particular, he highlighted the psychiatrist's statement that Sherard lacked remorse in that he was unable to appreciate the causal link between his act of shooting Harper and Harper's death.¹⁷¹

At the conclusion of the hearing, the judge ordered the defendant transferred to the criminal division. There, Sherard was convicted of first-degree murder and sentenced to twenty-five years in prison.¹⁷² The transfer was appealed, but the appellate court, finding no abuse of discretion, upheld the lower court's order.¹⁷³

2. *The Court's Interpretations in the Light of Adolescent Psychology.*

a. *Sherard's Countenance.* — The judge at Sherard Martin's transfer hearing assumed that the boy's face reflected his soul, that appearance accurately represented reality. Yet, wise thinkers through the centuries have cautioned against this very assumption, with adages ranging from Aesop's "Appearances are deceptive,"¹⁷⁴ to Shakespeare's "[O]ne may smile, and smile, and be a villain."¹⁷⁵ As a general principle, most would agree, it is risky to infer reality from appearance, depth from surface, character from countenance, and this is all the more true when developmental stage and culture separate the interpreting observer from the interpreted object.

To take up first the developmental stage: Sherard Martin was fourteen years old when he committed his crime—a time of life when it is rare to express contrition. As one child psychiatrist has put it: "Fourteen-year-olds do not appear remorseful, almost categorically. They feel relatively powerless within the system and react by rebelliousness, which feels authentic to them."¹⁷⁶

170. *Id.* Thomas Geraghty, lead counsel for the defense, offered the following explanation of the judge's reaction to his client: "Sherard was quite a bright kid, sort of proud, and not very communicative. He didn't know how to play the game." Telephone Interview with Thomas Geraghty, *supra* note 148.

171. See *Martin*, 674 N.E.2d at 101.

172. *Id.* at 92.

173. *Id.* at 102.

174. The Wolf in Sheep's Clothing, in *The Fables of Aesop: Selected, Told Anew and Their History Traced* by Joseph Jacobs 77, 77 (MacMillan Co. 1950).

175. William Shakespeare, Hamlet, Prince of Denmark act 1, sc. 5, l. 109, in *The Complete Works*, *supra* note 70, at 1060, 1076; see also The Cock, The Cat, And The Little Mouse, in *The Fables of Jean de la Fontaine* 161, 162 (Edward Marsh trans., 1933) ("Make it your rule, my son, at a first meeting / Never to judge by outward show."); John 7:24 (King James) ("Judge not according to the appearance . . ."); 1 Samuel 16:7 (King James) ("[F]or the Lord seeth not as man seeth; for man looketh on the outward appearance, but the Lord looketh on the heart.").

176. Telephone Interview with Judith Huizenga, M.D., child psychiatrist and psychoanalyst in private practice in Weston, Mass. (Oct. 9, 2000).

Besides his age, another factor militating against overt repentance was Sherard's involvement in a youth subculture. It is regarded as desirable in many adolescent circles to be perceived as very bad, a "badass."¹⁷⁷ More specifically, the youth in such circles may be required to be "tough," "alien," and "mean"¹⁷⁸—qualities diametrically opposed to the qualities needed for remorse, such as softness, humanity, and compassion. Toughness, in particular, is at odds with remorse, for as sociologist Jack Katz writes: "The person who would be tough must cultivate in others the perception that they cannot reach his sensibilities."¹⁷⁹ But in demanding remorse, that is exactly what judges, psychiatrists, and the general public are seeking: evidence that the child has been *reached*.

Psychological as well as sociological perspectives support the idea that Sherard's demeanor should not have been taken, so to speak, at face value. In a classic psychoanalytic study, "Forty-four Juvenile Thieves: Their Characters and Home-Life," John Bowlby found that "*indifference* was absolutely characteristic of every one of [the delinquent] children."¹⁸⁰ He explained this indifference as a shell to avoid the pain of wanting an affection that these youths could not get.¹⁸¹ Their "hardboiledness and apparent indifference . . . [were] a policy of self-protection against the slings and arrows of their own turbulent feelings."¹⁸²

Insofar as it was determined by his age and culture, I suggest, Sherard Martin's "impassive" and "remorseless" face was not an authentic expression of something deep within him, but a mask, or persona. But imagine for a moment that it *had* been possible for the judge at the transfer hearing to read Sherard's soul. Could he then have predicted the boy's ultimate character? In sending Sherard up to the criminal system, the court assumed an affirmative answer; however, consider that adolescence is a time of experimentation, of trying *on* and trying *out* different lifestyles and identities. It is scarcely possible, from one snapshot of a fourteen-year-old's character, to tell what he will become in the future. In the words of Peter Blos, the preeminent psychoanalytic interpreter of this de-

177. Jack Katz, *Seductions of Crime: Moral and Sensual Attractions in Doing Evil* 80 (1988).

178. See *id.* at 81, 87, 99. Chapter 3, "Ways of the Badass," has sections titled "Being Tough," "Being Alien," and "Being Mean."

179. *Id.* at 99. For a brilliant cinematographic depiction of the requirement of toughness in a delinquent subculture, see *Angels with Dirty Faces* (Warner Bros. 1938). Seeking to turn a group of street youths away from the life of crime, a priest persuades a charismatic, big-time hoodlum to cry out as if in fear when he enters the death chamber. Criminality loses its allure for the street youths when their hoodlum-hero betrays the code of toughness.

180. John Bowlby, *Forty-four Juvenile Thieves: Their Characters and Home-Life* (II), 25 *Int'l J. Psychoanalysis* 107, 124 (1944).

181. See *id.*

182. *Id.*

velopmental stage: "Character does not acquire its final countenance until the close of adolescence."¹⁸³

b. *Sherard's Belief that the Hospital Killed Harper.* — Sherard asserted that he was not responsible for Harper's death; rather, he believed that the hospital killed his victim.¹⁸⁴ The court took this belief as a sign that Sherard lacked contrition, but is that necessarily so? To some of us, the court's interpretation seems odd intuitively, even prior to analysis. For Sherard's statement appears less an indicator of remorselessness than of an inability to appreciate his causal role in the death. This inability may be psychological in origin—an unconscious defense to ward off the pain such understanding would bring—or it may be sociological—a manifestation of the subculture of delinquency and its beliefs.

As David Matza explains in his book *Delinquency and Drift*, the subculture of delinquency harbors its own views of legal culpability, which differ from those of adults and from the law itself.¹⁸⁵ Specifically, this subculture takes a narrower view of individual responsibility¹⁸⁶ and a broader view of accident,¹⁸⁷ insanity,¹⁸⁸ and self-defense.¹⁸⁹ Especially relevant here is the more inclusive view of accident, encroaching upon what the law would regard as individual accountability. As Matza explains: "Accidents of circumstance refer to bad luck According to the delinquent's subcultural precepts, bad luck is an extenuating condition and thus a defense to a crime."¹⁹⁰

Applying this sociological finding to the present case, we recall the psychiatrist's testimony that Sherard did not mean to kill Harper, only to wound him. From Sherard's point of view, then, Harper's death from infection a month and a day later may have signified bad luck or an accident. According to his subculture's precepts, either explanation would be a valid defense to the murder charge. Thus, Sherard's affirmation of his own innocence and the hospital's guilt was in keeping with the beliefs

183. Peter Blos, *On Adolescence: A Psychoanalytic Interpretation* 175 (1962); see also Erik H. Erikson & Kai T. Erikson, *The Confirmation of a Delinquent* (1957), reprinted in *A Way of Looking at Things: Selected Papers from 1930 to 1980*, at 621, 622 (Stephen Schlein ed., 1987) ("But the *certainty* of a man's or a woman's measure is not established before the end of his or her adolescence . . .").

184. Thomas Geraghty, lead counsel for the defense, provided information that may shed light on Sherard's belief. He recalls that there was some question as to the quality of the victim's care in the hospital; moreover, an infection was the immediate cause of Harper's death. Although these facts would not have diminished Sherard's culpability, the defense introduced them at the transfer hearing anyway, in the spirit of mentioning anything that could possibly sway the outcome. Telephone Interview with Thomas Geraghty, *supra* note 148.

185. See David Matza, *Delinquency and Drift* 74 (Transaction Publishers 1992) (1964).

186. See *id.* at 101.

187. *Id.* at 85.

188. *Id.* at 83.

189. *Id.* at 75–76.

190. *Id.* at 87.

of his subculture. This congruence does not make the beliefs *right*, but it does raise the possibility that the boy's attitude reflected mere conformity, rather than a personally meaningful ideology.¹⁹¹ For this reason, his statement seems unreliable evidence of remorselessness, a suspect indicator of Sherard's character, now or in the future.

B. "*They Killed Him And Laughed*": *The Anthony Archer Case*

It is no time for mirth and laughter,
The cold, gray dawn of the morning after.
George Ade, *The Sultan of Sulu*¹⁹²

And if I laugh at any mortal thing,
'Tis that I may not weep . . .
Lord Byron, *Don Juan*¹⁹³

"It was pretty extreme," the forensic psychologist said. "Some of the boys were crying; the others were wise guys. Even the police were shocked."¹⁹⁴ The scene he was describing occurred in a Philadelphia police station during the early morning hours of August 30, 1994. Four teenage boys—Anthony Archer and Ollie Taylor, fifteen; and Khalis Edmondson and Gregory Pennington, sixteen—were being held for processing following the robbery and murder of a Pakistani graduate student.

On the preceding evening, these boys and one older youth, eighteen-year-old Antoine Saunders, set out on the sidewalks of Philadelphia looking for someone to rob.¹⁹⁵ Near the student apartments adjacent to the University of Pennsylvania, they came upon their victim: a twenty-seven-year-old doctoral candidate in mathematics, Al-Moez Alimohamed. While Saunders pointed a sawed-off .22 caliber rifle, some of the other boys, including Archer, hit and kicked the victim. Someone took possession of the victim's money, which amounted to five dollars and change.¹⁹⁶ Then, with the robbery completed, Archer, Pennington, and Edmondson started walking away, but Saunders and Taylor remained with the victim.

191. Psychologist Gordon Allport proposed that beliefs lie on a continuum, from those reflecting "sheer conformity" to those based on "deeper motives," with "functional significance" for the individual. Gordon W. Allport, *The Nature of Prejudice* 285–86 (1954).

192. George Ade, *The Sultan of Sulu* 63 (1903).

193. Lord Byron (George Gordon), *Don Juan*, canto 4, stanza 4 (Leslie A. Marchand ed., Houghton Mifflin 1958) (1821).

194. Telephone Interview with Allan Tepper, Ph.D. (Nov. 2, 2000). A psychologist who examined Archer at the request of the defense, Dr. Tepper was cited in the appellate opinion.

195. *Commonwealth v. Archer*, 722 A.2d 203, 205 (Pa. Super. Ct. 1998).

196. Penni Roberts, *Verdict in Penn Student's Killing Brings Relief, Rage*, *Phila. Trib.*, Feb. 16, 1996, at 4A.

Taylor, now in possession of the rifle, heard a voice say, "Bang him."¹⁹⁷ He shot Alimohamed,¹⁹⁸ who died at the scene.¹⁹⁹

A block and a half away, two undercover police officers witnessed the entire course of the crime. Because of the officers' proximity, four of the boys were immediately taken into custody; the fifth boy escaped but was brought in by his grandmother.²⁰⁰ While the juveniles were being held in the police station, Edmondson and Pennington were observed to be weeping quietly, while Archer and Taylor were singing rap songs and laughing.²⁰¹ Indeed, Detective Joseph Fischer testified that every time he opened the door to Archer and Taylor's holding room, "there was laughter."²⁰² At one point, the officer reprimanded the boys with the words, "You think this is funny?"²⁰³ Rather than having the desired effect, his question provoked another laugh from Archer, who boasted that Taylor's name was "Homicide."²⁰⁴ Detective Fischer testified that "even at their arraignment later in the day, the pair couldn't stop giggling."²⁰⁵

1. *"Morbidly Inappropriate."* — From this point on, I will confine my retelling of the procedural history largely to one boy, Anthony Archer, because of the particularly salient role that "lack of remorse" played in his case. Archer was charged with murder, robbery, conspiracy, theft, and criminal possession. Because of the murder charge, jurisdiction vested initially in the criminal court, and Archer moved for "decertification," the term used in Pennsylvania for transfer back to the juvenile system. In her opinion denying the motion, Judge Carolyn Temin repeatedly characterized Archer as remorseless.²⁰⁶ She substantiated this assessment by describing the scene when the four defendants were in police custody, with two "quiet and crying," the others "laughing and talking."²⁰⁷ Still more specifically, she referred to Archer and Taylor as "indulg[ing] in morbidly inappropriate behavior, singing rap songs and boasting that Taylor's nickname was 'homicide.'"²⁰⁸

Tried before a jury, Archer was acquitted of murder but convicted of the other charges. Based on the acquittal of murder, Archer attempted once again to be transferred back to the juvenile court. Without relying

197. *Archer*, 722 A.2d at 205.

198. *Id.*

199. Telephone Interview with Vincent M. Lorusso, attorney who represented Archer at trial and on appeal (Aug. 20, 2002).

200. Telephone Interview with Vincent M. Lorusso, attorney who represented Archer at trial and on appeal (Nov. 9, 2000).

201. Yvone Latty, Cop: Teens Laugh After Murder Arrest, *Times-Picayune*, Oct. 2, 1994, at A11.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See *Commonwealth v. Archer*, 722 A.2d 203, 207 (Pa. Super. Ct. 1998).

207. *Id.*

208. *Id.*

on Judge Temin's earlier examination, another judge undertook an independent review of the factors relevant to transfer and found Archer "not amenable to treatment within the juvenile system."²⁰⁹ Like Judge Temin, this judge too concluded that the boy had shown "no remorse for this offense."²¹⁰ He described Archer as "laughing while in police custody . . . [and] singing rap songs indicating a callous attitude toward the victim . . . i.e. 'I got my hammer' and 'Yo, bust that m . . . f . . .'"²¹¹

The motion for decertification failed, and Archer was sentenced to prison. On appeal, Archer argued that two factors—one of them being his lack of remorse—had been given too much emphasis in the original decertification proceeding. The Superior Court of Pennsylvania acknowledged that remorselessness had been weighed heavily.²¹² Nevertheless, because other factors had also been considered, it upheld the lower court's decision and, with it, Archer's sentence: fifteen to thirty years.²¹³

To return now to the group as a whole: Taylor and Saunders pleaded guilty to first-degree murder in exchange for life sentences. Edmondson, who was thought to have been only a passive observer of the crime and who had shown remorse, was decertified and tried in the juvenile court. Pennington was tried with Archer before a jury. Like Archer, he was acquitted of murder but convicted of the other crimes; his sentence was somewhat more lenient than Archer's: ten to thirty years.²¹⁴ In explaining Archer's sentence in particular and the disparate outcomes in this case generally, both the defense attorney and the prosecutor emphasized the scene in the police station, in the early morning hours.²¹⁵

2. *The Mask of Laughter.* — This is indeed a hard case. Few can readily empathize with a boy who was involved in a random, "senseless" murder, then behaved with what appeared to be extreme callousness. For some whose lives were touched by the crime, the personal qualities of the victim made the legal process especially painful. Alimohamed was a gifted mathematician and a beloved man in the University of Pennsylvania community.²¹⁶ The University paid him tribute by awarding his Ph.D. posthumously. Moreover, Alimohamed's was not the only death that resulted from the crime: His fiancée, Rebecca Rosin, committed suicide during the trial. As Mary Porto, the Commonwealth's attorney on appeal, put it to me: "This crime destroyed two lives."²¹⁷ When I inter-

209. *Id.* at 208.

210. *Id.*

211. *Id.*

212. *Id.* at 207.

213. *Id.* at 205, 212.

214. See *Commonwealth v. Pennington*, 751 A.2d 212, 215 (Pa. Super. Ct. 2000).

215. Telephone Interview with Roger King, Assistant District Attorney, Philadelphia County (Nov. 8, 2000); Telephone Interview with Vincent M. Lorusso, defense counsel (Nov. 2, 2000).

216. Telephone Interview with Mary L. Porto, Assistant District Attorney, Phil. County, and Commonwealth's attorney on appeal (Nov. 7, 2000).

217. *Id.*

viewed them years after the appellate opinion came down, both Ms. Porto and the prosecutor, Roger King, remained profoundly affected by the case. "I didn't think justice was done," Mr. King said. "They killed him and laughed."²¹⁸ Let us see now whether there is another way of understanding that laughter.

I begin by noting that we are dealing here with a group crime, and a continued group process after the crime. The case thus highlights one of the transforming features of adolescence: the replacement of the family by the peer group. As Peter Blos writes: "This age represents, par excellence, the stage in life when exclusive group relations among peers assume, conspicuously and dramatically, a preoccupation and allegiance that brush all other concerns aside with passionate single-mindedness Within the society of the adolescent's contemporaries lies stimulation, belongingness, loyalty, devotion, empathy, and resonance."²¹⁹ Because it fulfills so many of the adolescent's needs, the peer group acquires considerable power over him; its disapproval may lead him to give up, usually temporarily, even well-established moral values.²²⁰

Such sacrifices of morality are especially common where the peer group adheres to the "code of the street." I have already alluded to this code and its requirement of toughness in discussing the Sherard Martin case.²²¹ But here I wish to elaborate briefly, taking advantage of a book based on four years of field research in Philadelphia, the very city where Anthony Archer was raised. The book is *Code of the Street*, by Elijah Anderson, and it emphasizes that Philadelphia street youths—the law-abiding no less than the criminals—"project a violent image" as part of their "style."²²² In so doing, they are motivated partly by survival, for a show of weakness would be dangerous on the street.²²³ In addition, they are expressing their admiration for the drug dealers' flair,²²⁴ much as society ladies once wore "highwaymen's capes," in response to the eighteenth-century robbers' allure.²²⁵

Unconscious defense mechanisms as well as conscious motives may encourage adherence to the code of the street. For example, the code

218. Telephone Interview with Roger King, *supra* note 215.

219. Peter Blos, *The Adolescent Passage: Developmental Issues* 71–72, 160 (1979).

220. See *id.* at 354; see also John E. Meeks, *Group Delinquent Reaction*, in 2 *Comprehensive Textbook of Psychiatry II*, at 2136, 2137 (Alfred M. Freedman et al. eds., 1975) ("[T]he youngster with group delinquent reaction is involved in unacceptable behavior because of the overriding importance of his delinquent peer group in his life.").

221. See *supra* notes 177–179 and accompanying text.

222. Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* 110 (1999).

223. See *id.* at 106.

224. *Id.* at 110.

225. See 7 *The Oxford English Dictionary* 233 (2d ed. 1989) (quoting the *Daily Chronicle* and *Vogue*). For an analysis of the attraction that criminals possess for the law-abiding, see Martha Grace Duncan, *Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment* 57–118 (1996).

resonates with “identification with the aggressor,” a defense in which one becomes *like* that which one fears;²²⁶ and with “reaction-formation,” in which one exaggerates the emotions diametrically opposed to one’s real feelings.²²⁷ For street youths, the benefits of such defenses are clear: Instead of feeling disenfranchised and vulnerable, they experience themselves as potent and impervious to danger. Though psychologically empowering, such solutions come at a price, especially when the youths are brought into contact with the criminal justice system. For the defenses may cause individuals to appear remorseless when in fact their guilt feelings are merely isolated or repressed.²²⁸ As for Anthony Archer, in the absence of many hours of psychiatric interviews, we cannot know the recesses of his heart. But given the forces inducing an inner-city teenager to adopt the code of the street and, with it, an “image of violence,” it is possible that Archer’s indecorous lyrics and laughter reflected only a mask, not his inmost self.²²⁹

With the word *mask*, we come now to a final aspect of that remarkable early morning scene: its archetypal quality.²³⁰ The two boys “laughing and talking,” the other two “quiet and crying,” bring to mind the two Greek masks that stand for tragedy and comedy and that, together, represent the theater. More broadly, the masks symbolize what Erik Erikson has called the “two most basic alternating moods . . . carnival and atonement.” Carnival, he explains, “gives license and leeway to sensual enjoyment, to relief and release at all cost,” while atonement “surrenders to the negative conscience which constricts, depresses, and enjoins man for what he has left unsolved, uncared for, unatoned.”²³¹ Though they seem antithetical, these moods can be understood as parts of a single whole, representing the range of responses to the human condition.

226. For general discussions of identification with the aggressor, see Freud, *The Ego and the Mechanisms*, *supra* note 13, at 109–10; Calvin Hall, *A Primer of Freudian Psychology* 77–78 (1954).

227. For a discussion of reaction-formation, see Hall, *supra* note 226, at 91–93.

228. See Otto Fenichel, *The Psychoanalytic Theory of Neurosis* 166 (1945) (describing character types who separate feelings of guilt from their actual source and experience those feelings in connection with an unrelated event).

229. Even the prosecutor, who felt that Archer should have received a life sentence, explained the boy’s behavior in the cell by the “Code of the Old West.” Elaborating, he said that Archer would need a reputation for toughness while serving his prison sentence. Telephone Interview with Roger King, *supra* note 215. For his part, the defense counsel said that Archer “did not behave like a punk with me, or with the judge.” Asked to explain his client’s inappropriate merriment in the hours after the crime, he said: “I gotta figure Anthony Archer is scared to death. Who wouldn’t be? It’s like you’re on that Russian submarine, and these are your last minutes alive.” Telephone Interview with Vincent M. Lorusso, *supra* note 200.

230. For a discussion of the symbolic and archetypal significance of masks, see Aniela Jaffe, *Symbolism in the Visual Arts, in Man and His Symbols* 230, 236–38 (Carl G. Jung ed., 1964).

231. Erik H. Erikson, *Young Man Luther* 75 (1958).

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Applying this idea to the two pairs of boys who sat in their jail cells that August morning, one reflects that they may be more similar than different. Perhaps both pairs are, in their fashion, responding to the horror of what has transpired, the unknown of what lies ahead. After all, laughter is a frequent symptomatic reaction to death. In laughing, one attempts to reassure oneself against the anxiety the death has aroused, as if one were saying: "It is the other fellow who died, not I."²³² That Archer and Taylor's laughter was indeed defensive seems likely in view of its exaggerated, prolonged expression.²³³

Thus, one can view the raucous, laughing boys differently than the courts have done—not as the opposite of the properly weeping youths, but as their complement. Death has not yet descended upon Archer and Taylor as it has on the mournful Pennington and Edmondson; nevertheless darkness already hovers over them, as it does over Euridice in the film *Black Orpheus*.²³⁴ She dances with abandon during the celebration of Carnival—dances because she knows that Death relentlessly follows.

C. "Songs About Shooting": *The Edward Tilley Case*

Thus, whenever the delinquent is assailed or provoked, the moral bind to law may be neutralized Being "pushed around" puts the delinquent in a mood of fatalism.

David Matza, *Delinquency and Drift*²³⁵

Late one night in January 1992, Edward Tilley was entertaining himself and a friend by letting his car slide on freshly fallen snow into the curbside garbage cans of a residential Ohio neighborhood. The car, a Chevrolet Camaro, was stolen—one of the fruits of a crime spree the boys had embarked on the day before. To celebrate their exploit, sixteen-year-old Tilley and his fifteen-year-old friend, Perry Weigreff, stayed up late inhaling gasoline fumes and drinking beer. While under the influence of

232. Fenichel, *supra* note 228, at 354–55. The reassuring function of laughter is seen in the Brazilian saying: "Ele riu para não chorar." (He laughed so as not to cry.) E-mail from the Reverend Richard Duncan, missionary in São Paulo, Brazil, to Martha Grace Duncan (Nov. 29, 2000) (on file with the *Columbia Law Review*). The phrase "laughin' just to keep from cryin'" also appears in blues songs, such as *Trouble in Mind*, a prewar standard recorded by many artists. Lightnin' Hopkins, *Trouble in Mind*, *on* *Autobiography in Blues* (Rykodisc 1996).

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233. See Fenichel, *supra* note 228, at 409–10. At age twenty-one, six years after the crime, Archer offered the following explanation for his behavior: "I wasn't laughing because somebody died; I was laughing because he [Taylor] said something funny I thought it was all a game. Then they said we killed somebody." Though expressing regret over the crime, Archer seemed at peace with his punishment: "Like I told my grandmother, I'd rather be in jail right now, because I'd probably be dead, with the dumb, dumb things I was doing." Telephone Interview with Anthony Archer, while he was serving time at the State Correctional Institute at Somerset, Pennsylvania (Nov. 29, 2000).

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234. *Black Orpheus* (Lopert Films 1958).

235. Matza, *supra* note 185, at 79, 89.

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these substances, they took the Camaro and set off on their fateful joyride.²³⁶

Two men independently noticed the car that was smashing into garbage cans and careening into yards in their neighborhood. Forty-year-old Gregg Pavlides²³⁷ and twenty-one-year-old Thomas Snedecker responded by getting in their respective pick-up trucks and following Tilley. As Pavlides later explained, the falling snow made it difficult to make out the license plate on the Camaro, so he continued to pursue it in hopes of a better view. Finally, when the teenagers turned around on a well-lit street, he read the plate, but also noticed that the occupants of the car “looked awfully young, even baby-faced,” so he continued to follow.²³⁸ The pursuit by the two pick-up trucks made Tilley nervous; he sped up and lost control of the car. The car hit a fence, and became wedged in the snow.

According to Pavlides, it was concern about the boys’ well-being that prompted him to get out of his truck and walk toward the Camaro;²³⁹ however, the appellate opinion presents a somewhat different picture. It states that the middle-aged man approached the teenagers’ vehicle and “ordered the driver to exit.”²⁴⁰ In response to this demand, Tilley opened the car door and shot Pavlides twice with a .38 caliber handgun. Upon hearing the shots, Snedecker turned to run back to his truck, but failed to reach safety before Tilley shot him in the head. Explaining why he fired at Snedecker, Tilley said: “I just pointed in his direction. . . . He was coming in too fast.”²⁴¹ Both victims survived, but Pavlides’ injury left him permanently paralyzed from the waist down.²⁴²

236. See *State v. Tilley*, No. CA-9059, 1993 WL 385318, at *1 (Ohio Ct. App. Sept. 20, 1993) (providing basic facts); Jolene Limbacher, For Good Samaritan, Insult Added to Injury: Jury Faults Victim for Approaching Teens’ Car, *Akron Beacon J.*, June 26, 1995, at A1 (reporting that Tilley and friend had been drinking and sniffing gasoline on night of crime).

237. Both the Christian name and the surname of this victim have been spelled in diverse ways in opinions and newspaper articles. The spelling employed here is based on a telephone interview with the secretary to Allen Schulman, Jr., Pavlides’s attorney in a subsequent civil suit (Sept. 26, 2000).

238. Limbacher, *supra* note 236.

239. See Cheryl Curry, Man Shot with Stolen Gun Tells What it’s Like to be Paralyzed: Gun Show’s Promoter and Teen-age Thieves are Target of Civil Suit, *Akron Beacon J.*, May 11, 1995, at C1 [hereinafter Curry, Man Shot with Stolen Gun].

240. *Tilley*, 1993 WL 385318, at *1.

241. Cheryl Curry, Teens Say Stealing Guns Was ‘Too Easy’: Youths Testify in Trial Brought by Man Shot After Guns Were Taken at Show, *Akron Beacon J.*, May 10, 1995, at D1.

242. Tilley’s reckless behavior on the night of his crimes makes more sense in light of the context he provided years later:

The thing that no-one ever knew about me was that I was a complete and total coward. Two months prior to the defining case I had shot another teenager with a B.B. gun during a macho confrontation in front of my friends. I was arrested for the first time ever, and although I was released to my parents hours later (I was 16), I knew I would be facing “hard time” in the serious juvenile lock-ups

1. *The Court Views Tilley as Remorseless.* — Charged with attempted murder, Tilley was transferred to the criminal court, where he pleaded guilty and was sentenced to twenty-two to sixty-five years in prison.²⁴³ On appeal, he argued that the Juvenile Court had abused its discretion by "binding him over" to the criminal court.²⁴⁴

The opinion by the Court of Appeals of Ohio emphasized two factors: first, the broad discretion enjoyed by the Juvenile Court in assessing the youth's potential for rehabilitation; and second, Tilley's character, especially his attitude toward his crimes. Relying heavily on the evaluation of the court-appointed psychologist, the court stated: "Most telling was appellant's lack of remorse for the injuries he caused others and that the 'thing that makes him feel the worst is that he is going to lose his girlfriend.'"²⁴⁵ The court highlighted that while detained in the Stark County Juvenile Attention [sic] Center, Tilley had "made up songs about the shooting."²⁴⁶ It also stressed that Tilley had justified his actions, on the grounds that the victims "had no right to follow him."²⁴⁷

The same psychologist who had deemed him remorseless nevertheless recommended that the juvenile justice system be given one last chance to rehabilitate him. Nevertheless, the Court of Appeals upheld the transfer decision as well as Tilley's conviction and sentence.²⁴⁸

2. *Reinterpreting Tilley's "Remorselessness."* — On first impression, it may seem that the court had a solid basis for viewing Tilley as unrepentant. For here the court employed several indicators of callousness, not only one, and these indicators were not limited to acts and statements the defendant made immediately after the crime. Moreover, unlike some other cases, here the court did not depend on family members, police officers, and similarly qualified "experts" to assess remorse or its absence,²⁴⁹ but rather listened to a mental health professional, who evalu-

known as "Indian River" or "T.I.C.O." . . . I knew that new guys got raped, beaten, robbed, etc. in those juvenile spots. Having that B.B. gun case looming over me was daily torture and anxiety, and I knew that my life was over—I would kill myself before it was time to get sentenced for that. . . . The night I shot the men with a real gun was supposed to be my last night alive. The gun, contrary to my later stories, was for me only.

Letter from Edward Tilley to Martha Grace Duncan 2 (Jan. 30, 2001) (on file with the *Columbia Law Review*).

243. Curry, *Man Shot with Stolen Gun*, supra note 239. Fifteen-year-old Perry Wiegref was allowed to plead guilty to complicity in Family Court. He was sentenced to twenty-two months in a detention center. *Id.*

244. *Tilley*, 1993 WL 385318, at *1.

245. *Id.* at *2.

246. *Id.*

247. *Id.*

248. *Id.* at *2-3.

249. Cf., e.g., *State v. Spina*, 982 P.2d. 421, 427-29 (Mont. 1999) (reviewing testimony in which Youth Court questioned bowling alley employee and police officers about degree of remorse shown by fourteen-year-old defendant); *State v. Hill*, No. 22714-2-II, 1999 WL 39483, at *1, *5-6 (Wash. Ct. App. Jan. 29, 1999) (citing testimony by detectives on

ated the boy and determined that he lacked contrition. What reasons do we have, then, to doubt this assessment?

In deciding how much weight to give an expert opinion, one would like to know how that opinion was reached. In this case, the record shows that the psychologist who testified to Tilley's lack of remorse largely failed to explain the basis of his assessment, relying simply on naked assertion.²⁵⁰ There is, however, one exception: He stated that he *asked* Tilley about remorse.²⁵¹ But the presence of remorse is not something one can assess by asking a direct question, especially when dealing with teenagers. Teenagers are known for their use of "secrecy and silence" in their interactions with adults.²⁵² Faced with the intrusiveness of adult interrogation, they are as likely to respond with evasion as with candid answers.

If the psychologist's assertions are not, by themselves, strong evidence of remorselessness, we must consider the specific indicators that the court cites. One of the most arresting of such indicators is Tilley's supposed act of composing songs about his crimes. When I embarked on my research on this case, I intended to obtain the lyrics to Tilley's songs and the context in which he had sung them, to better understand what the songs meant to Tilley. However, when I examined the record, I discovered that Tilley may not have composed any songs at all. To be sure, the record does mention the possibility that Tilley composed a song about the crime.²⁵³ Specifically, an employee of the Stark County Juvenile Attention [sic] Center said that, as far as he knew, Tilley and Wiegrefff made up a song he thought he heard Perry Wiegrefff singing.²⁵⁴ On cross-examination, however, when asked whether some of the other kids might have composed the song, he admitted: "I'm not sure who made it up."²⁵⁵

Another act that the court takes as evidence of remorselessness is the fact that Tilley rationalized his crime by saying the men should not have been following him. Again, the record does not fully bear out the opinion on this point. The page cited states that Tilley thought he had a right to shoot the men, rather than that they should not have pursued him.²⁵⁶ But in either case, the rationalization makes more sense when one knows

defendant's lack of remorse and by probation officer who reported that defendant's mother "was very concerned because he expressed no remorse").

250. See Record at 202-03, *Tilley* (No. CA-9059). This expert did not return my repeated calls.

251. *Id.* at 203.

252. James Anthony, *The Reactions of Adults to Adolescents and their Behavior*, in *Adolescence: Psychosocial Perspectives* 54, 76 (Gerald Caplan & Serge Lebovici eds., 1969) (describing the "principle of secrecy and silence adopted by the adolescent culture toward the adult"); see also Frankel, *supra* note 120, at 3 (referring to the "art of concealment [that] plays such a natural role in adolescence").

253. See Record at 241 (cited in *Tilley*, 1993 WL 385318, at *2).

254. *Id.*

255. *Id.* at 244.

256. *Id.* at 230 (cited in *Tilley*, 1993 WL 385318, at *2).

the full context. According to the record, Perry Wiegrefff stated that one of the pick-up trucks had "pulled right in front of us, cornered us in the yard," and the other was "pinning us on the side."²⁵⁷ Describing the two men, Tilley said that they "looked like hunters, you know, and this one [Pavlides] was real big . . . and he come over . . . he was started yelling, you f— out of the car [sic]"²⁵⁸ From this description, one gets the impression that Tilley may have been afraid of the men and shot to defend himself.

Like the concept of accident that was discussed in a previous section,²⁵⁹ self-defense likewise is viewed more broadly in the delinquent subculture than in law. To make out a claim of self-defense, the law requires the defender reasonably to perceive an imminent, unlawful threat of serious bodily injury or death.²⁶⁰ In the subculture of delinquency, by contrast, any time one "is assailed or provoked, . . . [h]e may . . . take the offensive."²⁶¹ As David Matza explains, "[t]he delinquent is subject to frequent oscillation between sensing himself as cause—humanism—and seeing himself as effect—fatalism."²⁶² And what "puts the delinquent in the mood of fatalism" is being "pushed around."²⁶³ Based on the facts in the record, Tilley may have had good reason to feel pushed around by Pavlides and Snedecker. While this hardly justifies shooting them, their behavior may have diminished his sense of accountability for the crime and, hence, his remorse afterward.

The final indicator of remorselessness cited in the opinion is Tilley's statement (in response to the psychologist's direct question) that the thing he felt worst about was losing his girlfriend.²⁶⁴ The court evidently wanted Tilley to say that he felt sorry for the victims or their families, or bad about his own sin or his infraction of the law. To respond that he felt worst about losing his girlfriend appears to have meant, in the court's eyes, a total self-absorption and a failure to appreciate the seriousness of his crime. But the court's implication that Tilley's statement negates "true" remorse seems to suggest that adolescents experience only "puppy love": ephemeral, trivial attachments distinct from the more permanent, deep attachments of adults.

If one admits that the loss of a girlfriend can be a profound deprivation—for a teenager as for a grownup—then the court's inference becomes problematic. Taken literally, Tilley's statement does not mean he is indifferent to the seriousness of his offense or the suffering of his vic-

257. *Id.* at 45.

258. *Id.* at 69–70.

259. See *supra* notes 184–191 and accompanying text.

260. Wayne R. LaFave, *Criminal Law* § 5.7(d) (3d ed. 2000).

261. Matza, *supra* note 185, at 79.

262. *Id.* at 88.

263. *Id.* at 89. For a discussion of what being "pushed around" means to a delinquent, see *id.* at 88.

264. See Record at 203.

tims. He says only that his girlfriend's loss overshadows everything else. And, one might ask, why not? To expect, as the court does, that such selfish concerns will be subordinate to regret over the offense itself in the first few hours after the crime seems unrealistic. Even the saintly Sonya, in *Crime and Punishment*, does not initially react to Raskolnikov's confession by saying: "How could you do such a thing to the pawnbroker and her sister?" Rather, she cries: "What, what have you done to *yourself*?"²⁶⁵

Thus far, I have attempted to show that the factors the court cites to show remorselessness are, at worst, unsupported by the record and, at best, ambiguous indicators of Tilley's remorselessness. But beyond these weaknesses in the court's analysis, an examination of the record reveals additional information that might indicate remorse or the capacity for remorse, but which the court chose to ignore. For example, in his interview with a police officer, Tilley was asked what he did after the crime. After he described shoveling snow off the driveway, presumably to create an alibi, Tilley was asked: "Then what did you do?"²⁶⁶

His answer, "Sat in my house and thought about all of this,"²⁶⁷ manifests a capacity for reflection, which is perhaps "the cultural instinct *par excellence*"²⁶⁸ and which is a prerequisite of remorse.

Still closer to remorse itself is Tilley's statement, remembered by the police officer, that he "was glad he got caught, he felt a lot better now that he was caught."²⁶⁹ The improved mood might suggest that the boy had been suffering from the tension of guilt, which was alleviated by the certainty of punishment.

A final factor, present in the record but ignored by the court, is that Tilley recollected having suicidal thoughts while sitting in his house after the crime.²⁷⁰ Reflecting the punitive superego's judgment that one has no right to go on living, suicide is the quintessential manifestation of hopelessness and remorse.²⁷¹

To be sure, any of these factors could mean something else entirely; I cite them only to show that if we are willing to accept ambiguous indicators, there are as many to be found on one side as on the other.²⁷²

265. Dostoevsky, *supra* note 109, at 411 (emphasis added).

266. Record at 74.

267. *Id.*

268. C.G. Jung, Psychological Factors Determining Human Behavior, in 8 *The Collected Works of C.G. Jung* 114, 117 (R.F.C. Hull trans., Bollingen Series XX 1960) (1937).

269. Record at 105.

270. *Id.* at 74, 182.

271. However, suicidal remorse may not be the *kind* of remorse that correlates with amenability to rehabilitation. See *infra* text accompanying notes 343–344 (discussing self-injury as a "wasteful" vicissitude of remorse).

272. Nine years after the crime, while serving his sentence in the Ohio State Penitentiary, Ed Tilley offered his own explanation of his "remorseless" behavior in the days following the shooting. He recalled that he had seen a 1980s movie, *Bad Boys*, which graphically depicts the sexual assaults that befall inmates in a juvenile detention center.

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D. "Half Woman, Half Child": *The Jeanice DeWester Case*

Though so sophisticated in many things she was such a child in others

Thomas Hardy, *Jude the Obscure*²⁷³

"If you take a mania like this, it won't be the last time and of that you can be sure. . . . Will you be trying to break into weddings the rest of your days? And what kind of life would that be?"

Carson McCullers, *The Member of the Wedding*
(Berenice speaking to Frankie)²⁷⁴

It was a cold winter night in the northern part of California's Central Valley. In Hilmar, a small town in the dairy region about twenty miles from Modesto, the body of a twenty-seven-year-old woman was found buried in a carport.²⁷⁵ As time would reveal, the woman had been shot while she lay on her bed and begged for mercy. After the shooting, a seventeen-year-old girl "ran from the house saying, 'I did it, I did it.'"²⁷⁶

The story of this crime actually begins in Modesto, a blue-collar town, home to a Gallo winery and the American Can Company, and the setting of the film *American Graffiti*.²⁷⁷ It was there, in December 1978, that Jeanice DeWester moved into the trailer home of a twenty-six-year-old woman, Nancy Anson.²⁷⁸ Soon after Jeanice's arrival, Nancy began to discuss marriage with Jack Von Gunten, a twenty-seven-year-old man who was already married to Patricia Von Gunten, the mother of his three children. To free Jack from the marriage and enable him to obtain custody of the children, Nancy, Jack and Jeanice contrived a plot to murder Patricia. Joining in their scheme was a twenty-year-old hitchhiker, Dennis

Knowing little about the legal system generally and even less about the possibility of bindover, Tilley focused all his efforts on "surviving the lock-up with giant hard-core kids like I'd seen in the movies." He elaborated:

It really was a no-brainer to me: tell the truth in court about my real home-life; be honest with the psychologist; tell the judge what I really felt, and go into the lion's den tagged a sissy, a coward, an empathetic nervous wreck; or go into the lion's den with a blaring reputation for callous violence, indiscriminate carnage and hardcore brutality. ? [sic] I was so far beyond the point-of-no-return that all the court hearings meant nothing to me other than the opportunity to enhance my image further.

Letter from Edward Tilley to Martha Grace Duncan, *supra* note 242, at 5.

273. Thomas Hardy, *Jude the Obscure* 238 (Folio Society 1992) (1895).

274. Carson McCullers, *The Member of the Wedding* 88 (1946).

275. Hilmar Woman Found Buried in Her Carport, *Merced Sun-Star*, Jan. 31, 1979, at 1.

276. *People v. DeWester*, 178 Cal. Rptr. 125, 126 (1981).

277. Interview with Amy Taylor, Reference Librarian, Stanislaus County Free Library, in Modesto, Cal. (Jan. 11, 2001) (providing information about Modesto); see also Nick Madigan, *Modesto Journal: Verily, but a Bit Tardily, the Auto Junkman Cometh*, N.Y. Times, May 15, 2002, at A14 (describing Modesto's evocation of the images in *American Graffiti*).

278. *DeWester*, 178 Cal. Rptr. at 126.

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Broome, whom Nancy had brought home as a companion for Jeanice. As the four friends contemplated the crime and the opportunity it would create for Nancy and Jack to marry, they envisioned a wedding in San Antonio, Texas. There was talk of Jeanice making the wedding dress and being in the wedding party. In addition, Jeanice sought to avenge a beating that Patricia Von Gunten had inflicted on her some years before.²⁷⁹

Gradually, the criminal plot took shape. Jack was supposed to lure Patricia outside by telling her he had a surprise for her. Then Jeanice, who was adept with a rifle, would shoot her. But the scheme did not go as planned. Jack was unable to persuade his wife to leave the house, so the group decided to commit the crime indoors, under cover of a staged robbery. Upon entering the house, they found Patricia in bed, undressed, watching television. It was Jeanice who pointed the rifle and ordered Patricia to dress and gather money and jewelry. Then, after the others had left the room, Jeanice ordered Patricia to lie down on the bed again. She shot her once in the chest, killing her.²⁸⁰

1. *An "Imperious and Grandiose Personality."* — Following the crime, Jeanice fled to San Antonio, where she was apprehended by police.²⁸¹ When asked whether she understood her Miranda rights, she stated "in a braggadoccio way . . . that she had been read them hundreds of times."²⁸² Deemed unsuitable for treatment as a juvenile, Jeanice was tried by a jury and found guilty of first-degree murder.²⁸³ At sentencing, the judge took into account a probation report that described a childhood riddled with abandonment and loss. Jeanice's mother had deserted her at the age of three months. Her father was in prison, so Jeanice lived in the homes of successive relatives until his release, when she was six.²⁸⁴ She dropped out of school at age thirteen, after completing only the fifth grade.²⁸⁵ At fourteen, she gave birth to a child and married the baby's father a few days later;²⁸⁶ however, her grasp at a normal life and happiness was short-lived. Her husband proved abusive, and nine months after the baby's birth, he left Jeanice, taking the infant with him. As of the time of the report, Jeanice had not seen her child again.²⁸⁷

279. *Id.* at 130. According to her lawyer, Jeanice's motive for the crime was "simple": "She needed friends." Telephone Interview with Mark Cutler, attorney in Cool, Cal.; formerly of the California Public Defender's Office in Sacramento, Cal. (Jan. 12, 2001).

280. *DeWester*, 178 Cal. Rptr. at 126.

281. *Id.* at 127.

282. *Id.* at 135. As she had no record, this could not have been true. *Id.*

283. *Id.* at 127.

284. *Id.* In a somewhat different account, a newspaper feature story states that Jeanice's father was not released until she was twelve. See Vanda Krefft, *Woman's World: A Senseless Favor*, *Merced Sun-Star*, June 29, 1982, at 41. From that time, Jeanice made her home with him, living in the motels of three different states for about a year, until he too abandoned her. *Id.*

285. *DeWester*, 178 Cal. Rptr. at 131.

286. *Id.* at 127-28.

287. *Id.* at 126.

While the account of her childhood may have garnered some sympathy for Jeanice, the psychological evaluation, which was also contained in the probation report, did not. Over and over, the evaluators emphasized Jeanice's lack of remorse. John A. Testa administered a battery of psychological tests to Jeanice and concluded: "There was no remorse or guilt felt in this [interview] nor any felt during my prior evaluation of Ms. DeWester."²⁸⁸ Most striking is the language of a psychologist, Dr. William Boblitt, who noted: "She shows an amazing lack of guilt or remorse considering the circumstances under which she currently finds herself."²⁸⁹ According to the probation officer, Dr. Boblitt told him that "he considers defendant the most dangerous person he has ever run across and feels she is not appropriate for the California Youth Authority programs."²⁹⁰

On the basis of these reports and the crime itself, the trial judge denied the defendant's motion for a remand to the California Youth Authority for evaluation. On June 25, 1979, the court sentenced Jeanice to an indeterminate sentence of twenty-five years to life on the murder charge and an additional two years for the use of a firearm. She was confined in the California Institute for Women at Frontera where, at the time of her admission, she was the youngest inmate.²⁹¹

The defendant then filed a petition for a writ of habeas corpus, challenging the trial court's refusal to order a diagnostic evaluation by the Youth Authority. In October of 1980, the California Supreme Court granted the writ and ordered the trial court to recall Jeanice from prison and refer her to the Youth Authority for an evaluation.²⁹²

Strikingly different from the earlier assessment, the two psychological reports that formed part of the Youth Authority's evaluation were very positive. For example, a psychological associate, Margo Krystian, wrote: "Given the advantage of two years hindsight it is possible to see that Jeanice is making productive use of the experience The energy and drive which formerly found a destructive course are now being rechanneled into constructive directions."²⁹³ Describing Jeanice as "half woman, half child," Ms. Krystian concluded that "there do not appear to be any counterindications [sic] to treating Jeanice within the California Youth Authority structure."²⁹⁴

Echoing these affirmative sentiments was the report of a staff psychiatrist, Dr. A.M. Greene. He addressed Jeanice's attitude toward her crime directly, stating that she "does not deny that she caused a death, but she

288. Id. at 128 n.6.

289. Id.

290. Id. at 128.

291. Id. at 127-28.

292. Id.

293. Id. at 129.

294. Id. at 128-29.

denies intent.”²⁹⁵ Reinterpreting what others had seen as remorselessness, he wrote: “The imperious and grandiose personality as well as the asocial conduct has grown out of the extended family background experiences. The lack of remorse is also a function of an inadequate self with its defensive pride.”²⁹⁶ In conclusion, he opined that Jeanice did not appear to be a danger to others in the sense of having a bad influence on other juvenile wards.²⁹⁷ He too found “no contraindications for the utilization of the California Youth Authority as a suitable agency for rehabilitation of this offender.”²⁹⁸

In addition to these reports, the Youth Authority evaluation noted that during the seventeen months of her confinement, Jeanice had obtained her GED (high school graduation equivalent).²⁹⁹ It stated that Jeanice was “adjusting well, in that, she [was] cooperative, usually mature behaving, self-directed and fit[] in well with the general YA population. . . . She was remorseful about the death of the victim.”³⁰⁰

Notwithstanding Jeanice’s progress, the probation department, which filed a supplemental report at this time, expressed concern about Jeanice’s “history of polydrug and alcohol abuse . . . unfortunate lifestyle and . . . unrealistic goal of attending law school.”³⁰¹ It further emphasized that Jeanice “may still be avoiding direct responsibility for the victim’s death.”³⁰² Above all, the probation department noted its concern that Jeanice might be released early if she were placed in the jurisdiction of the Youth Authority.³⁰³

At the second sentencing, the judge acknowledged all these reports and, in particular, the discrepancy between the reports of Dr. Boblitt and the Probation Officer, on the one hand, and those from the Youth Authority, on the other. “We have experts then,” the judge commented, “who come to different conclusions and the Court has to make the ultimate decision.”³⁰⁴ The judge emphasized Jeanice’s involvement in planning the crime and in devising a new plan when the first one failed.³⁰⁵ Characterizing the offense as one that involved “sophistication,” he also stated that Jeanice herself appeared to be “as sophisticated as” and “probably smarter than” her coparticipants in the crime.³⁰⁶ Although they were older than Jeanice, her smartness and sophistication made her

295. *Id.* at 129.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 128.

300. *Id.*

301. *Id.* at 129.

302. *Id.*

303. See *id.*

304. *Id.* at 130.

305. *Id.* at 131.

306. *Id.* at 130.

equally culpable.³⁰⁷ And since the coparticipants had been sentenced to twenty-five years to life, it was appropriate to punish Jeanice with a similar sentence.³⁰⁸

2. *Sophistication Revisited.* — On appeal, the Court of Appeal of the Fifth District took issue with the lower court’s characterization of the crime as sophisticated. Rather, it found that the crime was actually “unsophisticated,” in that the criminals “left a clear trail of evidence to be used in identifying and apprehending them.”³⁰⁹ Moreover, the court noted, “[t]he motive for the crime was juvenile.”³¹⁰ As to Jeanice’s being more intelligent than her coparticipants, the court rejected the idea that this would preclude a commitment to the Youth Authority. In this regard, it quoted Ms. Krystian’s observation that Jeanice functioned as “half woman, half child.”³¹¹ Finally, the Court of Appeal found that the trial court had been mistaken in taking into account the “fact that the two coparticipants were sentenced as adults.”³¹² Since Jeanice herself was not an adult, the relevant question was whether she was a suitable candidate for commitment to the Youth Authority. Only a finding that she was not suitable could justify sentencing her to state prison.³¹³

With regard to Dr. Boblitt’s evaluation, the Court of Appeal held that it was entitled to little credit as it was more than two years old at the time of the second sentencing. By that time, the Court noted, Dr. Boblitt’s pessimistic predictions had proven false. Jeanice had earned her GED, made progress in the academic, personal, and vocational realms, and expressed some remorse, especially on behalf of the victim’s children. Based on all these considerations, the Court of Appeal reversed the trial court’s order that Jeanice be confined in a state prison. The case was sent back to the superior court for an order committing her to the Youth Authority. Instead of being confined in an adult prison for twenty-seven years to life, Jeanice would be kept in a juvenile facility for, at most, five and a half years from the time of the second sentencing. She would be released no later than her twenty-fifth birthday, December 27, 1986.³¹⁴

3. *A Final Assessment.* — *People v. DeWester* teaches many things—among them, the self-correcting capacity of the legal system and the benefits of assessing a juvenile’s character over time. The case further shows that the problem of evaluating remorsefulness cannot be solved merely by mandating the use of mental health experts in all cases. Experts’ opinions are not sacrosanct. As we have seen, two sets of experts, after assess-

307. *Id.*

308. *See id.*

309. *Id.* at 132.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 131, 133, 135.

ing Jeanice's remorse at different times, disagreed about her attitude toward her crime and her amenability to rehabilitation.

It is tempting to draw yet another lesson from this case; to wit, that remorse may manifest itself only after long silence. But this assumes that the second set of evaluations, by Dr. Greene and Ms. Krystian, was correct. In fact, we do not know for sure which evaluations were the accurate ones. It may be that Jeanice developed remorse with the passage of time, under the influence of a rehabilitative environment, but it also seems possible that the earlier assessments of remorselessness, by Dr. Boblitt and Mr. Testa, were correct and that lack of remorse is simply a poor predictor of the capacity for rehabilitation. In support of the latter theory is the fact that Dr. Greene and Ms. Krystian seemed to focus less on the whole issue of remorsefulness than the earlier interpreters did. They made no claim that Jeanice's remorse came bursting forth two years after the crime; rather, they emphasized that she had proven her capacity to grow and transform her life.

So much for the issue of remorse, narrowly construed. But what of Jeanice's crime? Although it may seem unrelated to our topic, one suspects that some of the interpreters of Jeanice's character may have allowed their view of her emotional state *after* the murder to be colored by the cold-bloodedness of the murder itself. For this is indeed the most planned and deliberate, and perhaps the most heartless, of the crimes we have examined in this Article. Of the crimes in Part Two, it is the only one that was not impulsive; of those in Part One, Chris Thomas's crime was equally planned, but some observers believe that Chris's girlfriend was the mastermind.³¹⁵

It is interesting that the trial court made much of Jeanice's "sophistication" and the "sophistication" of her crime, while the appellate court took the opposite view of both the girl and the crime. To one accustomed to reading criminal cases about adults, the debate is striking, because it could only occur in a juvenile case. Only as applied to a juvenile would sophistication necessarily be a bad quality, because it makes it harder to argue that the juvenile should be treated as a child. With its denotative meaning—"deprived of native or original simplicity"³¹⁶—*sophisticated* belies one of the qualities, innocence, that is the hallmark of childhood, or at least of the Romantic idea of childhood.³¹⁷

315. E.g., Rosenberg, Thomas Execution Nearing, *supra* note 116 (quoting Dr. Henry O. Gwaltney, a clinical psychologist who testified for the prosecution. Speaking to the press, Dr. Gwaltney said: "Chris may have pulled the trigger, but the girl was the real killer.").

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316. Webster's New International Dictionary, *supra* note 10, at 2400.

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317. For a critical discussion of the Romantic conception of the child, see James Kincaid, *Child-Loving: The Erotic Child and Victorian Culture* 63-74 (1992). Though usually identified with Romanticism, the "symbolic association between childhood, innocence and regeneration is age-old, lying at the heart of the New Testament and of Christian thought." Jackie Wullschlager, *Inventing Wonderland* 17 (1995).

One might well argue with the legal system's assumption. Could not sophistication imply an intelligence that would auger well for the capacity to learn and change? And does not the law's use of the concept buy into an artificial, sentimentalized view of childhood itself? It is a promising argument but not the one I shall develop here. Rather, I will agree with the appellate court and endeavor to shore up its view of Jeanice as "half-woman, half child" and of her motive as "juvenile." Indeed, I suggest that the whole story of the crime is reminiscent of a fairy tale, which, as Bruno Bettelheim writes, "from its mundane and simple beginning, launches into fantastic events."³¹⁸ So also Jeanice, from wanting to make a wedding dress and be in a wedding party, became a party to conspiracy and murder.

But why, one may ask, did she join in such a fantastic scheme? Why did she, a kid who had been on the streets, taking care of herself from an early age, so lose sight of reality as to imagine that murder was a viable solution? Perhaps the pull of the fantasy was too strong for someone who had never been a member of any family for long. Perhaps, like Frankie Adams in Carson McCullers's novel *The Member of the Wedding*, Jeanice desperately wanted people to belong to and thought that the bride and groom could be, as Frankie says, "the we of me."³¹⁹

III. REMORSE AND CHARACTER: A REAPPRAISAL

A. *Remorselessness as an "Unreliable and Deceptious Seeming"*

All that we see may be equally seemings—but some of them are dependable, others not, or—as with mirror-images—only dependable when we know the special laws they follow.

I.A. Richards³²⁰

Having begun with a nine-year-old boy who killed a girl for bragging about her ability to play Nintendo, we have concluded with a seventeen-year-old girl who murdered a woman out of vengeance and a desire to be in a wedding party. In between, we have considered the cases of five other juveniles who were charged with murder or attempted murder. All were characterized by courts, prosecutors, or parole boards as lacking in contrition for their crimes. The chart below provides a summary of these cases.

318. Bruno Bettelheim, *The Uses of Enchantment: The Meaning and Importance of Fairy Tales* 63 (Alfred A. Knopf, Inc. 1976).

319. McCullers, *supra* note 274, at 35. Like Jeanice, Frankie had lost her mother, who died giving birth to her. Katherine Dalsimer interprets Frankie's fantasy about becoming a member of the wedding as a denial of this loss and the "cumulative sense of separateness." Katherine Dalsimer, *Female Adolescence: Psychoanalytic Reflections on Works of Literature* 14 (1986).

320. I.A. Richards, *How to Read a Page: A Course in Effective Reading with an Introduction to a Hundred Great Words* 161 (1942).

NAME	AGE	CRIME	INDICATOR OF REMORSELESSNESS	DISPOSITION
Cameron Kocher	9	Killed playmate	Said: "If you don't think about it, you won't be sad"; Resumed playing Nintendo	Involuntary Manslaughter
Gina Grant	14	Killed mother	Joked and showed no sorrow	Treated as juvenile but stigmatized
Chris Thomas	17	Killed girlfriend's parents	Fell asleep	Executed
Sherard Martin	14	Killed an older boy	Showed no emotion; Said: "The hospital killed him"	25 years
Anthony Archer	15	Participated in armed robbery and homicide	Laughed and sang	15 to 30 years
Ed Tilley	16	Shot two men, leaving one paralyzed for life	Made up songs about crime; Said: "They shouldn't have been following me"	22 to 65 years
Jeanice DeWester	17	Killed a woman "in cold blood"	Showed no regret	Trial Ct: 25 to life; After appeal: Treated as a juvenile

Through these seven case studies, I have attempted to challenge the process by which the legal system infers remorselessness in juvenile defendants. To reiterate some of the points made at the end of Part One and throughout the cases, I have called into question the following common practices: (1) interpreting the child or adolescent's emotional state within a few days or hours of the crime; (2) using non-experts to interpret lack of remorse (though experts too can make mistakes and may differ from each other); (3) disregarding developmental stages that bear on children and adolescents' ability to feel or express remorse the way adults do; (4) disregarding sociological findings about street codes of toughness that would provide an alternative explanation for an impassive countenance or callous words; and (5) employing stereotyped and conventional understanding to attribute an unequivocal meaning to behavior, when in fact such behavior may signify many things, even opposing things, and is thus deeply ambiguous. For all these reasons, the appearance of remorselessness in a juvenile is likely to be, in the philosopher's words, an "unreliable and deceptive seeming[]."³²¹

If this analysis is valid, certain practical questions arise. Should we, for example, jettison the concept of remorselessness in the transfer and sentencing of juveniles because we lack the ability to infer it accurately? Or, in the alternative, should we permit the use of remorselessness, but only when the child is assessed by an expert, over time, and only when this supposed marker of incorrigibility and evil is corroborated by other

321. *Id.*

indicators? Or, finally, should we continue employing remorselessness as a powerful factor in its own right, but try to convert it from a "deceptive" to a "dependable" seeming by learning the "laws [it] follow[s]?"³²²

Underlying these questions is a more fundamental one; to wit, if we could see clearly into a child's soul, would there still be a problem using the absence of remorse as a proxy for badness, a predictor of chronic criminality? There is, at present, no clear-cut answer to this basic query. It is true that some psychiatrists have included lack of remorse among traits characteristic of psychopathy—a difficult-to-treat disorder, defined in part by antisocial or criminal behavior.³²³ But other experts have found that psychopaths, when imprisoned, may display depression and feelings of deep regret.³²⁴ In an ironic twist, one expert suggests that criminals do experience feelings of remorse, but that these feelings, instead of deterring illegal acts, serve to enhance their view of themselves as fundamentally decent people.³²⁵ In any event, lack of remorse, by itself, is not indicative of psychopathy, for narcissistic people, too, avoid remorse.³²⁶ In narcissists, the positive sense of self depends upon maintaining the belief that one has no faults. Thus, "the admission of guilt . . . exposes something unacceptably shameful."³²⁷

If the relationship between lack of remorse and chronic criminality remains an open question in adults, it is all the more so in juveniles. Consider, for example, the entry under "Antisocial Personality Disorder" in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM IV)*, published by the American Psychiatric Association.³²⁸ The essential feature of this disorder, the *DSM IV* states, is "a pervasive pattern of disregard for, and violation of, the rights of others."³²⁹ In a chart listing seven diagnostic criteria of this condition, the final trait is: "lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another."³³⁰ So far, this sounds as though the courts were right in viewing remorselessness as a good predictor of enduring criminal tendencies. But the very next line on the chart specifies: "The individual is at least age 18 years."³³¹ And, lest the point

322. Id.

323. See Hervey Cleckley, *The Mask of Sanity: An Attempt to Clarify Some Issues About the So-Called Psychopathic Personality* 364 (2d ed. 1950); Robert D. Hare et al., *The Revised Psychopathy Checklist: Reliability and Factor Structure*, 2 *Psychol. Assessment* 338, 339 (1990).

324. See Gerald Adler, *Correctional Prison Psychiatry*, in 2 *Comprehensive Textbook of Psychiatry II* § 50.2, at 2438 (Alfred M. Freedman et al. eds., 2d ed. 1975).

325. Stanton E. Samenow, *Inside the Criminal Mind* 163 (1984).

326. Nancy McWilliams, *Psychoanalytic Diagnosis: Understanding Personality Structure in the Clinical Process* 178 (1994).

327. Id.

328. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994).

329. Id. § 301.7, at 645.

330. Id. at 650.

331. Id.

be missed, the *DSM IV* reiterates it three more times in the text, in words such as these, stating unequivocally: “Antisocial Personality cannot be diagnosed before age 18 years.”³³²

What is the rationale for this age-based caveat? One psychiatrist explained it as follows: “It’s just common knowledge that you can’t do it. You’ll see a kid who’s stealing, and a few years later he will be studying at Harvard! Sociopathic acts are within the range of expectable behavior for adolescents.”³³³ Addressing the building blocks of remorse more specifically, another psychiatrist observed: “Egocentrism and lack of empathy are such common features of middle and late adolescence that these traits don’t have the same predictive value they would with adults.”³³⁴ In keeping with this psychiatric common knowledge are the claims of experimental prison programs that they have found a way to teach young convicts empathy and remorse.³³⁵ If remorse can be taught, then the trait of remorselessness can change; it may not serve as a predictor of resistance to rehabilitation.

B. “*Worldly Grief*” and “*Godly Grief*”: *The Paradoxical Vicissitudes of Remorse*

We have considered the predictive value of remorselessness, but we have not yet touched on its converse, remorse. If remorselessness is not always bad, can we at least say that sincere remorse is always good?³³⁶ The

332. *Id.* at 647; see also *id.* at 646, 648 (repeating same stipulation).

333. Interview with John M. Nardo, M.D., psychiatrist and psychoanalyst, in Atlanta, Ga. (July 12, 2001); see also Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *Youth on Trial: A Developmental Perspective on Juvenile Justice* 291, 300–01 (Thomas Grisso & Robert G. Schwartz eds., 2000) (summarizing literature suggesting involvement in delinquency is normal in adolescence); Jules Glenn, *Alan Strang as an Adolescent: A Discussion of Peter Shaffer’s Equus*, 5 *Int’l J. Psychoanalytic Psychotherapy* 473, 478 (1976) (“Because marked regression is frequent in teenagers, it is often difficult to establish an adolescent patient’s diagnosis.”).

334. Telephone interview with Michael W. Bain, M.D., child psychiatrist and psychoanalyst in private practice in Atlanta, Ga. (July 22, 2001). For discussions of adolescents’ egocentrism, see Roni Cohen-Sandler & Michelle Silver, “I’m Not Mad, I Just Hate You!”: A New Understanding of Mother-Daughter Conflict 46 (1999) (“Teenage girls often become emotionally self-absorbed. Their ‘selfishness’ is legendary.”); David Elkind, *Egocentrism in Adolescence*, in *Contemporary Issues in Adolescent Development* 44, 48 (John Janeway Conger ed., 1975) (“[T]he young adolescent, because of the physiological metamorphosis he is undergoing, is primarily concerned with himself.”).

335. See, e.g., Sharon K. Hamric-Weis, Comment, *The Trend of Juvenile Justice in the United States, England, and Ireland*, 13 *Dick. J. Int’l L.* 567, 577 & n.56 (1995) (describing Capital Offender Program in Giddings, Texas, which seeks, inter alia, to “foster empathy and remorse”); Patricia Klein Lerner, *CYA Program Attempts to Teach Offenders Empathy and Remorse*, *L.A. Times*, Nov. 2, 1991, at B3 (describing “pioneering” California Youth Authority course to teach empathy and remorse).

336. I will not dwell here on the problem of criminals who “show an unfelt sorrow.” William Shakespeare, *Macbeth* act 2, sc. 3, l. 138, in *The Complete Works*, *supra* note 70, at 1219, 1234. For the defendant who feigns remorse in hopes of lightening his sentence is a type that has been widely recognized. See, e.g., Richard A. Posner, *Frontiers of Legal Theory* 237 (2001) (“But remorse is such an interior state of mind that the judicial system can never have much confidence that the defendant is remorseful rather than merely

novelist E.M. Forster, for one, would demur. In *Howards End*, he writes pityingly of the agony of his character, Leonard Bast, who has slept with Helen and left her with child:

Most terrible were his sufferings when he awoke from sleep. Sometimes he was happy at first, but grew conscious of a burden hanging to him and weighing down his thoughts when they would move. . . . He would sit at the edge of his bed, holding his heart and moaning: "Oh what *shall* I do, whatever *shall* I do?" Nothing brought ease. He could put distance between him and the trespass, but it grew in his soul.³³⁷

Soon after this passage, Forster remarks: "And of all means to regeneration, Remorse is surely the most wasteful. It cuts away healthy tissues with the poisoned. It is a knife that probes far deeper than the evil."³³⁸

The "wastefulness" of remorse can also be seen in the real-life case study of Peter, in Muriel Gardiner's book *The Deadly Innocents: Portraits of Children Who Kill*. At age eighteen, in an impulsive breakthrough of pent-up longing and rage, Peter killed his mother and two younger sisters. Within a few minutes of the crime, Peter reverted to his usual, nonviolent self. Horrified at what he had done, he immediately walked to the police station and made a full confession. His deep remorse persisted through years of imprisonment.³³⁹

Peter never adjusted to prison life; he attempted suicide on one occasion and made an unsuccessful escape attempt on another. In an effort to isolate himself from the other prisoners, he deliberately broke many rules but, in so doing, risked extending his already lengthy sentence.³⁴⁰ Yet despite his wretchedness, Peter refused to consider his friends and physician's advice for obtaining release through a new trial. When asked whether he had thought of having the case reopened, Peter replied: "I couldn't do that to my father. It was all so terrible for him, and he is just beginning to get over it. That would stir up all his tragic memories again."³⁴¹

While there are many possible interpretations of this remark, Peter's response manifests a determination to protect his father even at enormous personal cost. His self-sacrificing attitude may suggest that a "gnawing from the inmost heart" had attenuated his belief in his own worth to such an extent that he repudiated the chance to gain the freedom he so desperately longed for. If so, then this may not be the kind of remorse that bodes well for rehabilitation. In its deepest sense, *rehabilitation* refers

forensically resourceful."); O'Hear, *supra* note 18, at 1555 (maintaining that the "epistemological difficulties of remorse open a substantial risk of dishonesty").

337. E.M. Forster, *Howards End* 316 (1921).

338. *Id.*

339. Muriel Gardiner, *The Deadly Innocents: Portraits of Children Who Kill* 17–21 (1976).

340. *Id.* at 21–23.

341. *Id.* at 21.

to a transformation of character that will benefit not only society but also the offender himself.³⁴²

Of course, the most glaring examples of unproductive remorse are the cases of wrongdoers who, out of a torturing anguish over past crimes, inflict physical injury on themselves. One recalls the example of Oedipus, who upon learning what he had done,

struck at his eyes—not once, but many times;
And the blood spattered his beard,
Bursting from his ruined sockets like red hail.³⁴³

So also Judas Iscariot, after realizing that Jesus was to be crucified, and repenting of his betrayal, threw down the thirty pieces of silver and “went and hanged himself.”³⁴⁴

But the “wasteful” vicissitudes of remorse are not confined to *self*-injury; remorse over past wrongdoing may even lead, paradoxically, to further crimes. As Freud explains in discussing “criminals from a sense of guilt,” sometimes the feeling of guilt precedes rather than follows the guilty act.³⁴⁵ In such instances, criminals commit their misdeeds out of a desire to attach their oppressive guilty feelings to a particular wrongful act, and be punished for it.³⁴⁶ For example, in Dostoevsky’s *Crime and Punishment*, Raskolnikov experiences guilt feelings *prior* to killing the old pawnbroker and her sister; he may indeed commit the murders in order to suffer and be punished.³⁴⁷

For another example, consider Eugene O’Neill’s play *The Iceman Cometh*. The traveling salesman, Hickey, is chronically unfaithful, but suffers agonies of guilt toward his forgiving wife. Finally, to alleviate his remorse, Hickey murders her. As he explains to his friends in Harry Hope’s bar:

342. See Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 *Clev. St. L. Rev.* 147, 148 (1978) (describing the “rehabilitative ideal” as “the notion that the sanctions of the criminal law should or must be employed to achieve fundamental changes in the characters, personalities, and attitudes of convicted offenders, not only in the interest of the social defense, but also in the interests of the well-being of the offender himself”); see also Oppenheimer, *supra* note 21, at 242 (“The curative view of punishment according to which its infliction serves to dry up the spring of evil in the soul of the offender, either for the ultimate good of society or for the benefit of the criminal alone . . .”).

343. Sophocles, *Oedipus Rex*, in *The Oedipus Cycle* 67 (Dudley Fitts & Robert Fitzgerald trans., Harcourt, Brace & World 1961).

344. Matthew 27:5 (King James). This version differs from the account in *Acts* 1:18–19 (King James), which says that Judas died from a terrible fall in a place that later became known as the “Field of Blood.”

345. S. Freud, *Character-Types*, *supra* note 19, at 332–33.

346. *Id.*; cf. Peter Brooks, *Troubling Confessions: Speaking Guilt in Law and Literature* 21 (2000) (discussing the problematic nature of confessions, owing to omnipresent guilt feelings seeking expression).

347. For an elegant presentation of this idea, see W.D. Snodgrass, *Crime for Punishment: The Tenor of Part One*, 13 *Hudson Rev.* 202, 203, 244–45 (1960).

The one possible way to make up to her for all I'd made her go through, and get her rid of me so I couldn't make her suffer any more, and she wouldn't have to forgive me again! . . . I had to kill her.

. . . .

I hated myself more and more, thinking of all the wrong I'd done to the sweetest woman in the world . . . I got so I'd curse myself for a lousy bastard every time I saw myself in the mirror. I felt such pity for her it drove me crazy.³⁴⁸

After committing the murder, he recalls: "I felt as though a ton of guilt was lifted off my mind."³⁴⁹

Instances of remorse leading to crime can also be seen in real life. In his book, *Abnormalities of Personality*, Michael Stone quotes a patient who shot a policeman, leaving him a paraplegic. After benefitting from therapy, the patient expresses an emotional contradiction: "If I think about what I did even to the cop, I can't stand myself—so then I go and drink, only once I get drunk I know I'm going to go out there and do another crime."³⁵⁰

These illustrations suggest that the vicissitudes of remorse are not all equal, or equally likely to correlate with amenability to the transformation of self. As theologians would put it, there is "worldly grief" and "godly grief,"³⁵¹ and what is needed is the "godly" kind, such as that experienced by the Apostle Peter. After denying Jesus, Peter "went out, and wept bitterly," but went on to become the pillar of the church.³⁵² Psychoanalysts, for their part, might speak of a "loving superego,"³⁵³ versus a "criticizing and feared" one,³⁵⁴ or an "internal saboteur."³⁵⁵ They would

348. Eugene O'Neill, *The Iceman Cometh* 226–27, 239 (Vintage Books 1946).

349. *Id.* at 241.

350. Michael H. Stone, *Abnormalities of Personality* 449 (1993). Stone believes that lack of remorse is one of the most ominous traits of the psychopath. See *id.* at 281. Nevertheless, he finds that some criminals can make the transition from unrepentant to remorseful. See *id.* at 461 n.*.

351. *The Interpreter's Bible* defines these contrasting kinds of grief as follows. Godly grief is "the God-directed and beneficial kind, . . . a deep sorrow that leads to repentance, and so ends in the divine gift of salvation." Worldly grief is "remorse that shrinks from the penalty of wrong action but feels no real concern over the wrong done to God and man; it may result in self-torture, but it does not drive the sinner to seek forgiveness from God, and so it leads only to spiritual death." 10 *The Interpreter's Bible*, supra note 20, at 359–60 (interpreting II Corinthians 7:10). R

352. Matthew 26:75 (King James). According to *The Interpreter's Bible*, Peter "was wiser than Judas: he wept, made confession, and found peace. . . . He became a 'rock' in very fact." 7 *The Interpreter's Bible*, supra note 20, at 590. R

353. See Roy Schafer, *The Loving and Beloved Superego in Freud's Structural Theory*, 15 *Psychoanalytic Study of the Child* 163, 164 (1960).

354. *Id.* at 164.

355. See W. Ronald D. Fairbairn, *An Object-Relations Theory of the Personality* 106–07 (1952).

emphasize the need to distinguish between a bad self and a bad deed,³⁵⁶ so that the superego might not become too punitive, endangering the ego with its harsh judgments and merciless criticism.³⁵⁷

EPILOGUE: "THE REAL CHILD WAS NOT REVEALED"

The law speaks of remorse, but often seems oblivious of what it actually entails—a suffering so terrible that Yeats writes of release from this state as tantamount to euphoria:

When such as I cast out remorse
So great a sweetness flows into the breast
We must laugh and we must sing,
We are blest by everything,
Everything we look upon is blest.³⁵⁸

If our legal system were to take seriously the pain of remorse, then it would also have to anticipate a certain amount of resistance to it, especially in children and adolescents, who—as we have seen—are more likely to use denial, to exhibit a short sadness span, to follow the code of the street, and to engage in egotistical and non-empathic behavior.

In this Article, I have endeavored to raise questions about the ways our legal system interprets remorselessness in juveniles. It is my hope that, after reading this study, more people will hesitate before inferring callousness and lack of contrition in a seemingly indifferent youth. During that moment of hesitation, they might reflect on the words of one dissenting judge who feared that, despite all their efforts to elicit remorse, interviewers had “lamentably failed to break through . . . a wall of defensive self-denial.”³⁵⁹ In the entire legal proceeding, he said: “[T]he real child was not revealed.”³⁶⁰

356. Interview with John M. Nardo, M.D., psychiatrist and psychoanalyst in private practice, in Atlanta, Ga. (July 6, 2000); see Nathan Leites, *Depression and Mania* 104 (1979) (describing variations of self-condemnation under heading “The Evil Self”).

357. Cf. Sigmund Freud, *The Ego and the Id* (1923), reprinted in 19 *The Standard Edition*, supra note 19, at 2, 53 (1961) (describing the superego that “rages against the ego with merciless violence”); Charles Brenner, supra note 73, at 123 (“[A] superego which insists on self-punishment or self-injury becomes itself a danger from the point of view of the ego.”).

358. W.B. Yeats, *A Dialogue of Self and Soul*, in *The Winding Stair and Other Poems* 4, 9 (1933).

359. *In re Welfare of D.T.H.*, 572 N.W.2d 742, 747 (Minn. Ct. App. 1997) (Davies, J., dissenting). For a discussion of the significance of the boy’s supposed remorselessness in the majority opinion, see supra text accompanying notes 140–141.

360. *D.T.H.*, 572 N.W.2d at 747.