The Place of Repentance in Retributive Sentencing

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"...there are moments of delirium when men ought not to be judged by their actions...." (Confessions of Jean Jacques Rousseau, p. 29 ,London, 1923)
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ABSTRACT

Repentance touches many aspects of life. It is basic to human relations. The article sets forth the normative reasons for taking repentance into account in the frame of criminal sentencing. Change that takes place in people should be recognized as a relevant measure for society’s attitude toward them. The web of
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Social relations among offender, victim, and society needs to permeate the criminal justice system and the considerations of punishment that it includes. Whoever wants to disconnect between the prevailing social reality, which attributes great interpersonal importance to repentance and forgiveness, and the question of how a person is punished in individual-state relations, has the burden of proof to show that the social reality is not worthy. If a person has a right to be punished as a consequence from her being a rational moral agent she may also repent her offense as an autonomous person. The repentance may change not only one's future but also illuminate her past.

I. Introduction

Repentance touches many aspects of life, and it is basic to human relations. The present article sets forth the normative reasons for taking repentance into account, and tries to raise the awareness of the value of repentance in the frame of criminal retributive sentencing. It argues that repentance may change not only one's future but also illuminate her past; therefore, if a person has a right to be punished as a consequence from her being a rational moral agent she may also repent her offense as an autonomous person.

The second part of the article discusses the value and importance of repentance for the individual and for society at large, in light of which, it argues, repentance should constitute a central consideration within criminal punishment. Then, the third part of the article examines the central end for imposing punishments: the
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principle of retribution. The fourth part addresses the question of whether repentance falls within retributive punishment or whether it acts outside it as an extenuating circumstance. The article claims that the offender's repentance is a pertinent factor that should be calculated under a model of retribution. Part five discusses different arguments that militate against the consideration of repentance when meting out criminal punishment. The article concludes that although recognition of the influence of repentance on sentencing raises many difficult problems, there is no escape from addressing them within the framework of sentencing rather than waiving the factor of repentance because of its complexity. The importance of the interpersonal relationships between offenders and victims as well as the importance of repentance for the moral growth of the individual and society, warrant the inclusion of repentance within the considerations of punishment.

II. The Value of Repentance

Much has been written on the importance of repentance. Repentance operates on the plain of interpersonal relations; repentance and forgiveness act to heal wounds, to derive lessons, to rehabilitate relations.\(^1\) Repentance that is expressed on the part

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of the offender constitutes confirmation of the victim’s rectitude and opens the possibility of salving the wounds of the trauma.\textsuperscript{2} It is easier for the victim who receives an apology to forgive and to heal.\textsuperscript{3} Sincere repentance by the offender can, then, return the victim’s sense of respect and equality.\textsuperscript{4}

But even in the absence of mutual relationships between the offender and the victim, repentance is vital for the moral development of the individual.\textsuperscript{5} In religious thinking, repentance is also the natural role that God gives to the erring soul in order that it returns to the straight path.\textsuperscript{6} Hebrew sages claim that "in the place where penitents stand, even the wholly righteous cannot stand".\textsuperscript{7} The German philosopher Scheler views repentance as a kind of self-healing of the soul, and in effect the only form in which the soul can collect its strength. Repentance kills, in his view, in order to create,\textsuperscript{8}

\textsuperscript{5} ABRAHAM ISAAC KOOK, THE LIGHTS OF PENITENCE, THE MORAL PRINCIPLES 96 (Ben Zion Bokser trans., 1978). (stating that: “Great and majestic is the happiness of penitence. The consuming fire of the pain engendered by sin itself purges the will, cleanses the character of the person so that the great wealth in the treasures of the life of penitence grows for him. The person continues to ascend through penitence, through its bitterness and its sweetness, through its grief and its joy. Nothing purges and cleanses a person, raises him to the full stature of a human being, like the profound experience of penitence”).
\textsuperscript{6} MAX SCHELER, ON THE ETERNAL IN MAN 39 (1954, Bernard Noble trans.).
\textsuperscript{7} BT Berachot 34b (Epstein ed.).
\textsuperscript{8} SCHELER, \textit{supra} note 6, at 57.
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and is the most revolutionary power in the moral world. Self-contentedness develops from pain accompanied by repentance can also lead to supreme happiness. The process of repentance cleanses and purifies the soul; in addition, it leads the person to a new place where he can stand strong, resilient, and with self-respect.

Scholars criticize conceptions that view repentance as harmful, an unproductive mental enterprise, and disharmony of a sick soul, for what reason is there to cry over the past, which cannot be returned. Scheler insists that repentance constitutes a revaluation of the past and shapes new value and meaning for it. Repentance stations the misdeed in a new relation to the significance of an individual’s life, and in this way it changes the unchangeable. Weinberg stresses that though it is true that the sinful act has completely ended, the sin continues to nest in a person's heart. The sin as a mental event is constantly in operation even after the one-time event has finished, thus demanding its

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9 Id. at 56.
10 Id. at 54. See also KOOK, supra note 5, at 121-22 (“Although at the time he may be perplexed how to extricate himself from the mire of sin, although he may still be unsure how to mend his past and his course is not yet clearly marked out to him, with many stumbling blocks yet facing him, the will to be good – this is a wind from the Garden of Eden blowing on the soul and filling it with contentment…”).
11 Id. at 66-67.
12 WIEBERG, supra note, at 194; SCHELER, supra note 6, at 39.
13 Id. at 41-42.
14 Id. at 42.
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repair through repentance.\textsuperscript{15} Repentance is not a cry about what happened but an effort related to the future. It is an operation penetrating deep within the soul and putting an end there to the same evil that had sprung up following the sin, and preparing the soul for a new, pure, and healthy life.\textsuperscript{16} Repentance is not only a feeling of sorrow on past occurrences, but a kind of surgeon’s scalpel for cutting into and ripping out the root of the sin, stopping the channel that nurses it and gives it life. Hence, according to Weinberg, an answer for those who ask what good is repentance about what previously occurred.\textsuperscript{17}

Weinberg posits that complete repentance rejuvenates the past. With a person’s decision to start life anew, she improves and repairs her past life.\textsuperscript{18} Sin-repairing is a change in one’s mental experience. It is a change that includes not only uprooting the bad, but also turning bad into good, so as wickedness becomes virtue.\textsuperscript{19} Repentance shapes the personality of the individual in a way that the past is perceived in a different form. The offense is perceived as a failure that is vital to growth, not as a destructive event that testifies to the offender’s baseness and apathy.

\textsuperscript{15} YECHIEL YAACOV WEINBERG, L’PRAKIM (to episodes) 200 (2003) (Hebrew).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 102.
\textsuperscript{19} Id. This is in accord with what is written in BT Yoma 86b.
According to the described conception, repentance is a process that needs to occupy a permanent place in a person’s heart. Repentance improves the character of the offender, perhaps even generates an upheaval in one’s soul. Full repentance that assures a non-return to crime it is not only important to the offender but it also constitutes a paramount public interest.

On the background of the significance of repentance we would examine how repentance should be integrated into the central end of punishment – the principle of retribution. We will address first the principle of retribution and then consider the fitness of repentance with this principle.

III. The Principle of Retributive Punishment

The idea of retributive justice is central to our general Weltanschauung (world view) as human beings. We want to suppose, from a moral point of view, that a relationship exists between a person’s deeds and fate, and that life is not a continuum of chance events over which we have no control. Accordingly, just as we expect a positive reward for a good deed, our expectation is that whoever commits a wrong will receive a negative desert. In real life, as is known, this principle does not always obtain. Children were murdered in Auschwitz. The story of Job teaches us that suffering is not necessarily a by-product of sin. However, we have a prima facie expectation that this principle will be upheld at least in
the framework of the justice system, and especially the criminal justice system. Accordingly, Michael Moore’s argument that any reasonable theory of punishment will proffer a central place to retributive justice, is well understood.\textsuperscript{20}

According to the doctrine of retribution inspired largely by the philosophy of Kant and Hegel, punishment bears an independent objective: doing justice as distinguished from attaining some benefit, such as a general deterrence, prevention of a future offense, or rehabilitation of an offender.\textsuperscript{21} This doctrine is retrospective. It relates to a person’s past deed.\textsuperscript{22} Robert Nozick stresses that retributive punishment is good in itself, as it connects the offender with the appropriate social values.\textsuperscript{23} Through punishment, society drums into the head of the offender those values toward which he has demonstrated contempt. Therefore, it exerts a significant influence in that person’s life, even if in a painful way.\textsuperscript{24} The doctrine of retributive justice is crudely manifested in the conception of “an eye for an eye,” measure for measure. More delicately, it expresses the relativity between the degree of the

\textsuperscript{20} M\textsc{ichael M}o\textsc{ore}, P\textsc{lacing B}lame: A G\textsc{eneral} T\textsc{heory of the Offender} L\textsc{aw} 191 (1997).
\textsuperscript{21} \textit{Id.} at 87-91; S\textsc{tephen P. G}ar\textsc{vey}, P\textsc{unishment as A}tonement, 48 U\textsc{CLA} L. R\textsc{ev.} 1801, 1805 (1999).
\textsuperscript{22} A\textsc{ndrew V}on H\textsc{irsch}, R\textsc{ecent Trends in American Criminal S}entencing T\textsc{heory}, 42 M\textsc{d. L. R}ev. 6, 27 (1983).
\textsuperscript{23} R\textsc{obert N}o\textsc{zick}, P\textsc{hilosophical E}xplanations 374 (1981).
\textsuperscript{24} \textit{Id.} at 374-75.
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offender’s guilt and the amount of his punishment.\textsuperscript{25} Punishment has to reflect the seriousness of the offense in its broadest sense. It constitutes a function of the offender’s guilt and of the damage caused or that might have been caused.\textsuperscript{26} Justice obligates to not punishing the offender to a greater or lesser extent than what is appropriate for his behavior.\textsuperscript{27} "If a man is punished \textbf{because} he sins, he \textbf{ought} to be punished \textbf{as} he sins" (emphasis in the original).\textsuperscript{28} The punishment needs to constitute a proper response to the misdeed. Punishment that is not inflicted on accordingly will be unjust.\textsuperscript{29} Too light a punishment might be perceived as a lack of respect for the feelings and rights of the victim.\textsuperscript{30} Too severe a punishment might create a feeling that the justice system is committing a worse crime than the offender’s,\textsuperscript{31} turning actually the offender into the victim.\textsuperscript{32}


\textsuperscript{27} Von Hirsch, \textit{supra} note 22, at 25.

\textsuperscript{28} \textit{Paul Ricoeur, The Symbolism of Evil} 42 (1967).


\textsuperscript{30} \textit{Geoffrey Scarre, After Evil: Responding to Wrongdoing} 100 (2004).


Following Hegel, retributive punishment may also be thought of as punishment for the sake of respecting the offender.\textsuperscript{33} Hegel opines that the offender has the right to be punished. It is not only the criminal act that is on stake, but also the fact that the offender is a rational moral agent possessing freedom of choice. The punishment embodies the will and the prerogative of the offender. It stems from his choice as a rational moral agent to commit an offense, a direct result of which is that person’s agreement to bear responsibility for his criminal conduct. A person does not receive due respect when the degree of punishment does not stem from his acts, let alone when he is related to as a dangerous animal who needs to be deterred or reformed.\textsuperscript{34} As opposed to the obvious wonderment why someone would want to claim for himself the right to be punished instead of conceding this “privilege,”\textsuperscript{35} certainly when the alternative is not hospitalization in a mental institution but an exemption from punishment, Herbert Morris offers two possible answers. One is that a person cannot concede being an

\begin{thebibliography}{9}
\item HEGEL’S PHILOSOPHY OF LAW (T.M. KNOX TRANS.) §100 (OXFORD UNIVERSITY PRESS, 1952); on the development of the concept of “the right to be punished” from the mid-18\textsuperscript{th} to the mid-19\textsuperscript{th} centuries, see Markus Dirk Dubber, The Right to be Punished: Autonomy and Its Demise in Modern Penal Thought, 16 LAW & HIST. REV. 113 (1998).
\item As Feinberg phrased it, “…the offender’s "right" to be punished is well-nigh certain to be renounced”. See JOEL FEINBERG, DOING AND DESERVING 73 (1970). See also Antony M. Quinton, On Punishment 55, 57 reprinted in THE PHILOSOPHY OF PUNISHMENT (H.B. Acton ed., 1969).
\end{thebibliography}
autonomous, sentient being. That is a human being’s nature from birth. Willful choice to commit an offense means therefore a willingness to bear its ensuing consequences. The second answer suggests that the right to punishment is a paternalistic right intended for the good of the offender, and this good occurs when a person’s choice is respected. Punishment is in the interest of the offender in that it strengthens one’s identity as an autonomous individual who has the ability to choose by his own free will, and is capable of comprehending the significance of his acts. Furthermore, the punishment is meant to cause the offender feelings of guilt and to make him cognizant of the immorality of his deed. Punishment has the effect of cleansing the soul.

At any rate, the doctrine of retribution stands on its own feet, as emanating from the need to have justice done even without relating to the supposed right of the offender to receive a punishment worthy of his offense. In contrast to philosophers like Michael Moore who emphasize the inherent value of retribution,

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there are those who maintain an affinity between retribution and revenge. Although the latter is perceived by many as something to be condemned and as destructive to persons in that it invests them with the past and the status of a victim, it is nevertheless inherent in a person’s nature. The desire for revenge and feelings of indignation and insult on the part of the victim are natural, more so than any willingness to forgive. As the well-known aphorism goes, "To err is human, to forgive divine." Channeling the personal emotion of vengeance toward the criminal justice system contributes to the stability of society. A situation in which organized society is unwilling to or incapable of imposing proper punishment on the offender through a sentencing system might lead to anarchy—to taking the law into one’s hands, to lynch law. However, while revenge might cause an escalation in violence, and while it is by nature without constraint (the victim can, for example, wish to murder the offender for stealing a horse or a vehicle), the principle of retribution posits the requirement of

41 See SCARRE, supra note 30, at 99.
42 THEODOR REIK, THE COMPULSION TO CONFESS: ON THE PSYCHOANALYSIS OF CRIME AND PUNISHMENT 408 (1961); SCARRE, supra note 30, at 17. The explicit prohibition against revenge in the Torah (Leviticus 19: 18) is narrowly constructed as only relating to monetary matters, not to physical, mental, or emotional injury (see BT Yoma 23a, The Babylonian Talmud, Epstein ed. Soncino press, 1938 ); "Any scholar who does not avenge himself and retain anger like a serpent— is no [real] scholar."
43 SCARRE, supra note 30, at 10.
45 Nygaard, supra note 32, at 833
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relativity between the offense and the punishment, and so an upper bar for the amount of punishment.⁴⁶

In effect, there is quite broad recognition of the legitimacy of a sense of resentment on the part of the victim. After all, a person will likely be angry at something bad that done to him.⁴⁷ Stifling natural emotions of indignation can be detrimental to the rehabilitation of the victim.⁴⁸ However, recognition of the legitimacy of resentment reflects more than recognition of the nature of the individual’s psychology. Resentment also has a moral value in that it testifies to the fact that victims respect both themselves and their rights.⁴⁹ A demonstration of resentment reflects to the offender the seriousness of his misdeed.⁵⁰ It also manifests respect for the social order in general through recognition of the harm caused to this order.⁵¹

On the face of it, it is difficult to find fault with granting the offender her due desert.⁵² On the contrary, a show of apathy toward

⁴⁷ Scarre, supra note 30, at 101.
⁴⁸ Thomas Brudholm, Resentment’s Virtue 40 (2008). In contrast, some philosophers insist that forgiveness enables the victim to conduct a constructive life: see Trudy Govier, Forgiveness and the Unforgivable, 36 Am. Phil. Q. 59, 60 (1999).
⁴⁹ Murphy, supra note 4, at 10; Joram Graf Haber, Forgiveness 78 (1991); Garvey, supra note 21, at 1822; Bibas, supra note 3, at 331.
⁵⁰ Haber, supra note 49, at 82.
⁵¹ Murphy, supra note 4, at 20.
⁵² Brudholm, supra note 48, at 29.
the hurt or injury suffered by others testifies to the absence of empathy and dissociation from moral values.\textsuperscript{53} A show of mercy in the imposition of sentence, mercy being defined as a lessening of the proper punishment,\textsuperscript{54} is an ambivalent gesture. On the one hand, pity is related to generosity and to empathy for people. On the other hand, mercy is conceived as a compromise with justice and as equivalent to arbitrariness\textsuperscript{55} Little wonder, then, that some philosophers opine that there is no place for mercy in the court’s considerations.\textsuperscript{56} However, a distinction must be drawn between mercy and considerations for determining the due punishment. In contrasts with Martha Nussbaum’s position, that a merciful judge is obliged to carry out an empathetic investigation of people’s internal nature,\textsuperscript{57} and with Dan Markel’s position, that any consideration that acts to lessen punishment for reasons not related to the ability of the individual to choose to perform the offense is based on mercy,\textsuperscript{58} scholars maintain that a sensitive examination of the

\textsuperscript{53} MOORE, \textit{supra} note 20, at 164.

\textsuperscript{54} MURPHY, \textit{supra} note 4, at 13-14; Jeffrie G. Murphy, \textit{Forgiveness and Resentment} 14, 20 in: JEFFFIE G. MURPHY & JEAN HAMPTON, \textit{FORGIVENESS AND MERCY} (1988); Jean Hampton, \textit{The Retributive Idea} 111, 158 in: \textit{FORGIVENESS AND MERCY}, \textit{supra} note 54; HABER, \textit{supra} note 49, at 33; Everett L. Worthington, Jr., \textit{FORGIVENESS AND RECONCILIATION: THEORY AND APPLICATION} 3 (2006); Garvey, \textit{supra} note 26, at 1321 (discussing possible interpretations of “mercy.”).

\textsuperscript{55} SCARRE, \textit{supra} note 30, at 87; Garvey, \textit{supra} note 26, at 1324.


\textsuperscript{58} Markel, \textit{supra} note 26, at 1436, 1467.
nuances of the specific case is not equivalent to exercising mercy. And, indeed, recognition of the complexity in determining the proper punishment warrants taking into account varied mitigating circumstances, some related to the initial choice to commit the offense and some external to it. In the following section, we will examine whether repentance on the part of the transgressor can nullify the offense or at least lessen its seriousness, not as a consideration of mercy but as a legitimate factor for determining the amount of the deserved punishment.

IV. Does Repentance Falls Within Principle of Retribution or Does It Act Outside It?

Repentance would at first glance seem to be external to the principle of retribution, for repentance cannot change the past. The

59 Scarre, supra note 30, at 94; Alwynne Smart, Mercy 212, 216 in The Philosophy of Punishment, supra note 25 (stating that "Now although it is quite normal to talk about mercy in the sort of cases I have described, what we actually doing is redressing a potential wrong. We say there are mitigating circumstances and what we mean is that the prescribed penalty doesn't fit the case in question and that it would be an injustice to impose it"); B. Douglas Robbins, Comment: Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation, 149 U. PA. L. REV. 1114, 1141, 1163-64 (2001) (insisting that the reference to the personal change that the repentant offender underwent is not a matter of mercy, and that the offender is entitled in these circumstances to a less severe punishment.)
evil deed stands on its own even if its executor honestly repents its commission. However, the matter is not so simple. Thus, there are cases in which repentance will be inseparably combined with the offense. Consider the following example: A becomes upset at B in the course of an argument, loses control, and punches the latter. Immediately after the punch, A falls on his knees, breaks out crying for having lost control in such a shameful manner, and begs for forgiveness. Under these circumstances, it may be said that repentance nullifies the offense or, at least, considerably lessens its seriousness. The main damage of the punch is the attendant shame suffered by the one attacked. The immediate repentance and the humiliation that the attacker subjects himself to in that act cancels or reduces a considerable portion of the shame element; that is, the damage that was caused.

However, even in cases in which the physical harm was not canceled out and even in cases in which repentance came later than the criminal act, repentance can still operate to diminish the damage done to the victim. An offense can cause concrete physical damage—whether to body or to property—and it can also cause mental psychological damage. When another person is at fault for the damage that occurred, insult is added to injury, which does not exist when the damage is caused, for instance, by forces of
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nature. Psychological damage is manifested in the insult and humiliation that the victim experiences when the offender behaves toward her as a means. The offense transmits a sense of valuelessness to the victim. The victim can lose her sense of security following the crime and experience feelings of a loss of control and of autonomy. The victim might feel that the world is a frightful and frightening place, that one’s self-worth and social worth is lost. There are offenses for which the insults they cause are more painful than the physical damage. When physical damage is caused by someone in whom we had placed our trust, the insult can be more scathing than the physical damage. Repentance in itself cannot annul bodily or property damage; however, it may have influence at the level of the victim’s psychological damage. And here repentance by the offender can return to the victim a sense of control over her life and restore self-confidence. The contrite offender responds to the victim’s resentment and respects it. The willingness to repent is impossible

60 SCARRE, supra note 30, at 1-2.
61 Bibas, supra note 3, at 331.
62 SCARRE, supra note 30, at 24.
64 Id. at 959.
66 SCARRE, supra note 30, at 24.
67 Id. at 5.
68 HABER, supra note 49, at 99.
without humiliation, which acts counter to a person’s natural pride.\(^{69}\) Hence, the very expression of repentance —so long as it is not perceptibly dishonest—contains an effect of humiliation for the offender, who conveyed the victim’s inferiority through his malevolent act.\(^{70}\)

Nonetheless, there will be cases in which repentance appears to be external to the principle of retribution that relates to the seriousness of the offense. This situation occurs when there is no interaction between the offender and the victim. In different types of crime in which the victim is killed there can be no such interaction, and repentance in itself cannot in any event diminish the damage done. In other types of offense, the victim can refuse to forgive owing to the serious damage he incurred or to the person’s being by nature the bearer of a grudge even when there is immediate, sincere repentance. The victim can refuse any contact with the offender out of fear of the offender himself or of the return of the trauma or of the lack of any desire to stay anywhere near that offender. In the absence of the victim’s willingness to forgive, the offender’s repentance will not diminish the damage done.

However, these cases, too, may fall into the category of retributive punishment. Jeffrey Murphy, the central theoretician

\(^{69}\) Scheler, supra note 6, at 44.
\(^{70}\) Murphy, supra note 54, at 28.
dealing with the philosophy of forgiveness, distinguishes between retributive punishment based on the gravity of the offense (the punishment should fit the seriousness of the offense and its circumstances) and retributive punishment relating to one’s character (a person’s desert is a function not only of that individual’s misdeeds but also of his character).\textsuperscript{71} Repentance can play a more central role in the latter model although it can also have an effect, as we have seen, on the damage caused the victim.\textsuperscript{72}

In the retributive model relating to one’s character, the consideration of repentance is based on the possibility of distinguishing between the ill deed and the doer.\textsuperscript{73} A person who repents has a better character than a person who has no repentance.\textsuperscript{74} Scheler views repentance as an act that influences the past, since it illuminates the offender’s past in a positive light and dismisses the element of wickedness in the deed.\textsuperscript{75} The ability to repent testifies to the fact that a person is not fundamentally base.\textsuperscript{76} The offender who feels repentance seeks to separate her

\textsuperscript{71} Id. at 43.
\textsuperscript{72} Id. at 43-44.
\textsuperscript{73} Hagit Benbaji & David Heyd, \textit{The Charitable Perspective: Forgiveness and Toleration as Supererogatory}, 31 CAN. J. PHIL. 567, 571-572 (2001).
\textsuperscript{74} MURPHY, \textit{supra} note 4, at 50; Bibas, \textit{supra} note 3, at 340.
\textsuperscript{75} SCHLER, \textit{supra} note 6, at 44.
\textsuperscript{76} AVISHAI MARGALIT, \textit{THE ETHICS OF MEMORY} 199 (2002).
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personality from her conduct. Through repentance the offender rejects the misdeed and refuses to identify with the person-that-was at the time it was committed, breaking thereby the connection between the sin and the sinner. The offense, under such circumstances, can be apprehended as a one-time event, not as a way of life. And, indeed, a person’s good character, so long as it relates to the absence of a criminal record and to a contribution to society, is routinely presented as an argument for a lighter sentence.

Murphy argues that a person who repents commits himself to the values of the community, is not in need of personal deterrence, and clearly—in accordance with the theory of retribution relating to character—deserves a punishment that is less than that imposed on an unrepentant offender. In his view, when utilities inherent in punishment can be attained without compromising the legitimate interest of the law in crime prevention and in retribution relating to the gravity of the offense (for which repentance is still relevant), it will be irrational, even cruel, not to show mercy towards the

77 Benbaji & Heyd, supra note 73, at 580.
78 HABER, supra note 49, at 90, 95-96; MURPHY, supra note 4, at 80; Murphy, supra note 54, at 24; Robbins, supra note 59, at 1140. This idea was expressed by Bruria, Rabbi Meir’s wife, in her interpretation of the sentence in Psalms (104: 35), “And sins will be ended on Earth”—sins will be ended, not sinners (BT Brachot 10a).
79 Tasiouls, supra note 46, at 499.
80 For considering a lack of criminal record see: Andrew von Hirsch, Doing Justice: The Principle of Commensurate Deserts 243, 244 in SENTENCING, supra note 36.
repentant offender.\textsuperscript{81} Although Murphy uses the term mercy, in our opinion, he describes considerations pertinent to determining the due punishment.

In relating to the character of the repentant offender, scholars view repentance as having the power to dissociate the offender from the offense talking of a person’s being created anew following the penitential experience.\textsuperscript{82} Kolnai and Derida speak of the paradox of forgiveness that is based on this assumption. It emerges from this paradox that repentance acts not only to mitigate but also to exempt one fully from punishment. Thus, Kolnai presents the forgiveness paradox in the remark that forgiveness on the part of the victim is not justified (in a case in which repentance is absent) or redundant (for in view of the change that the repentance generates in the offender—the change of heart—there is nothing to forgive).\textsuperscript{83} Derida, too, casts doubt on the reasonable possibility of forgiving an offender who repented and repaired his ways; to whom is the forgiveness addressed, he wonders, for the same person now standing before us is prima facie not the same person who committed the wrong.\textsuperscript{84} The change in one’s identity makes forgiveness toward that person impossible. Weinberg introduces a

\textsuperscript{81} MURPHY, supra note 4, at 52.
\textsuperscript{82} Robbins, supra note 59, at 1141, 1160.
\textsuperscript{84} JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS 38-39 (2001).
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psychological conception, on which he disputes, according to which a person is an ever-changing creature. The A of today is not the same as the A of yesterday. According to this conception, the question is posed what is the reason for repentance if not only the sinful deed itself has passed out of this world, but also the sinner has gone, is no longer with us; what use is repentance for the offenses of others?  

The assumption as to the possibility of complete dissociation of the person from the offender act should, however, be rejected. First, an offender’s repentance certainly does not cancel the harm caused by the offense, for instance, to a victim who has been left handicapped because of the criminal act. In the absence of any reference to the harm caused to the victim of an offense or to society as a whole, it would be hard to argue that repentance annuls the offense. Second, in contrast to the argument that the repentant person differs from the person who committed the offense, it should be recalled that society relates to persons as to the same entity, without any connection with physical and psychological changes that transpire in the course of their lives. Yotam Benziman holds that logically it is impossible to dissociate an ill deed from the identity of a person, stressing that the person we

85 WEINBERG, supra note 15, at 195.
86 SCARRE, supra note 30, at 61.
forgive is the same person who committed the wrong, and that the wrongdoing he committed is part of his biography.\textsuperscript{88} Weinberg posits that apart from the fact that the religious outlook in Judaism promotes the unity of the individual and rejects the discrete concept of the ego,\textsuperscript{89} simple experience teaches that the individual sees himself as an undivided and unbreakable being.\textsuperscript{90} Hence, Weinberg’s conclusion that the one who commits the offense and the one who feels repentance for it are one and the same.\textsuperscript{91}

Indeed, a human being is a single, complex entity, with moments of elevation and collapse alike composing the mosaic of one’s character. There will be cases in which sincere repentance will create a personality change similar to that of Raskolnikov in \textit{Crime and Punishment}.\textsuperscript{92} It seems, however, that repentance, more than creating a change in personality, usually reflects another aspect of a person’s complex character. Consider a case in which a craftsman goes to a person’s house to work, steals the homeowner’s wallet, which had been placed in plain view on the table. Following the theft, he feels repentance over surrendering to temptation, and he

\textsuperscript{88} \textit{id.} at 47. Kolnai, who presents the forgiveness paradox, also acknowledges that the person who expresses remorse is the same person who committed the injustice: \textit{supra} note 83, at 101.

\textsuperscript{89} \textit{WEINBERG}, \textit{supra} note 15, at 195.

\textsuperscript{90} \textit{id.} at 196.

\textsuperscript{91} \textit{id.} at 198.

\textsuperscript{92} FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Pocket Books, 2004. First published in 1866).
returns the wallet secretly to the homeowner by placing it on the doorstep of the house. Can it be said that this person has undergone a personality change? It may be assumed that the extent of the change that repentance generates in the soul and character of the individual is related also to his perception of the seriousness of the sin. Therefore, it may be assumed that a murderer who repents his act will undergo a greater personality change than will a thief who immediately returns a stolen item to its owner (although a thief, too, can think that his sin is huge as did the protagonist of Dostoevsky’s story *An Honest Thief*). But even in a case in which repentance creates a psychological change, this in itself cannot transform the person into another entity. It is also difficult to suppose that in the tangle of human relations the victim of an offense will agree to hear from the offender a sentence such as this: “I wanted to apologize to you for the damage I caused, but unfortunately I cannot apologize, for whoever hurt you was another person.” It appears, then, that there are responses to the paradoxes of Kolnai and Derrida in regard to the inability to forgive in a face of repentance. However, these paradoxes are able, at the least, to demonstrate that a change that takes place in an offender in the wake of the recognition of his sin can be perceived as falling within the principle of retribution; even if it is not possible to

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94 See also SCARRE, supra note 30, at 61.
completely dissociate the offense from the offender, the justice due the contrite offender cannot be identical to that inflicted on the unrepentant offender.

Another retributive aspect that justifies taking repentance into account relates to the suffering connected with it. When the offender succeeds in including the victim’s distress or internalizing her own moral failure, the shame she experiences constitutes difficult suffering. Processing her moral failure can cause the offender hard pangs of conscience. The suffering that the offender experiences is humbling and teaches humility.\textsuperscript{95} In this sense, suffering can atone for that aspect of the injustice in which the offender tried to humble the victim.\textsuperscript{96} Sufficient suffering can in itself constitute a basis for reducing the punishment.\textsuperscript{97} Feelings of revenge toward the offender can lessen owing to a tragedy that visits her.\textsuperscript{98} If external suffering that the offender experiences is recognized as a reason for mitigating the punishment, the suffering that a person experiences in the aftermath of her repentance for an offense committed can and should act, with equal force, toward lightening punishment.

\textsuperscript{95} Murphy, supra note 54, at 27.
\textsuperscript{96} Id. at 27-28.
\textsuperscript{97} Id. at 26-28.
\textsuperscript{98} WORTHINGTON, supra note 54, at 56-57; Smart, supra note 59, at 215-16.
V. Taking Repentance into Account—Difficulties and Solutions

A. Taking the Victim’s Position into Account

Yotam Benziman book, *Forgive and Not Forget: The Ethics of Forgiveness*, speaks about “dialogic forgiveness” between offender and victim. The process of forgiveness involves realistic dialog between offender and victim, ending in a sincere acceptance of the offender by the victim.\(^9^9\) Prevailing opinion is that forgiveness on the part of the victim is considered proper only in the light of true repentance on the part of the offender and the latter’s readiness to ask the victim’s forgiveness.\(^1^0^0\)

Philosophers argue that an offender's forgiveness depends on the victim. The victim—and only the victim—is capable of forgiving, and only the victim is entitled to forgive the offender for the harm caused.\(^1^0^1\) This outlook is manifested in an aphorism found in the Talmud, to the effect that “sins between man and God—the Day of Atonement [Yom Kippur] provides atonement; sins between man and his fellow man—the Day of Atonement does not provides atonement, until he appeases his fellow man.”\(^1^0^2\) In the absence of forgiveness on the part of the victim, the offender is unable to see

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\(^9^9\) Benziman, *supra* note 87, at 12.

\(^1^0^0\) Murphy, *supra* note 4, at 35.


\(^1^0^2\) Mishna, Yoma 8: 9 (artScroll Mishna Series, 2nd edition 1990); BT Yoma 85b; see also Maimonides, Code, Laws of Repentance 2: 9 (Eliyahu Touger trans., 1990)
himself as having obtained forgiveness. An exception to this principle, introduced by Maimonides in his *Laws of Repentance*, lies in the possibility that forgiveness may also be asked from a deceased person. Even if the offender’s atonement depends on the victim, there are those who perceive obstinacy on the part of the victim in refusing to forgive as deserving in certain circumstances moral condemnation. Thus, in Maimonides’ opinion, after the offender has performed the acts required of him to appease the victim, which are detailed in the “Laws of Repentance”, and the latter refuses to forgive,”if he [still] does not want [to forgive him] he may let him alone and need not to pursue [the matter further]. On the contrary, the person who refused to grant forgiveness is the one considered as the sinner. Maimonides thus turns creation upside down: the victim becomes

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103 HABER, supra note 49, at 49; Benziman, supra note 87, at 25.

104 MAIMONIDES, supra note 102, at 2: 11. Maimonides, Code, Laws of Repentance 2: 11 (Eliyahu Touger translation, Israel 1990) p. 49: If a person wronged a colleague and the latter died before he could ask him for forgiveness, he should take ten people and say the following while they are standing before the colleague’s grave: I sinned against God the lord of Israel and against this person by doing the following to him... if he owed him money, he should return it to the heirs; if he is unaware of the identity of his heirs, he should place [the sum] in [the hand of] the court and confess”. According to Maimonides, too, if the victim is alive he is the only one who can forgive.

105 Murphy, supra note 54, at 29; Garvey, supra note 21, at 1828; MARGALIT, supra note 76, at 196 (pointing out that a rejection of a request for forgiveness is like rejecting a gift. In both cases, weighty reasons are required for the rejection). But see Benbaji & Heyd, supra note 73, at 577-79 (forgiveness is always of a supererogatory nature).

the offender. In this spirit, Maimonides advises that a person may not be cruel and refuse to make peace; rather, an individual should be easy to please and hard to make angry. And when the wrongdoer asks for forgiveness, he should forgive "with a complete heart and a willing spirit".\textsuperscript{107} In contrast, others contend that it is only natural that a victim may refuse to forgive one for the murder of someone close or for serious harm done to his body or for stripping his dignity—even when the offender expresses deep repentance. Forgiveness under these circumstances is rare and heroic—and should not be expected from everyone.\textsuperscript{108} When there is a loss or a serious trauma, the refusal to forgive is a legitimate and well-understood reaction; and it certainly should not be related to as an irrational or improper response. Moreover, refusal to forgive can in certain circumstances also manifest a noble, moral attitude.\textsuperscript{109}

The central question, however, is whether the status of repentance for setting the sentence should be dependent on the victim’s attitude. The interpersonal process of repentance and forgiveness raises fascinating and complex issues. These issues may not always be transferred to the field of criminal justice. As is well

\textsuperscript{107} MAIMONIDES, supra note 102, at Code, Laws of Repentance 2: 10.


\textsuperscript{109} Brudhold, \textit{supra} note, at 171.
known, the accuser in a criminal trial is the state, represented by the prosecutor, and the authority to punish is given to the state through the court system. The prosecutor is perceived as representing the interest of the public at large, not just that of the victim. Thus, the prosecutor is entitled to decide on filing an indictment from considerations of the public interest even if the victim is not interested in taking this step.\textsuperscript{110} The public interest can overcome the forgiving attitude of the victim. The victim, furthermore, cannot decide the proper punishment. His reactions to the offense are subjective to a great extent. The victim can be vengeful or merciful;\textsuperscript{111} he can possess self-confidence or lack it. The victim can be indulgent and request a light punishment even without any meaningful reason. In this regard, unrestrained forgiveness is not always perceived as proper. It can testify to the fact that the victim does not know his value, that he is too weak to cope with the harm caused him, or that he absorbs the message of inferiority that the offender conveyed with the misdeed.\textsuperscript{112} In contrast, the victim can be stiff-necked even in a face of sincere repentance on the part of the offender. Whereas a not insignificant proportion of victims prefer reconciliation over retribution,\textsuperscript{113} others

\textsuperscript{110} ANDREW ASHWORTH, THE OFFENDER PROCESS – AN EVALUATIVE STUDY 16 (1994).

\textsuperscript{111} ASHWORTH, supra note 110, at 36; John Braithwaite, A Future Where Punishment Is Marginalized: Realistic or Utopian?, 46 UCLA L. REV. 1727, 1744 (1999).

\textsuperscript{112} Garvey, supra note 21, at 1829.

\textsuperscript{113} Worthington, supra note 54, at 248; Bibas & Bierschbach, supra note 1, at 137.
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wish to be chained to their status as victims.\textsuperscript{114} Victims’s reactions differ from one another. Furthermore, the same person might react differently to an offense, depending on the level of his vulnerability at a certain stage of his life. Traumatic events in the past can influence a victim’s response (although grave harm may be expected to influence anyone). There are victims who need time to overcome feelings of bitterness when great anger still floods them during the trial, precluding their responding to attempts at reconciliation on the part of the offender. Thus, the victim weighs his own considerations, with no commitment to take the public’s interest or the offender's interest into account.

Michael Moore takes an extreme stand, according to which the victim’s position on the proper punishment for the offender is a foreign and illegitimate consideration from a retributive point of view.\textsuperscript{115} For Moore, too, the damage caused the victim is taken into account when evaluating the proper punishment,\textsuperscript{116} and the injured person’s perception of the injury is relevant, as well, to the evaluation of the damage and, as a direct result, to determining the proper punishment.\textsuperscript{117} Apart from that, the injured person’s

\begin{footnotesize}
\begin{enumerate}
\item[115] MOORE, supra note 20, at 89; Moore, supra note 40, at 67 ("Victims should and must be ignored if you are claiming to be doing retributive theory").
\item[116] \textit{Id.} at 69.
\item[117] \textit{Id.} at 72-73.
\end{enumerate}
\end{footnotesize}
subjective position as to the proper punishment for the offender is irrelevant.\textsuperscript{118} The victim is, only naturally, a prejudiced person, who will find it hard to evaluate objectively what justice demands in a specific case.\textsuperscript{119} Taking the injured person’s view into account might even violate the principle of equality, which necessitates that two offenders who committed an identical act under the same circumstances will receive an identical punishment.\textsuperscript{120}

Without entering into the tangled debate over the appropriate status of the victim in the criminal process,\textsuperscript{121} the foregoing discussion enables us to conclude that an offender should cope on two separate levels with the offense committed. The first level concerns the interest of the injured person. In the event that the offender caused an injury to an individual who may be identified (as distinct from offenses without a specific victim, such as importing drugs or tax evasion), then no matter the amount of the punishment imposed, the offender bears the onus of personally

\textsuperscript{118} Id. at 75.
\textsuperscript{119} Id. at 75-76.
\textsuperscript{120} Id. at 77. For the principle of equality in sentencing see: Andrew von Hirsch, supra note 80, at 246-47. For justifying a deviation from this principle under certain circumstances see: Norval Morris, Punishment, Desert and Rehabilitation 257, 257-271 in SENTENCING, supra note 36.
\textsuperscript{121} See, e.g., an opposing radical stance presented by Russell L. Christopher, Deterring Retributivism: The Injustice of “Just” Punishment, 96 NW. U.L. REV. 843, 939 (2002) (The theory of retributive punishment relates to victims as a means, not an end, in that it takes into consideration only the objective harm done to them, and not their wills).
asking for the forgiveness of the injured party and taking reasonable steps toward reconciliation.

The second level concerns the criminal process that the state opens up against the offender. The court system is not a kind of “third party” that improperlyforgives the offender in the name of the victim; rather, it bears the duty of determining the punishment. In fulfilling this task, it must take into account the public’s interest. The proper punishment should consider the offender’s repentance (as well as other mitigating circumstances), without any connection to the question of whether this repentance actually penetrated the heart of the victim. The injured party’s attitude toward the proper punishment should be taken into account in the framework of considerations of the public interest, but does not have to be decisive.\footcite{122} The criminal justice system is obliged to impose the proper punishment according to clear and objective criteria, for the criminal justice is in the interest of the public, not just of the individual. Therefore, the punishment does not have to match the individual desire of the victim. Although the judge cannot personally forgive the offender for having harmed the victim, the criminal justice system as a whole can grant, through written laws and verdicts, exemption from punishment. Thus, one of the rationales for determining statutes of limitations, which bar putting someone

\footcite{122} ASHWORTH, supra note 110, at 37.
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on trial after the lapse of certain period of time since the commission of an offense, is the rationale of amnesty derived from the notion of forgiveness.\textsuperscript{123} Statute of limitations overcomes the victim’s desire to apply the full extent of the law.

Forgiveness is a personal, not an institutional, act. According to the accepted definition, it means overcoming feelings of bitterness toward the offender.\textsuperscript{124} In contrast to the accepted definition, Benziman suggests defining it as a way of jointly bearing the wrong caused by establishing relations between the offender and the offended against a constant analysis of the wrong, which leaves room for a reflooding of feelings of bitterness.\textsuperscript{125} An examination of Benziman’s definition can be interesting within the theory of “restorative justice.” At any rate, however, the court does not “forgive” the offender, and in our opinion it does not even exercise mercy. Its function is to impose the proper punishment on the offender. In evaluating the offender's due punishment it must also relate to her repentance.

\textsuperscript{123} Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 PAC.L.J. 453, 460-61 (1997).
\textsuperscript{124} WORTHINGTON, supra note 54, at 3; MURPHY, supra note 4, at 13-14; Murphy, supra note 54, at 20; HABER, supra note 49, at 33; Garvey, supra note 21, at 1827; Bibas, supra note 3, at 330; MARGALIT, supra note 76, at 193; Benbaji & Heyd, supra note 73, at 570; Govier, supra note 48, at 59; Margaret R. Holmgren, Forgiveness and the Intrinsic Value of Persons, 30 AM. PHIL. Q. 341, 341 (1993); ENRIGHT & FITZGIBBONS, supra note 101, at 4.
\textsuperscript{125} BENZIMAN, supra note 87, at 114.
Bibas and Bierschbach try to convince that only repentance and forgiveness in the framework of interaction between offender and victim is of social importance that should have an effect on the criminal process.\textsuperscript{126} However, whereas philosophers express a position on the inter-personal level that in the absence of forgiveness on the part of the injured party owing to his death or refusal to give this forgiveness, the offender cannot see himself as someone whose offense was forgiven, the court system is obligated to relate equally toward accused persons whose circumstances are similar. Consider a case in which two guilty persons took the same path in terms of the extent and depth of repentance they experienced. If we maintain that the victim’s death, let alone his refusal to forgive (actually, a moral luck), should decide the fate of the court’s consideration of the offender’s repentance, then we will stand the offender up before a fortified wall and grant the victim a veto over the way the court relates to the offender. The value of repentance and the importance of triggering a process of repentance necessitate finding a solution for the repentant offender even in the absence of other party who is willing or able to forgive. If the offender thinks she cannot do anything to be rehabilitated because of the death of the victim or because of the injured party’s unwillingness to forgive, such an attitude will undermine the process of repentance. This undesirable result may clarify

\textsuperscript{126} Bibas & Bierschbach, \textit{supra} note 1, at 114.
Maimonides’ concept of the limits to requesting forgiveness from someone who refuses to give it and of the possibility of asking forgiveness from a deceased person.

B. Difficulties in Identifying Sincere Repentance

In J. M. Coetzee’s book *Disgrace*, Prof. David Lurie stands before a university committee of inquiry, whose function is to recommend how to deal with him following complaints of sexual harassment lodged by a female student and of his forging records pertaining to this student. Professor Lurie admits immediately the accusations against him, without even reading the indictment. The committee members, however, are unwilling to suffice with the admission. To Professor Lurie’s question, “And that will satisfy you: an admission I was wrong?” the following dialog is recorded between him and one of the members of the committee:

’No, says Farodia Rassool. ’That would be back to front. *First* Professor Lurie must make his statement. *Then* we can decide whether to accept it in mitigation. We don’t negotiate first on what should be in his statement. The statement should come from him, in his own words. Then we can see if it comes from his heart.’ ’And you trust yourself to divine that, from the words I use – to divine whether it comes from my heart?’ ’We
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will see what attitude you express. We will see whether you express contrition.' 'Very well. I took advantage of my position vis-a-vis Ms Isaacs. It was wrong, and I regret it. Is that good enough for you?' 'The question is not whether it is good enough for me, Professor Lurie, the question is whether it is good enough for you. Does it reflect your sincere feelings?' He shakes his head. 'I have said the words for you, now you want more, you want me to demonstrate their sincerity. That is preposterous. That is beyond the scope of the law. I have had enough. Let us go back to playing it by the book. I plead guilty. That is as far as I am prepared to go.'

When committee chairman Manas Mathabane later contacts Professor Lurie at home in an attempt to aid him by making it clear that an expression of repentance on his part could prevent his being fired, Professor Lurie responds:

'Manas, we went through the repentance business yesterday. I told you what I thought. I won't do it. I appeared before an officially constituted tribunal, before a branch of the law. Before that secular tribunal I pleaded guilty, a secular plea. That plea should suffice. Repentance is neither here nor there.

\footnote{127 J. M. COETZEE, DISGRACE 54-55 (Penguin Books, 2000).}
Repentance belongs to another world, to another universe of discourse.\textsuperscript{128}

The fictional Professor Lurie remains rebellious, refusing to express repentance, and is fired from his position at the university. At this stage, it seems that he does not absorb the moral defect in his actions and is incapable of understanding the distress of the female student toward whom he related only as a sexual object. However, how many people would not respond to an explicit invitation to express repentance in exchange for a lighter sentence? If an offender knows that his punishment will be eased with such an expression, would not a regular course of action upon his being convicted be for him to express repentance to the judge and to his probation officer, whatever the degree of sincerity in such an expression?

A central argument against taking repentance into account relates to the difficulty of identifying repentance and evaluating its sincerity.\textsuperscript{129} The ability to identify the nature of the repentance has occupied philosophers, theologians, judges, and probation officers. Maimonides, in his “Laws of Repentance,” expounds in relation to the repentant who expresses complete regret: “He who knows the hidden will testify concerning him that he will never return to this

\textsuperscript{128} Id. at 58.

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sin again”. However, who is the “Knower-of-mysteries” who is suited to determine the sincerity and depth of the repentance? Is it perhaps the judge? Or the probation officer? Obviously judges and probation officers can err. Not everyone is sufficiently skilled in distinguishing the nature of the repentance. It is difficult at times to become familiar with the accused in the short span of time at one’s disposal for assessing her character. There are people who feel repentance but have difficulty in expressing their feelings. Thus, the accused might experience this difficulty if she feels the atmosphere to be alienating. A person can also camouflage her repentance by acting apathetically or even haughtily.

There may be indications of repentance, such as making restitution at the offender’s initiative. This act, though, cannot constitute a decisive indication of repentance. Even an appeal to the victim with a plea for forgiveness cannot constitute such an indication in that it can be issued mechanically. On the other hand, not appealing to the victim to request forgiveness or not making restitution does not necessarily demonstrate the absence of repentance. There are victims who are not interested in contact with

130 MAIMONIDES, supra note 102, at Code, Laws of Repentance, 2: 2.
132 Id. at 1554-55.
the offender, and at times the police and the courts forbid the latter to make any contact with the injured party.\textsuperscript{134} Making contact can even be seen as a criminal offense of harassing a witness or attempting to obstruct justice. The offender who repents can also be deterred from any communication with the victim owing to a fear of the latter’s reaction.

There exists, therefore, a natural difficulty in trying to enter into the depths of another person’s mind and soul, the inner workings of which are hidden to us.\textsuperscript{135} Consider the example of Dostoevsky’s \textit{Crime and Punishment}, whose protagonist, Raskolnikov, goes to the police station of his own free will to confess a double murder at the same time that another man, Nikolai, was already taking responsibility for the murders by giving a false confession. Despite the cat-and-mouse game between the investigator Porfiri Petrovitsch and Raskolnikov, it seems that the incriminating evidence against the latter is quite weak. During the trial, Raskolnikov relates that repentance motivated him to confess.\textsuperscript{136} However, at the stage of his confession, he still had not fully repented but continued to justify to himself and to his relatives the utilitarian reasons for his act.\textsuperscript{137} His confession stems from complex psychological factors, not from repentance. In prison,

\textsuperscript{134} Bibas, \textit{supra} note 3, at 329.
\textsuperscript{135} MURPHY, \textit{supra} note 4, 108.
\textsuperscript{136} Supra note 92, at 625.
\textsuperscript{137} Id. at 605-06.
Raskolnikov even becomes ill because his pride has been injured; he feels himself to be a weak person, someone who cannot cope with the consequences of his deeds, and even yearns to feel remorse.\textsuperscript{138} He finally recognizes the fallacy of his acts and of the theory he believed in only after a dream he had in prison of microbes that destroyed the world; only then does he succeed in making peace with himself and effecting an internal change.\textsuperscript{139} An objective observer of the circumstances of Raskolnikov’s confession would not have guessed that at the time of his confession the murderer had yet to internalize the erroneous notion that informed his actions.

And, indeed, a person can feign repentance as a tactical maneuver in order to gain a lighter sentence.\textsuperscript{140} Judges find it difficult at times, as is obvious, to distinguish whether the offender’s sorrow stems from his recognition of the wrong that he has caused or the fact that he has ruined his own life.\textsuperscript{141} The offender’s bad feeling after committing the offense (for instance, an abusive husband) is not the equivalent of repentance. It is difficult to base repentance on the mere fact of a feeling of regret and on the

\textsuperscript{138} Id. at 633-34.
\textsuperscript{139} Id. at 638.
\textsuperscript{140} Hampton, supra note 38, at 234; Cheryl G. Bader, “Forgive Me Victim for I Have Sinned”: Why Repentance and The offender Justice System Do Not Mix – A Lesson from Jewish Law, 31 FORDHAM URB. L.J. 69, 94 (2003).
\textsuperscript{141} Duncan, supra note 133, at 1490.
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offender’s difficult mental state. Traumatic events, depression, anxiety, sleep difficulties, and feelings of confusion, despondency, and emptiness are not at all rare characteristics of a person who is facing for the first time in his life criminal charges. A person’s sense of “I would like to turn back the clock” testifies to regret, but not necessarily to repentance emanating from an internalization of his moral failure. Moreover, doubt may be cast on whether the offender himself knows how to identify repentance and whether the pain he is experiencing originates in the consequences that he suddenly has to bear owing to having committed an offense or to having internalized his moral failure.

When an offender expresses repentance, it is only natural that one wonders about it: why didn’t this repentance begin earlier, immediately upon committing the offense? Why did it suddenly appear with his being apprehended? How is repentance consistent with the commission of several offenses? Why did the offender not confess but choose to go to trial and then express repentance for his misdeeds only with his being convicted?142

142 Judges do tend to assume that the conduct of a trial, and let alone legal strategy that seeks to suppress evidence, does not accord with sincere remorse on the part of the accused. See Margaret Etienne, Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers, 78 N.Y.U.L. Rev. 2103, 2119, 2137 (2003). Etienne is of the opinion that this assumption lacks basis: id. at 2162.
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A partial answer to this last question has to do with the dichotomy that the accused person experiences.\textsuperscript{143} An expression of repentance means an admission of guilt.\textsuperscript{144} The criminal justice system sanctifies—and justly so—principles such as proving the defendant’s guilt beyond a reasonable doubt as a condition for his conviction, the non-obligation of the accused to serve as a tool for supplying evidence against himself, and basing a conviction on evidence legally obtained. Certain legal rights emanate from these principles, such as the right to remain silent, the right not to plead guilty, and the right to request the suppression of evidence illegally obtained. A repentant accused person might, then, distinguish between the emotional inner coping with the criminal act committed and coping with the charges against him in court. In an attempt to avoid or minimize the damage that could be caused by a conviction and in light of relatively weak incriminating evidence, a reasonable defense counsel will recommend going to trial in order to attain an acquittal.\textsuperscript{145} Jewish law, which does not permit use of self-confession in a criminal trial as proof of the defendant’s guilt, enables the defendant to express repentance without fear of

\textsuperscript{143} Cohen, \textit{supra} note 31, at 904 (relating to the fact that the civil court system encourages denial instead of accepting responsibility).

\textsuperscript{144} Bader, \textit{supra} note 140, at 70.

\textsuperscript{145} Etienne, \textit{supra} note 142, at 2163 (on the ethical obligation placed on the defense attorney to exhaust the burden of defense against the accusation).
devastating consequences.\textsuperscript{146} Similarly, scholars propose recognition of an exception to the rules of evidence to the effect that an apology to the victim will not be admissible as evidence at trial.\textsuperscript{147} However, our criminal law, which views a confession as strong, even decisive proof of guilt,\textsuperscript{148} can dissuade the repentant offender from declaring his repentance to others before conviction. The issue of coping with a trial and the question of repentance constitute separate matters and produce an unbridgeable tension within which the offender, who is at the focus of both issues, is forced to function.

Another question pertaining to the sincerity of the repentance can arise in light of the accused person’s request for a milder punishment. It may be prima facie expected that an offender who truly and honestly feels repentance for his offense will request to atone for it through punishment, seeing in it a due desert; therefore, the begging for mercy shows the insincerity of the repentance.\textsuperscript{149} Michael Moore presents a well-known example of a young man by the name of Richard Herrin, who crushed the skull of

\textsuperscript{146} Bader, \textit{supra} note 140, at 70-71.


his 23-year-old girl friend with a hammer while she slept because she wanted to separate from him. If he were in Herrin’s place, Moore opines, he would have felt guilty as hell. Any punishment would be perceived as proper. A person who has guilt feelings will see himself as worthy of suffering.\textsuperscript{150} In Moore’s opinion, such a deep feeling of guilt is more proper than self-forgiveness.\textsuperscript{151} Terrible guilt feelings should lead a person like Herrin to the conclusion that he cannot manage his life as though nothing happened. The idea of managing one’s life without changing goals and hopes and with the same degree of happiness should seem completely unreasonable.\textsuperscript{152} Moore, to be sure, presented an extreme example, of the murder of a girl friend in her sleep, but his analysis should certainly change with lighter offenses. Nevertheless, even with the latter, the question may arise why the offender does not consider the punishment proper in view of his understanding of the fallacy of his act.

Jeffrey Murphy, who raises this question,\textsuperscript{153} responds that no conclusive conclusion regarding the insincerity of the repentance should be drawn when there is a request to lighten punishment. The offender who expresses repentance can ask to do something useful

\textsuperscript{150} MOORE, supra note 20, at 148.  
\textsuperscript{151} Id. at 145. Herrin has thought that the punishment imposed on him was excessive, and that sentence of one to two years’ imprisonment was the appropriate punishment.  
\textsuperscript{152} Id. at 149.  
\textsuperscript{153} MURPHY, supra note 4, at 46-47, 52-53.
in his life.\textsuperscript{154} He can make a decision to atone for his acts by devoting his life to good deeds. The more sincere his repentance, the more the offender can think that, from a retributive point of view, his punishment is inappropriate to the moral situation in which he currently finds himself. He can feel that repentance and its accompanying suffering constitute a fitting punishment or are part of the punishment. In contrast, he can perceive another punishment imposed by the state, such as imprisonment, to be ruinous and useless. In being aware of both his suffering and his having internalized the seriousness of his misdeed, the offender can feel that the punishment that is being sought for him is unnecessary for his rehabilitation, and that in this situation it is a kind of superfluous hardship for its own sake.

Another difficulty in identifying repentance pertains to the ability to comprehend its depth. It is argued that no empirical proof exists to connect sincere repentance to the likelihood of recidivism.\textsuperscript{155} Thus, it may be assumed that many rapists and robbers would agree that having a law against rape and robbery is justified. Theodor Reik is far reaching in believing that from a psychological point of view not only is there no relationship between repentance and non-commission of future offenses, but paradoxically repentance feeds the continuing appetite of the guilt

\textsuperscript{154} Id. at 52.
\textsuperscript{155} Bibas & Bierschbach, \textit{supra} note 1, at 106.
feelings and even encourages carrying out further offenses. Reik bases his remarks on Freud’s well-known theory that a person commits a criminal act in order subconsciously to connect the general feeling of guilt, with which everyone is afflicted, with a concrete offense. In his opinion, repentance can in fact intensify the offender’s guilt feelings, which paradoxically again, can lead to committing further offenses. Reik’s contention is appropriate for the abusive husband syndrome: a man beats his wife over and over again and after every outbreak of violence toward her expresses his remorse. However, the repentance of the abusive husband is not complete. Weinberg said of this kind of situation that any repentance that does not involve a change of behavior, it would be better not to have come in this world, because not only does it not repair the past situation, but it adds still more damage and defect, despair and weakness; Hebrew Sages have already stated that the wicked are full of remorse every day of their life.

According to Reik’s mode of thought, then, the project of repentance is doomed to failure. This view, though, might be met in

156 REIK, supra note 42, at 396.
158 REIK, supra note 42, at 396.
160 WEINBERG, supra note 15, at 200.
two ways. First, Reik actually describes wallowing in a feeling of guilt and not repentance. This mental state is not equivalent to repentance, and it does not lead the offender towards a better future. Second, repentance is not binary; rather, there are various gradations of repentance. Even a person who feels repentance for moral grounds may not withstand the temptation to commit other offenses owing to a weak will, just as a person who decides to go on a diet from a recognition of the importance of a healthy diet can “break” in the presence of a chocolate cheesecake. There are those who take stock of themselves very profoundly, and there are those who examine themselves only superficially. Weinberg insists that real repentance that liberates a person from his past does not take place absentmindedly. What is required is a radical and willful uprooting of sin; overcoming the sin in such a manner, in his view, is penitence. What is common to the thinking of many theorists is the statement that a person can be a complete penitent, that this is the highest gradation that one can attain who is not tempted to commit the same offense again even if placed in the same situation.

The ways of complete penitence are described by Maimonides and in greater and more complex detail by Yonah Gerondi in *Shaarei Teshuvah* (Gates of Repentance), which lists twenty such gates: Remorse, abandoning sin, grief, expressing sorrow in deeds,

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161 Murphy, *supra* note 129, at 378.
worry at the fear of punishment, shame, humbling oneself, humility in deeds, breaking physical and materialistic desire, ameliorating one’s actions in the same areas in which one sinned, seeking one’s ways, investigating the magnitude of each of one’s sins, considering light sins to be serious, confession, prayer, correcting misdeeds, pursuing righteousness and truth, constantly remembering one’s sins, forsaking sin when there is the occasion to sin by virtue of one’s desires, and turning others from sin.\(^{163}\) Weinberg describes Maimonides’s philosophy that only repentance penetrates deeply arouses a complete revolution in the soul, and places the penitent on a new road of development, which is also safe assurance that he will never return to this sin.\(^{164}\) As Weinberg concludes, whoever enters into true repentance in the sense described of giving birth to the soul, it is impossible that he will return to sin.\(^{165}\) This statement is close to the conception of Joram Graf Haber, according to whom repentance includes the obligation not to commit an offense of the same kind and to ameliorate our deeds in the future.\(^{166}\) And indeed, according to one writer’s rhetorical question, "After all, how meaningful is it really for a wrongdoer to wish the wrong had not been done if the wrongdoer is willing to commit a similar wrong in

\(^{163}\) RABBI YONA OF GERONDI, GATES OF REPENANCE (1990).

\(^{164}\) WEINBERG, supra note 15, at 191.

\(^{165}\) Id. at 205.

\(^{166}\) HABER, supra note 49, at 97.
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the future?"\textsuperscript{167} Hebrew Sages had already nullified the repentance of one who says, “I will sin and repent.”\textsuperscript{168}

Another difficulty in identifying repentance pertains to evaluating its motives. The reasons for repentance can emanate from a moral internalization of the flaw in the misdeed, or it can stem from sorrow for the results of the offense for the offender. There is no doubt that remorse having a utilitarian interest, like the second reason, deserves less consideration, for it contains no estimation regarding the moral character of the offender. Similarly, remorse stemming from utilitarian motives constitutes a less certain guarantee of a non-return to crime than does repentance whose motives are moral. For a person’s interests can change. Thus, if a person is convinced that the chances of his getting caught when committing another offense are very weak, then he may commit the offense once again. Nevertheless, the value of utilitarian remorse should not be completely negated. It may possibly serve as a safeguard against future criminal activity. Remorse having a utilitarian motive operates on the level of intimidation. Just as the barricade of the law dissuades people from committing offenses, there are those for whom the barricade of law becomes concrete only after the commission of an offense and the fear of punitive consequences that can be expected in its wake. Utilitarian remorse

\textsuperscript{167} Robbins, \textit{supra} note 59, at 1138.
\textsuperscript{168} Mishna, Yoma 8: 9.
can also strengthen moral remorse that is insufficiently deep. The value of utilitarian remorse is prominent when compared to an offender who expresses no remorse at all, for instance, for hate crimes. Nevertheless, remorse for utilitarian motives should not be attributed with any retributive value. It may be taken into account only in the framework of considerations of personal deterrence and incapacitation. Remorse from moral motives, in contrast, has value from a retributive point of view.

Moreover, the question remains as to whether conceptually one can speak of utilitarian remorse as repentance. Actually, this kind of remorse is closer to sorrow than to repentance. The difference between a person who expresses sorrow for his misdeeds because of the bitter personal consequences to which he is subject and a person who recognizes the unacceptable moral nature of such deeds does not lie only in the motive for remorse. Rather, a conceptual distinction has to be drawn between sorrow and repentance. Repentance refers to the very act of the offense, whereas sorrow relates to being apprehended and the punishment to follow. The fear of the criminal process constitutes an element that builds sorrow. Not so conscious moral repentance, which refers to the misdeed itself independent of the punishment that may follow. Sorrow is but one of the identifying marks of repentance, but repentance itself is not sorrow but a person’s recognition of the
error of his act.\textsuperscript{169} The fear of punishment can motivate repentance, but this fear in itself does not constitute repentance.\textsuperscript{170} The depth of repentance is not like the depth of sorrow; rather, it is like the depth of shame that seizes a person who faces a reality that she created, while recognizing the wrongful nature of her deed.\textsuperscript{171}

True repentance is a moral one. The motive for repentance does not matter; even utilitarian sorrow can motivate a process of moral sorrow. What matters is the final result: Do we have a moral penitent who recognizes the wrongful nature of his actions, who feels sorrow for them, and who resolves not to return to them?

To conclude, in view of the problematic in identifying repentance, one could have maintained that a theoretical model concerned with taking repentance into account is doomed to failure given the practical inability to identify repentance. Despite this difficulty, however, one must recognize the fact that evaluations relating to the depths of one’s mind are an integral part of the criminal law. The difficulty in evaluating repentance is potentially not conceptually far from the difficulty in evaluating mens rea,\textsuperscript{172} in evaluating the character traits of the accused for setting a sentence.

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\textsuperscript{169} Scheler, supra note 6, at 54.
\textsuperscript{170} Id. at 50.
\textsuperscript{171} Weinberg, supra note 15, at 194-95.
\textsuperscript{172} Bibas, supra note 3, at 344; Robbins, supra note 59, at 1166.
\end{flushright}
or in evaluating the reliability of witnesses. \(^{173}\) Of course, a direct question to an offender, “Do you feel remorse?” is of dubious value as a measure of repentance (a reasonable defense counsel would advise the accused to answer this question affirmatively after being convicted). There can, however, be other indications of repentance, such as the degree of empathy toward the victim and accepting responsibility for one’s actions. So long as the offender blames only external causes and ascribes to them the guilt for his acts, he is incapable of repentance. \(^{174}\) Recognizing the responsibility imposed on him, and his ability to choose between good and bad, is what enables the offender to make room for repentance. \(^{175}\) The fear of mistakenly identifying repentance has to be estimated in light of the complexity of the issue of repentance, its definition, nature, and sincerity, and the complexity of proving each of its components. All this leads to the conclusion that the assessment of repentance is not a binary matter. Between the poles of the absence of repentance, on the one hand, and the existence of a deep, pure and proven non-utilitarian repentance, on the other, a qualitative and quantitative gradation exists. This gradation, which in most cases does not approach a satisfying level of exactitude, must be included

\(^{173}\) Bibas & Bierschbach, supra note 1, at 142-43.

\(^{174}\) See also EDWARD SAGARIN, RASKOLNIKOV AND OTHERS 52 (1981) (analyzing Daniel Defoe’s Moll Flanders).

\(^{175}\) Kook, supra note 5, at 119-120.
in the considerations of punishment and be manifested by giving relative weight to the degree of repentance proven to the court.

C. Punishment as Atonement

A certain aspect of the concept of retribution views punishment as an atonement for the criminal act. For Hegel, retributive punishment in its strict form even nullifies the commission of the offense.\(^{176}\) According to this conception, an offender needs to atone for his offense by means of the suffering inherent in punishment.\(^ {177}\) When Raskolnikov asks Sonia, after confessing to the murder, what he should do, she replies decisively: “Suffer and expiate your sin by it, that’s what you must do.”\(^ {178}\) Dunia, his sister, expresses a similar attitude when she asks, “Aren’t you half expiating your crime by facing the suffering?”\(^ {179}\) The punishment, according to this mode of thought, restores the moral equilibrium.\(^ {180}\) Hence Kant’s well-known saying that even the residents of an island whose inhabitants are about to abandon it and to disperse around the globe (and since the society ceases to exist, the element of general deterrence is not relevant here) must execute murderers who have been condemned

\(^{176}\) Hegel, supra note 34, at 101.

\(^{177}\) Weigend, supra note 29, at 88.

\(^{178}\) Crime and Punishment, supra note 92, at 490.

\(^{179}\) Id. at 605.

\(^{180}\) Hegel, supra note 34, at para 100; Scarre, supra note 30, at 116.
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to death.\textsuperscript{181} Serving the punishment is what enables the individual to reintegrate into society (on the assumption that the offender does not receive the death penalty or a life sentence) as a better person.\textsuperscript{182} The atonement explanation, according to which suffering atones for an offense and annuls it, is found in the Talmud: "The afflictions purge all a person's sins". \textsuperscript{183}

Steven Garvey speaks about punishment as atonement.\textsuperscript{184} For him, punishment is a means of atonement, and it cannot be avoided under this model; As Garvey puts it: "Punishment—tragically—is for us an inescapable part of atonement."\textsuperscript{185} According to this conception, the offender cannot restore his moral standing without punishment.\textsuperscript{186} It is only punishment that constitutes a just desert for violating the dignity of the victim and atones for the moral injury to her.\textsuperscript{187} This conception claims, hence, that the carrot of conscious repentance alone, not accompanied by the stick in the form of punishment, is insufficient for the atonement process.

However, the pangs of conscience brought about in the wake of remorse also cause suffering. Martha Duncan describes this pain:

\textsuperscript{181} IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., 1887).
\textsuperscript{182} GABRIELE TAYLOR, PRIDE, SHAME AND GUILT: EMOTIONS OF SELF-ASSESSMENT 93 (1985).
\textsuperscript{183} BT Berachot 5a.
\textsuperscript{184} Garvey, supra note 21.
\textsuperscript{185} Id. at 1844.
\textsuperscript{186} Id. at 1823.
\textsuperscript{187} Garvey, supra note 21, at 1846; Garvey, supra note 26, at 1336-37.
"...remorse itself is a form of terrible suffering;... The word 'remorse,' derives from the Latin *remordere*, 'to bite again,' and thus describes a deep, torturing anguish over past wrongdoing, akin to being bitten repeatedly by one's own conscience."\(^{188}\) Kook writes that a person who is attacked with remorse "will suffer pain".\(^{189}\) There is no reason, therefore, why pangs of conscience, just like punishment, cannot be seen as atonement. The punishment message of *Crime and Punishment* is not the eight years in a Siberian prison, the sentence inflicted on Raskolnikov, but the pangs of conscience that tore at him from inside and wiped out his personality.\(^{190}\) Ian McEwan’s Briony Tallis in the novel *Atonement* gives up her plans to study at a university in order to do the difficult practical work of a hospital nurse; she does this to atone for the fact that her false testimony led to the conviction and imprisonment of Robbie Turner, her sister’s boy friend, on the charge of rape, which Briony claimed to have witnessed. For many of us, a punishment inflicted by one’s conscience constitutes a stronger threat than a punishment imposed by the criminal justice system.\(^{191}\) Many offenders see the punishment itself as shameful and stigmatizing.\(^{192}\) Hence, pangs of conscience should be related to as

\(^{188}\) Duncan, *supra* note 133, at 1472.

\(^{189}\) KOOK, *supra* note 5, at 44.

\(^{190}\) SAGARIN, *supra* note 174, at 20.


\(^{192}\) Id. at 69-70.
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a meaningful punishment (although self-inflicted punishment) in the frame of retributive criminal justice.193

In Hebrew, the word for to atone is LEKHAPER. The literal meaning of this verb is to cover.194 Benziman emphasizes that “Whoever atones for a sin does not erase it. The past cannot be changed. Whoever atones for a sin covers it. He spreads a layer over it: of blood, of sweat, of tears.” The act of covering not only does not abrogate the past, but it creates contact anew with the pain and the sin, and consequently aids remembrance of the wrongdoing.195 By serving a punishment, then, the offender does not cancel the damage caused to society or to the victim.

It is customary to speak about a person opening a new chapter in his life after serving a punishment. On the one hand, it may be argued that without any punishment, the offender will be unable to atone for his actions. On the other hand, the punishment in and of itself cannot change anything in the offender. He can finish serving his full punishment in a worse state morally than when he began. If the suffering that the concrete offender experienced did not generate any moral change in him, and he is even ready to offend again, it will be difficult to see why suffering itself expiates

193 Robbins, supra note 59, at 1141.
194 BENZIMAN, supra note 87, at 156-57.
195 Id. at 158 (our translation). This idea was expressed by the Psalmist (Psalm 51: 5), “and I have always sinned against myself.” On this issue, see also MAIMONIDES, supra note 102, at Code, Laws of Repentance 2:: 8.
the offense. It is more logical to state that society will be ready to enter the offender into its everyday life and to allow him to open a new page in his life, not because he was punished for his misdeed (given the circumstances in which the punishment did not bring about an internalization of the misdeed's seriousness) but because he expressed remorse for it. In any event, repentance creates renewed contact with pain no less, and perhaps even more, than does punishment. A person who repents will see in the wrongdoing part of his life and will need to cope with it over and over again like the pains of a wound that has formed a scab or the pains of a broken bone that touches torn nerves while healing.

D. Punishment as Conveying a Message to the Offender and to the Public

In contrast to Michael Moore, who stresses that punishment is intended only to do justice—that is, to give the offender his due—other scholars emphasize non-empirical utilitarian aspects of retributive punishment. According to this mode of thought, punishment is required for the purpose of moral condemnation.\textsuperscript{196} Retributive punishment bears the symbolic meaning of expressing condemnation of the offender’s behavior. It is meant to convey a

\textsuperscript{196} Bibas, \textit{supra} note 3, at 339; Garvey, \textit{supra} note 21, at 1844; Von Hirsch, \textit{supra} note 22, at 24.
message about the seriousness of the misdeed and the degree of the offender’s culpability.\textsuperscript{197} It makes it clear to the offender and to the public alike that punishment is being imposed because of the offense the culprit committed.\textsuperscript{198} Punishment constitutes a strong reminder for the offender of the injustice that he caused.\textsuperscript{199} Without painful punishment, a person can lessen the seriousness of his wrongful act.\textsuperscript{200} Additionally, punishment has moral value for the public as a whole.\textsuperscript{201} It conveys a message to the public about the proper norms of behavior. Through the condemnation, society defines behavioral norms and its values and renews its commitment to them. This established role of punishment is important for the existence of life together in a social framework.\textsuperscript{202} Although laws that determine offenses and punishments also have symbolic educational value, it is only by means of punishment in the specific case that society reaffirms the social values embodied in those laws. Punishment fulfills, then, a function in preserving the identity of the community.\textsuperscript{203}

\textsuperscript{197} Nozick, \textit{supra} note 23, at 370-71.
\textsuperscript{198} Morris, \textit{supra} note 37, at 264.
\textsuperscript{199} Id. at 268.
\textsuperscript{200} Hampton, \textit{supra} note 38, at 234.
\textsuperscript{201} Bibas, \textit{supra} note 38, at 1391.
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Joel Feinberg discussed the expressive character of punishment. The expression of moral condemnation is an integral part of punishment and constitutes an independent objective of its own.\(^{204}\) Unpleasant punishment itself expresses this condemnation\(^{205}\): “The very walls of his cell condemn him, and his record becomes a stigma.”\(^{206}\) Ordinary forms of harsh punishment are the symbols that exist to manifest the public’s revulsion.\(^{207}\)

When society imposes a punishment, it not only does something but also says something through this act.\(^{208}\) Garvey argues that punishment conveys a contrary message nullifying the hidden false message that the offender broadcasts with her misdeeds in regard to her supremacy on the victim, confirming the value and the status of the latter.\(^{209}\) Imposing too light a punishment can undermine the public’s appreciation of the value of the victim and the latter’s self-esteem. The absence of meaningful punishment conveys the message that the criminal act was not, after all, so evil, thereby adding to the harm done to the victim.\(^{210}\) Additionally, from a utilitarian point of view, taking repentance into

\(^{204}\) Feinberg, supra note 35, at 98.

\(^{205}\) Id. at 99.

\(^{206}\) Id. at 100.

\(^{207}\) Id.

\(^{208}\) Garvey, supra note 21, at 1820.

\(^{209}\) Id. at 1821.

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account harm deterrence, for a person may think that even if she is apprehended, she will succeed in making a convincing plea that she feels pangs of conscience, leading in effect to a reduction in punishment.\footnote{Id. at 106.}

Furthermore, there are those who believe that no contradiction exists even between forgiveness of the offender on the part of the victim and the latter’s insistence on imposing on the offender the proper punishment from such considerations as restoring the social order or conveying a message to the public.\footnote{Garvey, supra note 21, at 1828; Murphy, supra note 54, at 21-22; Hampton, supra note 54, at 158-59; WORTHINGTON, supra note 54, at 3; Bibas, supra note 3, at 340.} In contrast, Benziman thinks that one who forgives and takes the offender to his bosom will usually want to sweeten the latter’s punishment.\footnote{BENZIMAN, supra note 87, at 146; in this vein, see also Bibas, supra note 3, at 330.} Nevertheless, as we discussed, there is no similarity between the attitude of the victim toward the offender and the position of the judge, who can more broadly observe the significance of imposing too light a punishment.

According to the concept of punishment as conveying a message, punishment officially imposed on the offender has significance. That the state inflicts punishment is required for the sake of conveying the message embodied in the punishment. In Hart’s well-known definition, punishment is an intentional, external
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act of causing the offender pain, and its being "...intentionally administered by human beings other than the offender" is a necessary component.\textsuperscript{214} Therefore, pangs of conscience do not answer the definition of punishment.\textsuperscript{215} Recognition of contrition as punishment conveys neither to the public nor to the victim a similar message to that conveyed through punishment that is officially inflicted on the offender against his will.\textsuperscript{216} A person cannot inflict punishment on himself; it should be imposed on him by the state. Thus, for example, if a person who is sentenced to death tries to commit suicide a day before his execution, the state will not allow the individual to do so, but will take action to return him to his normal state of health so as to enable carrying out the punishment.\textsuperscript{217}

One may, however, cast doubt on the effectiveness of the message conveyed to the offender through punishing him. There is great uncertainty as to whether punishment causes an offender to recognize his wrongdoing and to regret his misdeed. Punishment needs not be humiliating to lead the offender to repentance.\textsuperscript{218} Imprisonment, however, a routine enough punishment, cuts the convicted person off from his family, friends, and the community

\textsuperscript{214} H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 5 (1968).
\textsuperscript{215} HERBERT MORRIS, ON GUILT AND INNOCENCE 104 (1976).
\textsuperscript{216} Tasioulas, supra note 46, at 505.
\textsuperscript{217} NOZICK, supra note 23, at 370.
\textsuperscript{218} Tasioulas, supra note 46, at 487.
and exposes him for long periods of time to physical and psychological conditions that are at times oppressive.\textsuperscript{219} It demeans the individual and affects his self-esteem.\textsuperscript{220} Prison does not constitute, as a rule, an educational institution that prepares the prisoner for normative life.\textsuperscript{221} Under these conditions, the ability of the offender to live a useful life in the future as a direct outcome of the punishment is not great.\textsuperscript{222}

Whereas philosophers like Joel Feinberg aver that punishment clarifies for the offender that the hostility toward him is justified and that his punishment is a kind of "legitimized vengefulness,"\textsuperscript{223} Nietzsche insisted that contrary to the prevailing approach, punishment did not arouse a sense of guilt, but just the opposite: "...punishment hardens and deadens; it concentrates; it intensifies the feeling of alienation; it strengthens resistance"; in effect, "it is the practice of punishment itself which has most powerfully hindered the development of this sense of guilt (emphasis in the original)." \textsuperscript{224} Genuine pangs of conscience are especially rare


\textsuperscript{221} \textit{Id.}

\textsuperscript{222} Kaye, supra note 219, at 415.

\textsuperscript{223} Feinberg, supra note 35, at 100.

\textsuperscript{224} FRIEDRICH NIETZSCHE, \textit{ON THE GENEALOGY OF MORALS} 62 (Oxford University Press, 1996, Douglas Smith trans.).
among criminals and prisoners; "prisons and jails are far from being
the preferred breeding-grounds of this species of gnawing worm",
and, in fact, punishment that is a suffering "in the service of justice"
actually blurs the wrongfulness of the criminal act. 225 Jonathan
Cohen, who in general thinks that denial of guilt on the part of a
guilty person is immoral, is conscious of the fact that transferring
his ideas to the criminal field is problematic when courts impose
punishments that are not proportional to the seriousness of the
offense. In such cases, the offender is led to believe that the
criminal justice system is committing a more serious crime than his
own. 226 Prison, Braithwaite opines, causes the offender to be
embittered and to leave prison angrier than when he went in. 227
One may deduce therefore that the ability of the punishment of
imprisonment to broadcast an educational message to the offender
that leads him to moral repentance is indeed doubtful.

So long as the purpose of the punishment is to convey an
educational message to the offender, there is no use to imposing a
severe punishment on the already repentant offender in order to
internalize his faulty act. 228 The repentant offender conveys a
message of surrender and of humility with his repentance.

225 Id.
226 Cohen, supra note 31, at 948.
227 Braithwaite, supra note 111, at 1738. See also Sagarin, supra note 174, at 63 (analyzing
Victor Hugo’s Les Miserables).
228 Nozick, supra note 23, at 372.
Repentance itself conveys a message of condemnation of behavior, for the offender himself condemns his own act. Robert Nozick thinks that a person who truly expresses remorse for his misdeed before being apprehended, who compensates the victim at his own initiative, and who also does good deeds for humanity with the intention of acting well with others is already connected to the proper social values. Those values significantly influence one's life, and there is no need for punishment so long as its purpose is to connect one to the proper social values.\textsuperscript{229} Even if the offender does not meet Nozick's strict literal criteria (for instance, an offender can choose for any of the various reasons we discussed not to demonstrate remorse prior to his conviction), he may possibly already be connected to these values. Jean Hampton, who opines that punishing is important for conveying an educational message both to the offender and to society, nevertheless recognizes deviations from this general rule. According to Hampton, when a person repents and experiences great pain for the offense he committed, his punishment may be reduced, and he may even be pardoned. The educational message in such a case is absorbed by the offender. Sincere repentance can also constitute sufficient

\textsuperscript{229} Id. at 385.
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lesson for the public at large. Under these circumstances punishment would be vindictive.  

There is no more effective message for the individual in regard to the seriousness of his deed than the internal message, manifested in pangs of conscience. Sincere repentance constitutes a painful reminder of the individual’s past offense. Taking repentance into account in the imposition of punishment conveys to the offender the external message that the criminal justice system recognizes the fact that he has learned his lesson and that he has the ability to pave his life’s way in the light of this lesson.

As to the message for the public, it can and should be conveyed to the effect that a person who repents is entitled to a special consideration. The repentant person conveys a message by means of his repentance about his wrongful act and about the injured party’s value and respect. Repentance can, then, also repay the victim for the blow to his dignity. Repentance also erases the message of inferiority that the offender prima facie conveys to the victim through the criminal act. Indeed, this message will not always be absorbed by the public. The public hears about the offense and about its punishment. It is not necessarily aware of what is percolating in the depths of the offender’s mind and soul. It

\(^{230}\) Hampton, supra note 38, at 234-35.

\(^{231}\) Murphy, supra note 129, at 378.
is liable to think that the repentance is fabricated. The public might respond cynically by statements such as “express remorse and escape punishment.” Despite this, the message that repentance is worthy of encouragement and that persons should be motivated to change is an appropriate and important message. People must be educated to have trust in the institution of repentance even if the message does not fully seep through. The gap between messages that the legal system wants to convey and their absorption by the public arises in other contexts, as well. But such a gap does not negate the need for recognizing repentance and transmitting the message of its importance.

E. The Seriousness of the Offence as Placing Limits on Taking Repentance into Account

In certain cases, as we have pointed out, repentance can nullify completely the damage that was caused in consequence of the commission of an offense. In other cases, it can diminish the damage caused. Of course, the more serious the offense, whether in terms of its nature or its circumstances, the less will repentance succeed in overcoming its weight.

Furthermore, there are those who argue that certain cases are unforgiveable even in light of the offender’s repentance. Yotam
Benziman thinks that murder, manslaughter, and the abuse of children may not be forgiven. In these cases, the victim cannot forgive either because the person is no longer alive or because a child is insufficiently mature to offer forgiveness; when a person matures, his personality will differ from that in childhood in a manner that he will be incapable of evaluating the nature and extent of the harm experienced as a child. Hannah Arendt opines that radical evil—acts that are beyond the pale of human understanding—are neither punishable nor forgivable: "... men are unable to forgive what they cannot punish and...they are unable to punish what has turned out to be unforgivable." For what the Nazis did, no punishment can be imposed that is proportional to the obnoxiousness of the crime; any punishment will be too lenient. Genocide and massacres are unworthy of absolution. No one has the right to forgive in the name of the victims of Auschwitz and the other extermination camps or any place that felt the touch of death by the Nazis and their aiders.

232 BENZIMAN, supra note 87, at 134-36.
233 BENZIMAN, supra note 87, at 138-145.
235 Vladimir Janke'le'vitch, Should We Pardon Them?, 22 CRITICAL INQUIRY 552, 556-58 (1996) (declaring that “Pardoning died in the death camps”:id. At 567); Benbaji & Heyd, supra note 73, at 575.
they necessarily project the personality of the wrongdoer in a way that is impossible to separate the misdeed from its doer.\textsuperscript{237} On the other hand, there are those who express a position that every person (as distinguished from his acts) may be forgiven and redeemed under certain circumstances.\textsuperscript{238}

It is difficult to maintain that a certain type of crime may not be forgiven in any situation. Thus, even homicides are not all made out of the same cloth: one may think of a mercy killing or of a murder of someone who victimized the murderer very badly in the past.\textsuperscript{239} The South African Truth and Reconciliation Commission testifies to the ability to forgive even in the face of atrocious crimes. In any event, it is obvious that a direct relationship exists between the seriousness of the offense in terms of its nature and circumstances, and the degree of consideration of repentance at the sentencing. The more serious the offense, the less ability repentance has to diminish the damage caused by the commission of the offense.\textsuperscript{240} However, even under these circumstances repentance reflects a smaller moral failure than non-repentance, and therefore justifies lower sentence as a matter of retributive justice.

\textsuperscript{237} Benbaji & Heyd, supra note 73, at 576; Smart, supra note 59, at 226-27.
\textsuperscript{238} Govier, supra note 48, at 59, 71.
\textsuperscript{239} See also Smart, supra note 59, at 212-15.
\textsuperscript{240} Smart, supra note 59, at 226-27.
VI. Conclusion

Repentance is not a legal institution. It does not come from the legal world. That is its power—it is basic to human relations, and it is difficult to maintain that the legal world is a bubble into which repentance will not penetrate. But that is also its disadvantage: “Repentance is neither here nor there. Repentance belongs to another world, to another universe of discourse,” as Professor Lurie in J. M. Coetzee's novel Disgrace says. Repentance is a personal matter. Professor Lurie was not prepared to elevate it to the level of legal analysis.

Nevertheless, repentance should be given recognition in the frame of sentencing. Repentance cannot alter the results of a physical act, although in certain cases it is inseparably combined with it. It cannot change the fact that the offender caused an injustice. However, repentance can, in certain cases, lessen the damage on the psychological level and in this way have implications for the seriousness of the offense.

A conception that makes an idealization of repentance as changing one’s personality and transforming her into another person can lead to the conclusion that the offender who feels and
expresses remorse should always be exempt from punishment, for the person who stands trial is not the person who committed the offense. Even in rare cases in which repentance does indeed change the individual’s personality, the conception that we are talking about two different people should not be accepted. Nonetheless, repentance should as a general rule be taken into account even when it is unable to diminish the damage caused, for three main reasons. The first reason is the matter of suffering, which pangs of conscience cause the offender. The suffering accompanying repentance can constitute sufficient punishment under certain circumstances, and punishment that has to be taken into account in other circumstances. The second reason is that society should welcome an offender who moves, morally speaking, from where she is now situated. Positive change that takes place in people should be recognized as a relevant measure for our attitude toward them. In addition to the benefit to society that develops as a result of the offender’s repentance, sincere repentance, which includes the obligation not to return to evil deeds, in and of itself is worthy of encouragement and cultivation. The third reason is that the moral development of the offender projects her character and also her past, illuminating in a new light the offense that she committed. Repentance can reduce or even nullify the maliciousness of the offender. An offender who truly and honestly repents has learned
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her lesson in a way that the need for personal message regarding the seriousness of the offense diminishes and even no longer exists.

There is no reason to freeze the action of the offender for a specified time after which the offense has come to an end. An individual's future is open to change.\textsuperscript{241} Society in general does not want to leave a person where he is, but to make him grow morally. Maimonides stressed in this regard that "an individual cannot but sin and err, either through ignorance—by professing an opinion or moral quality that is not preferable in truth—or else because he is overcome by desire or anger. If then the individual believed that this fracture could never be remedied, he would persist in his error and sometimes perhaps disobey even more because of the fact that no stratagem remains at his disposal …. If, however, he believes in repentance, he can correct himself and return to a better and more perfect state than the one he was in before he sinned"\textsuperscript{242}

Even in the absence of a second party who is capable of or interested in forgiving the offender, and also in victimless crimes, repentance is vital for the moral development of the individual. Society needs to strive toward educating for values of repentance. Recognition of moral repentance on the part of the offender within the criminal punishment conveys the message as to the proper

\textsuperscript{241} Govier, \textit{supra} note 48, at 66.

moral values. The state should also show interest in the matter of how the offender reacts to his misdeeds.

Every psychologist will tell his patient that even if the past cannot be changed, our attitude toward it can be changed. Changing an attitude will also influence the perception of the past. This assumption is correct, too, in relation to the offender who repents; the attitude toward repentance has an effect on the attitude toward the offense. Repentance assumes a person of choice. He can choose to obey the law from this time on and change his ways. Both the offense and the repentance are inherent in will power. Furthermore, repentance can change a person’s choice not only about the future but also about the past, and in this sense alter the conception of “the right to be punished.” There is no reason to chain a person to the choice that he made in the past. Thus, God says to the Prophet Ezekiel: “Say to them: As I live—declares the Lord God—it is not My desire that the wicked shall die, but that the wicked turn from his [evil] ways and live.... nor shall the wickedness of the wicked cause him to stumble when he turns back from his wickedness.” So far as the offender is concerned, the question is whether the punishment is necessary for him as an

243 SCARRE, supra note 30, at 184.
244 Garvey, supra note 21, at 1857.
245 Ezekiel 34: 11.
246 Id. at 12.
autonomous individual for whatever reason. Relating to the individual as to one who is incapable of changing morally means not recognizing this person’s moral and intellectual abilities. The offender can sense that the offense is foreign to him and does not reflect his personality. Under these circumstances, receiving a harsh punishment can frustrate the offender. It conveys a message that he is a bad and base person. Punishment can in such circumstances strip a person of his self identity.

One should note that the recognition of the ability of the future to change the past is found in other legal contexts. If an offense has been committed and the prohibition in regard to the deed invalidated through legislation, criminal responsibility for carrying it out will be abrogated. Although a person chooses to break a valid law as a rational moral agent, the law nevertheless recognizes future change in regard to society’s attitude toward his deed as also projecting his past. Additionally, some jurisdictions exempt from punishment a person who withdraws his attempt to complete the offense (although criminal attempts constitute an offense under

248 Govier, supra note 48, at 70.
249 Taylor, supra note 182, at 90.
250 Thus, section 4 of the Israeli Penal Law of 1977 provides: Where the prohibition of an offence is abrogated after its commission, criminal responsibility for doing it shall cease; proceedings which have been commenced shall be discontinued; if a sentence has been passed, its execution shall be discontinued; and consequences arising out of the conviction shall no longer exist.
normal circumstances) if he abandons his intent on account of repentance albeit his initial choice to transgress the law.  

A positive attitude toward repentance as a consideration that is able to bring about a lighter sentence is rooted in personal relations. The manner in which a person judges his fellow human who injured him changes, among others, as a direct result of the existence or non-existence of repentance. At the macro level, the concept of repentance is an integral part of offender-victim relations; often the victim implores the offender to show signs of repentance and empathy no less than he asks to receive compensation or to punish the offender. The basis for the offender’s asking meaningfully for forgiveness and for the ability of the victim to forgive is found first and foremost in the motivation for a process of repentance. Part of the resilience of a society and of social relations is rooted in the ability to repent and to repair. A healthy society will encourage repentance and repair of the sin, but this will be possible only if the repentant has a realistic chance of convincing people of his repentance. In the event of a message that repentance is not of interest, huge mental powers are needed to motivate a process of repentance. It is difficult to assume that in a social reality in which repentance has no chance of being accepted, mental powers and a supporting environment will be found in the

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252 Robbins, supra note 59, at 1155-56.
usual case to set in motion a process of repentance that has no real results except for the moral achievement of the repentant. The web of social relations among offender, victim, and society needs to permeate, too, the criminal justice system and the considerations of punishment that it includes. Whoever wants to disconnect between the prevailing social reality, which attributes great interpersonal importance to repentance and forgiveness, and the question of how a person is punished in individual-state relations, has the burden of proof to show that the social reality is not worthy. In the mosaic of human life, repentance is not only an existing fact. It is also a paramount social need, for it is difficult to describe a process of rehabilitation without its being proceeded by acknowledging responsibility and repentance. A sentencing system that endorses repentance conveys a positive message that sees in repentance a generator of change and rehabilitation.

Taking repentance into account accords also with retributive theory, which should be derived not only from the offense that has been committed but also from events that come after the offense. Taking repentance into account also means respecting the autonomy of the individual to choose his path at any given moment.

253 Robbins, supra note 59, at 1159.
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Recognition of repentance does not imply lessening the seriousness of the offender’s misdeeds. On the interpersonal level, forgiveness may be given only in a face of wrong. Forgiveness goes hand in hand with moral condemnation of the deed. A repentant offender declares himself to be someone who caused injustice.

If a person has a Hegelian right to be punished, he also has the right to repent and the right that his repentance should be taken into account when meting out criminal punishment. As Maimonides considers a person who unjustifiably refuses to forgive to be an offender, and the offender under these circumstances becomes pardoned, so, too, a criminal justice system that refuses to recognize repentance and a change of heart becomes injurious and turns the offender into a victim. As Scarre put it, “If to err is human, to forgive is not only humane but a sign that we recognize ourselves to be less than divine in our moral character.” Every person may fall. A basically moral person may also rise again through repentance.

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254 SCARRE, supra note 30, at 17; Benbaji & Heyd, supra note 73, at 571; Govier, supra note 48, at 60; Holmgren, supra note 124, at 341; BENZIMAN, supra note 87, at 11.
256 SCARRE, supra note 30, at 188.
257 Id.