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5 The ideal of the responsible agent sits uneasily with an image it is easy to form of suspects or defendants in capital cases, even suspects or defendants who are well-represented, intelligent, and guilty. The image is of David and Goliath. A suspect is often pictured as a single individual ranged against the might of the police, and a defendant is pictured as facing the combined forces of the police, the courts, and sometimes the media. If anyone manages to endure the process of prosecution and get an acquittal, then, one might think, it is a victory against considerable odds, and it might be said that whoever manages to survive the ordeal deserves to. The problem with this image, at any rate in democratic countries with robust legal institutions, is that the David figure is not just plucked arbitrarily from the general population and made to face an overwhelming adversary for the purpose of a public spectacle. A crime has to have been committed and good *prima facie* evidence found that implicates the David figure. In the case in which the crime is at the extreme end of the range of murder offenses, the so-called David figure may pose a considerable public danger. The serial murderer Ted Bundy is a case in point. Against this background, the arrest and trial of the David figure is not to be seen as something that satisfies the whim of the bored and powerful. It is not preliminary to some sort of scandalously uneven gladiatorial contest or a battle of wits against the odds. It is to be seen as a process in which evidence for the commission of a great wrong is tested to see whether it justifies punishment of the accused. The things in the balance are not the powers of the state and the powers of the individual but the evidence against the accused and the defense against that evidence, and, when guilt has been established and sentence must be passed, the crime and the punishment. Of course, things *can* go wrong. And something has gone very wrong in a liberal democratic state when the powers of the prosecution are not in any way counterbalanced by protections for the accused. When the protections exist, however, it is never David against Goliath no holds barred. Many holds *are* barred to Goliath. So the image of a contest against great odds can often be sheer illusion. Even when it is not, the guilt of an accused makes a great difference. If someone is guilty of a serious offense and uses all the resources offered to the innocent against a strong prosecution, then, notwithstanding the strength of the prosecution, it is still an evasion of responsibility to enter a trial posing as an innocent person.

6 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, adopted and opened for signature, ratification, and accession by United Nations General Assembly resolution 2200A (XXI), Dec. 16, 1966; entry into force, Mar. 23, 1976 <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

7 SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, AIMING AT THE ABOLITION OF THE DEATH PENALTY, adopted and proclaimed by United Nations General Assembly resolution 44/128 of Dec. 15, 1989. <http://www.unhchr.ch/html/menu3/b/a_opt2.htm>.

8 For an up-to-date survey of the state of thinking about the death penalty in relation to the ICCPR, *see* H. J. STEINER & P. ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS 18-55 (2nd ed. 2000).

9 There are sometimes good moral arguments to the conclusion that scales of justice should not be too finely calibrated in the effort to achieve proportionality. Although it serves the goal of proportionality to have aggravated punishment for mass murder, it may strike a better balance between the desideratum of proportionality and the ideal of respect for persons to confine methods of execution to the most painless, most clinical, and fastest-acting.

Caution about Character Ideals and Capital Punishment: A Reply to Sorell

SEANA VALENTINE SHIFFRIN

Tom Sorell's essay raises the fresh issue of how the criminal should behave were she now to behave as well as possible given that she has already committed a terrible crime.[1] Sorell argues that the "ideally responsible agent" who has engaged in criminal behavior would take responsibility by "admitting to the crime before a relevant public," "admitting to it *promptly*," and "submitting to the response of the relevant public."[2] In a just (but not necessarily perfectly fair) state, the "ideal of responsible agency . . . justifies nothing less than cooperation with the prosecuting authorities," "confession," and "willing submission to proportionate punishment."[3]

Sorell submits that this ideal has consequences for how we should think about the death penalty. On its own, he concedes, the ideal of the just state requires that we convict and execute only the guilty (if anyone). This ideal, taken alone, would recommend the death penalty's

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abolition, given its finality and the concerns that imperfect enforcement techniques may result in the conviction and execution of the innocent. However, Sorell contends that his ideal of responsible agency weighs against this risk-aversion argument. So long as a state enacts and implements serious measures to administer justice fairly, the ideal of responsibility may justify the application of the death penalty in real-life circumstances even in cases in which the risk of error remains.[4] I contest Sorell's claim that this ideal, assuming its plausibility, should influence positively our assessment of the justice of the death penalty. I also question the content of this ideal and raise some worries about Sorell's claim that the ideally responsible agent is one who would confess, confess promptly, and submit willingly to prosecution.

To begin, I remain uncertain about the structure of the argument that Sorell deploys. In particular, I am confused about how the ideal of responsible agency weighs against the risk-aversion argument whose power he acknowledges. Perhaps Sorell means something as weak as the following: the argument for risk-aversion focuses on the possibility of unwittingly executing the innocent. The guilty who confess their guilt could, justifiably, be executed despite this argument even if this argument were to rule out executing those who consistently maintain their innocence. He may be suggesting that the implications of the risk-aversion argument are narrower in scope than abolitionists might suggest and that the risk-aversion argument may not merit a comprehensive condemnation of the death penalty. But at many points in the text Sorell appears to have a stronger position in mind—namely, that the importance of the guilty's taking responsibility for their crimes and submitting to the appropriate penalty may outweigh the risk that innocent people will be executed. So, in some circumstances, the death penalty may be justly imposed even on those who maintain their innocence and the death penalty may be a part of a just legal system even if the risk of executing the innocent has not been fully eliminated.[5]

I doubt that the ideal of responsible agency that Sorell describes could accomplish any of these ends, or even make a healthy contribution to them. That is, I doubt that it could provide any independent argument for the death penalty even within a state that otherwise achieved attainable standards of fairness—one that respected human rights, operated under a system of fair administration of law, and employed generally reliable methods of evidence collection and presentation. With respect to the weak argument, executing only those who confess would still not eliminate what should be substantial concerns about false confessions.[6] Even if allegations of false confessions are investigated, as Sorell advocates, any real system of implementation, especially one that attempts to handle claims expeditiously, will have imperfections. The risk of executing the innocent would be only reduced, not eliminated. Further, this scheme would have consequentialist disadvantages from Sorell's own perspective, for it would provide disincentives for confessing and greater incentives for falsely maintaining innocence.

It is not clear that we should treat the non-ideal agent as though she were acting ideally.

With respect to the stronger argument that I take Sorell to be making, I fail to see how the claim that the ideal agent would accept responsibility and punishment for her crime, even the death penalty, translates into an argument that we may permissibly impose the death penalty on non-ideal, unwilling agents. It is not clear that we should treat the non-ideal agent as though she were acting ideally. The ability, if any, of the ideal of responsible agency to justify imposition of such a harsh penalty may hinge upon the voluntary acceptance of the penalty. The values accomplished by its imposition on willing agents may not be realized when imposed on unwilling agents. Perhaps the implicit suggestion is that a failure to confess here is a further wrong that itself merits punishment? I return later to this position indirectly when I consider the content of Sorell's ideal and question whether we should expect confessions to occur within the time frame of a speedy trial.

Whatever the underlying structure of Sorell's argument, there are reasons to suspect that the ideal of responsible agency could not supply, but instead presupposes, a fully satisfactory justification for the death penalty. The plausibility of the claim that the ideal criminal should confess and submit herself to the community's chosen penalty depends on the community's chosen penalty antecedently being a reasonable one. We need an independent argument for the correctness of the death penalty. The characterization of the ideal responsible agent will not contribute much to that requirement. If the death penalty is an unreasonable (or even inhumane and cruel) response to a subdued criminal who no longer poses a risk to public safety, then I fail to see why it amounts to an evasion of responsibility for the criminal to resist that

particular penalty. Resistance need not amount to proceeding as though the crime had not occurred or that the action was permissible, as Sorell seems to suggest.[7] One may contest the death penalty's justice without contesting one's susceptibility to punishment—even to severe forms of punishment that aim to register, in their form, the remarkable badness of the crime at issue. Sorell seems to hint that it may be important to administer (and accept) the death penalty in order to register the special badness of aggravated murder.[8] Although the severity of a penalty and the relative severity of penalties may play important expressive functions in distinguishing between degrees of moral crime, these expressive functions may be met through other graduated systems of penalty, without recourse to the death penalty. In any case, it is unclear that the expressive aim should be dispositive given the range of serious objections to the death penalty. In sum, if the wrongdoer's resistance is motivated by the view that the death penalty in particular is beyond the bounds of decency or is otherwise inappropriate, I do not see why a guilty criminal's resistance to it should register as an evasion of responsibility instead of as a more particularized complaint about a specific mode of punishment. Further, even if the ideal responsible agent should accept whatever penalty, appropriate or not, that the community chooses, it does not follow that this authorizes the community to mete out any penalty it likes. The administration of the death penalty might not violate the right of the criminal, on this hypothesis, but it may still be the wrong way for us to respond to violence and to treat a member, albeit a wayward one, of the moral community.

Thus, I believe it is too ambitious to suggest that this account of responsible agency could generate an independent argument for the death penalty or even one that exerts some weight against the risk-aversion argument. Still, the ideal may bear on our thinking about the death penalty in at least two other concrete ways. Assume for the moment that some independent argument can be generated to justify the death penalty, at least in circumstances of fair administration. (I do not believe this could be so and perhaps this will indirectly influence the arguments to come. I leave that to the reader to assess.)

First, the ideal of responsibility might have implications for how the "good" criminal should approach criminal proceedings. In particular, one might take from Sorell's argument the suggestion that the "good" criminal should not contest the criminal proceedings, even were the death penalty sought. This suggestion might be elaborated in quite different ways: that the criminal should admit to her act, even if the sentence sought is the death penalty and her admission would greatly increase the chance that that penalty would be imposed; or, that the criminal should admit to her act and should not appeal a sentence of the death penalty if it is imposed by the judge or jury; or, that the criminal should admit to her act and should not argue (even to the jury or the judge) against the imposition of the death penalty. Sorell does not distinguish among these different possible implications although I think the variations might matter considerably. In particular, the last position is not only too extreme but may be in tension with the picture of responsible agency he articulates. I return to this tension shortly.

Second, the view of responsibility Sorell outlines may also appear to have implications for whether the death penalty (or other severe penalties) should be imposed. It may seem to some that, when deciding whether to impose the most harsh penalty, it should matter whether the criminal has subsequently behaved responsibly. One might think that the discretionary imposition of a lesser available penalty is more appropriate when the criminal has met the conditions of responsible agency that Sorell identifies—prompt confession and willing submission to punishment. The failure of a criminal to accept responsibility may then appear to argue against exercising this discretion.

It is too ambitious to suggest that this account of responsible agency could generate an independent argument for the death penalty.

I want to challenge these possible implications by contesting Sorell's picture of "ideal responsible agency." Of course, the notion of "ideal responsible agency" here is a little strange. It is odd to ask what the "good" criminal would be like and, in particular, what the "ideal" or "good" aggravated murderer is like. By the time that a murder has occurred, so much has gone wrong that there may not be much room for an ideal theory here. Still, ironic terminology aside, Sorell is right to ask what we believe the murderer should do after her or his crime. And he is right to observe that we believe that there is moral reason for the guilty to take responsibility for what they have done.[9] But need this happen at or before trial? Need it occur immediately or, as Sorell puts it, promptly?[10]

There are instrumental moral reasons why we might deny that it is obligatory for a criminal to plead guilty, even when guilty (especially if no one else is thereby made a suspect), and to resist the imposition of the death penalty. Contests by the guilty may do us all a service by providing comprehensive incentives for prosecutors and the state to remain honest and vigilant of all citizens' rights in the collection and presentation of evidence and in the uniform, fair imposition of penalties. But I want to put aside these important instrumental concerns and focus just on the character of the guilty party.

I am not entirely certain that the ideal responsible agent who has committed a serious crime is one who would own up, fully, in a *prompt* manner. Sorell's emphasis on prompt admissions put me in mind of Justice Powell's recantation of *Bowers v. Hardwick*.[11] *Bowers v. Hardwick* was the 1986 Supreme Court decision that upheld the constitutionality of Georgia's anti-sodomy statute. The decision represented a serious, still-present obstacle in the movement to recognize the equal status of gay and lesbian citizens and the fundamental right to sexual freedom. Justice Powell's vote was the decisive one. The decision Powell joined was sadly insensitive to the history of discrimination against homosexuality and instead regarded this history as a positive reason to confirm the constitutionality of criminal penalties for sodomy.[12] Only four years after Powell cast his decisive vote, just after he retired from the court, he began to declare publicly that he had gotten it wrong in *Bowers*.[13] In a telephone interview he declared, "I do think it was inconsistent in a general way with *Roe [v. Wade]*. When I had the opportunity to reread the opinions a *few months later*, I thought the dissent had the better of the arguments."[14] Ironically, the other opinion that Powell publicly regretted was his lead opinion and deciding vote in *McCleskey v. Kemp*, a 1987 case that upheld the constitutionality of the death penalty's administration in Georgia despite evidence of racially disproportionate application.[15] Powell's recantation of this decision (and of the constitutionality of capital punishment generally) preceded, but did not halt, Mr. McCleskey's execution by just a few months.[16]

Although I believe *Bowers* was a terrible decision and that Powell was correct to reconsider his position, I remember being very troubled about the timing of his reported private rethinking ("a few months later") as well as his public recantation. The near-immediacy of his private reconsideration raised the worry that his initial decision had not merely been horribly misguided but that his deliberation process must also have been importantly substandard, perhaps incomplete. If he came to see that he was wrong that quickly, it felt to me as though he could have come to the correct decision at the time if only he had deliberated more searchingly and deeply. (As it was, he had initially planned to vote the other way.[17]) In his case, the promptness of his recantation seemed to reflect poorly on him. Given the opinion's tremendous importance and its deep misguidedness, I would have felt better about him as a judge and as person had he had deeper convictions about the opinion he had signed, ones he had come to reconsider over time and with more experience. I am not suggesting that he should not have recanted once he realized his error (although some may question the propriety of justices engaging in public chatter of this sort), but rather that the promptness of his realization reflected badly, at least prima facie, on the nature of his initial error and on his character.

Of course, our standards for evaluating judicial behavior differ from those applicable to criminal defendants. Nonetheless, I wonder whether something similar might be said, in certain situations, about criminal behavior and recantation. There is something rather peculiar about sudden, major changes of mind and heart. The fully formed, integrated, mature agent deliberates thoroughly, commits to action, and may become fairly identified with it. A change of heart may require substantial time to reconsider fully and take the measure of what has really happened. It is doubtful whether we should always regard prompt remorse or willing submission to punishment as a mitigating factor or character virtue, even if sincere and even when it is the right thing to do once one has realized that one has done the wrong thing. Being positioned to engage in prompt recantation or prompt acceptance of the appropriateness of a severe penalty may be a signal that the underlying crime was performed with a disturbing degree of casualness, there is a failure to take seriously the nature of the action one is set to perform. There is something bizarre about the picture of a first-degree murderer who suddenly turns on a dime. It is not obvious that that person's situation is more estimable than the criminal whose change of heart takes considerable time and effort.

By no means am I claiming that all sudden changes of heart are pathological. There are crimes of passion in which confrontation with the consequences of her action startles the criminal back into a more deliberative state that is more consistent with her true character and, so, into a terrible realization of what has happened. But not all serious crimes are ones of passion or of weakness of will. In other cases, depending on the time frame, prompt

remorse may not signal a character virtue or a reformation as much as it reveals either an initial failure to take one's agency and one's action as seriously as one ought to have, or a strange feature of personality—a disassociation from what one has done.

This suggests that, depending on whether the trial is indeed a speedy one, we should not value prompt remorse unequivocally or take it to be a sign that we are dealing with a more virtuous character. Nor should we, necessarily, require it when deciding whether to levy the death penalty or generally whether to levy a more or less severe penalty. Furthermore, contesting the penalty during trial may actually serve the values Sorell emphasizes. This is what I meant when I remarked earlier that one possible interpretation of his position that the criminal should not contest the prosecution or the penalty seemed in tension with the values he celebrates. When the penalty and its appropriateness are subject to discussion and argument, there is a greater opportunity for the criminal to listen to and engage with the community's reaction to his behavior. The process may provide a vivid context for appreciation of the nature of the crime and the community's stance toward it. Here, the issue is not whether the "ideal responsible agent" will accept the community's reasonable penalty but how this acceptance should come about. Remorse may come to be deeper if the criminal engages in a more prolonged dialogue and discussion about the events with those institutions that hold him responsible. Immediate or prompt cooperation with authorities and acceptance of punishment may bypass the processes that would help the criminal to come to a fuller understanding of what he has done and its wider significance. Thus, the initiation and participation in processes that assess guilt and assign penalties should not necessarily be taken as a sign of a *further* failure to act responsibly by criminals; rather, their instigation may be part of what it is to take responsibility.

NOTES

[I am grateful to Dustin Osborn for research assistance.]

1 Sorell, *Two Ideals and the Death Penalty*, 21 CRIM. JUST. ETHICS 27 (this issue, 2002).

2 *Id.* at 29 (emphasis added).

3 *Id.* at 33. *See also* 29.

4 *Id.* at 28 and 33.

5 *Id.* at 33.

6 *See* Leo, *False Confessions: Causes, Consequences, and Solutions*, in WRONGLY CONVICTED, 36, 37, 42 (S. Westervelt & J. Humphrey ed. 2002) (declaring that "contemporary methods of psychological interrogation can, and sometimes do, cause cognitively and intellectually normal individuals to give false confessions to serious crimes of which they are entirely innocent" and also discussing the phenomenon of purely voluntary false confessions). *See also* Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987). The Bedau-Radelet study sampled 350 purportedly erroneous convictions in potentially capital cases since 1900. They found that in 49, or 14.3%, of the cases, false confession was a cause of wrongful conviction. Even adjusted for the effect of *Miranda*, the figure declines by only 3.5 % to 11.4%. Not all of the cases of false confession they describe were caused by police coercion or pressure. Id. at 63, 169.

7 Sorell, *supra* note 1, at 33.

8 *Id.* at 33-34.

9 In a note, Sorell expresses doubts whether the ideally responsible agent who has behaved criminally must also *regret* her crime. *Id.* at 34, n.3. What seems more essential to Sorell is that the ideally responsible agent should facilitate her being held publicly accountable. Although Sorell's examples of ideal but non-repentant murderers seem peculiar and do not persuasively motivate his position, similar views are familiar from traditional positions on civil disobedience. On some understandings of civil disobedience, the disobedient is to defy the law openly and submit willingly to punishment. She should willingly submit not because she should regret her defiant act nor because she should acknowledge the legitimacy of the law being contested, but rather as a demonstration of her general commitment to the rule of law. However, in contexts such as the ones Sorell is discussing, in which the laws that are violated are just ones and the violations are not forms of protest against injustice, it may be harder to sustain the view that the moral ideal of responsible agency focuses just on allowing oneself to be held accountable. In such cases, repentance may be a part of taking full responsibility for what one has done.

10 *Id.* at 29.

11 478 U.S. 186 (1986).

12 *Id.* at 192.

13 Agneshwar, *Powell on Sodomy: Ex-Justice Says He May Have Been Wrong*, Nat'l L.J., Nov. 5, 1990, at 3, col. 1. *See also* Marcus, *Powell Regrets Backing Sodomy Law*, Wash. Post., Oct. 26, 1990, at A3; Greenhouse, *When Second Thoughts in Case Come Too Late*, N.Y. Times, Nov. 5, 1990, at A14, and *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. Times, Aug. 26, 1998, at D19.

14 Agneshwar, *supra* note 13, at 3 (emphasis added).

15 481 U.S. 279 (1987).

16 J. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451-54 (1994).

17 Justice Powell's biographer reports that Powell felt torn and tried to craft an Eighth Amendment argument that would allow him to duck the Fourteenth Amendment issue about the right of privacy. *Id.* at 513-23. *See also* Kamen, "Powell Changed Vote in Sodomy Case: Different Outcome Seen Likely if Homosexual Had Been Prosecuted," Wash. Post, July 13, 1986, at A1.

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