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# So You're Sorry? The Role Of Remorse In Criminal Law

Rocksheng Zhong

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So You're Sorry? The Role of Remorse in Criminal Law

A Thesis Submitted to the  
Yale University School of Medicine  
in Partial Fulfillment of the Requirements for the  
Degree of Doctor of Medicine

by  
Rocksheng Zhong

2013

## ABSTRACT

### SO YOU'RE SORRY? THE ROLE OF REMORSE IN CRIMINAL LAW.

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The role of remorse in judicial decisions in the criminal justice system has been addressed in scholarship and remains controversial. The purpose of this qualitative research was to examine the views of seated criminal judges about remorse, its assessment, and its relevance in their decision-making. After exemption by the IRB, 23 judges were interviewed using an open-ended format. Transcriptions of these audio-recorded sessions were analyzed phenomenologically by members of the research team. The results showed that judges varied widely in their views about the assessment of remorse and its relevance in judicial decision-making. Judges generally agreed that remorse was a valid legal construct. However, they disagreed about which types of crimes and at which stage of criminal proceedings remorse was most relevant. They further disagreed about the indicators of remorse; behaviors that suggested remorsefulness to some judges suggested remorselessness to others. Finally, judges differed in their opinions concerning the impact of mental illness on remorse and often oversimplified psychiatric disorders. These findings suggest a role for forensic psychiatrists as educators and consultants for the courts on the issue of remorse. Greater involvement on the part of psychiatrists could promote justice, particularly in forensic populations.

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## INTRODUCTION

Remorse can in some ways be likened to pornography: oftentimes, people do not know exactly what it is, but they know it when they see it. This intuitive approach is usually adequate in everyday life when stakes are low and rigor is unnecessary. When little Timmy says, “I’m sorry,” after knocking over the cookie jar, we generally need not explore the psychological depths of his statement. However, in the realm of criminal law, the evaluation of remorse takes on greater significance. Remorse has long been held to be an appropriate consideration for courts, particularly during the sentencing phase of criminal proceedings.<sup>1</sup> Despite the acceptance of the legal relevance of remorse in theory, legal scholars, as well as those in other disciplines, have had difficulty grasping the precise nature of remorse, and courts have applied the concept inconsistently.<sup>2</sup> These issues are further complicated in individuals with psychiatric illness, whose behavior and cognitions may deviate in unexpected ways from those of people without psychiatric illness.

Remorse is a complex blend of emotion and cognition. Drawing upon both the medical and legal literature, as well as novel empirical investigation, this thesis aims to offer a clearer picture of judges’ views of remorse, the indicators they use to assess it, and their assumptions regarding its expression. This improved understanding will not only shed light on the courts’ current treatment of this nebulous concept, but also aid psychiatric experts in crafting more effective forensic reports. Finally, the findings presented may have implications regarding the fair treatment of offenders with mental illness whose experience or expression of remorse may be influenced by their disorder.

### *Definitions of remorse*

The confusion surrounding remorse begins with its definition. Remorse has been explored from a variety of angles. Authors, poets, theologians, psychologists, philosophers, and jurists have all attempted to characterize it, with varying results. Currently, the Oxford English Dictionary defines remorse as “deep regret or guilt for doing something morally wrong.” Moreover, the word carries overtones of biting and gnawing; its etymological forebear is the Latin *remordēre*, which literally means “to bite again.”<sup>3</sup> Other sources have highlighted additional facets of remorse. For instance, the philosopher Thalberg comments that one can feel remorseful only for one’s own actions (or omissions) and only when one desires a different outcome than what actually occurred.<sup>4</sup> Meanwhile, Murphy suggests that an element of atonement—some form of restitution or penance—is important to distinguish remorse from regret.<sup>5</sup>

Thus defined, remorse is an ancient concept. Matthew 27:3-5 (New International Version) writes that “[w]hen Judas...saw that Jesus was condemned, he was seized with remorse... ‘I have sinned,’ he said... Then he went away and hanged himself.”

Shakespeare’s *Macbeth* presents a similar theme of intense distress followed by self-harm. The title character and his wife conspire to murder the King of Scotland and ascend the throne. Although they are successful in their plot, they are gradually overcome by the burden on their conscience. Macbeth becomes increasingly murderous and paranoid, while Lady Macbeth begins to sleepwalk and hallucinate bloodstains on her hands, providing one of the Bard’s most famous quotes: “Out, damned spot. Out, I say!”<sup>6</sup> Eventually, she is driven to suicide.

Although these texts help broadly to illustrate some of the central ideas of remorse, they hardly articulate a thorough, coherent conception. Indeed, a review of the literature reveals a variety of definitions; most are vague, some have different focuses, and some even conflict outright with others.<sup>2</sup> Recently, Proeve and Tudor have sought to combine the wide range of intellectual inquiry concerning remorse into a more precise and well-developed characterization of the concept, and I have summarized their discussion to create the following formulation: *Remorse may be defined as a distressing emotion that arises from acceptance of personal responsibility for an act of harm against another person. Often, with further reflection, the remorseful individual may desire that the act had never occurred at all and wish to make restitution toward the victim.*<sup>7</sup>

Several elements of this definition are notable. First, remorse creates discomfort. Second, it is a combination of an emotion (the uncomfortable sensation) and the cognitions about the circumstances giving rise to that emotion. Third, “acceptance of personal responsibility” encompasses not only willful acts of harm, but also harm resulting from reckless, negligent, or otherwise unintentional behavior. Fourth, there must be an act or active failure to act. The mere thought of causing harm could induce an emotion perhaps better characterized as guilt. Finally, the actor must believe that the act is morally offensive. Typically, this requires that the victim or victims be one or more specific persons rather than a more theoretical group, like “society” as a whole. Nevertheless, one might also feel remorseful for having caused harm to non-human animals or even inanimate things, such as by destroying a precious object. For the purposes of the present research, I will focus primarily on concrete persons.



### *Remorse in legal theory*

The use of remorse or its absence as a mitigating or aggravating factor during criminal sentencing is accepted in both federal and state courts.<sup>8,9</sup> Historically, this practice arose in the United States from the moral and religious nature of early Puritan courts. Defendants, particularly those sentenced to death, were expected to confess and repent so that a religious sermon delivered at their public execution could instill righteousness among the townsfolk.<sup>2</sup> Modern jurisprudential justifications have generally been framed in terms of the four standard theories of punishment: deterrence, rehabilitation, incapacitation, and retribution.<sup>1,7,10</sup>

Deterrence takes two forms: specific deterrence aims to deter offenders from repeating their offenses, while general deterrence aims to deter other potential offenders. Deterrence holds that punishment should scale according to the severity of a crime, since greater harm justifies a greater barrier in the form of threatened punishment. At the same time, punishment should be parsimonious so that offenders do not encounter a situation in which they believe no additional punishment is possible (e.g., “I have already killed a guard during this bank robbery, so I may as well kill everyone else too.”). Insofar as remorse is assumed to be a predictor of reduced recidivism, less punishment may be needed to deter the remorseful offender. Conversely, if the absence of remorse is assumed to predict increased dangerousness and recidivism, a remorseless individual requires additional punishment to accomplish the same degree of deterrence.

Rehabilitation views punishment as a means or opportunity to reform an offender and reduce or remove that person’s desire or need to commit crimes. Frequently, these interventions take the form of medical treatment, therapy or counseling, education, and

training programs. As with deterrence, some believe that rehabilitation may be more or less readily attained when a defendant is remorseful or remorseless so that corresponding levels of (rehabilitative) punishment are warranted. A drunk driver who expresses remorse about injuring a pedestrian, for instance, may be more willing to submit to treatment for alcohol abuse and driver education than one who is not remorseful.

Incapacitation is the most direct manifestation of the broader consequentialist principle of minimizing harm: would-be offenders should be prevented from engaging in criminal acts by imprisoning them, executing them, or otherwise making it impossible for them to offend. In its purest form, incapacitative punishment would not require a criminal act to have actually occurred if future criminality were reliably predictable, nor would a crime necessarily require punishment if it could be shown that the act was not repeatable. Again, for those who claim that the presence or absence of remorse suggests a lower or higher likelihood of future crime, less or more incapacitation is needed. For instance, a man who expresses remorse after violently assaulting another may need less intensive sequestration because his internal distress may be a built-in barrier to attacking others again.

Finally, retribution, in contrast to the other three theories, argues that punishment is not merely an instrument of harm reduction, but an end in itself, a form of just deserts. There are two varieties of punishment as retribution, vengeful desert and deontological desert. Vengeful desert, also known as *lex talionis*, is summarized by the phrase “an eye for an eye.” Offenders should be punished in a way that reflects the crime, either literally, or more commonly today, proportionately to the harm caused. In short, bad acts deserve to be punished. Deontological desert, meanwhile, focuses on the moral blameworthiness

of the offender rather than the degree of harm of the offense. Bad people (who commit bad acts) deserve punishment. While the offense may be part of the assessment of blameworthiness, other factors, including state of mind and external conditions, also come into play. Thus, a remorseful person may not be as bad as a remorseless person and therefore deserves less punishment.

Although remorse is theorized to be relevant to all four justifications for punishment, its role in the criminal justice system has been challenged. Some contend that judges should take neither a defendant's expression of remorse nor its absence into account when determining that person's punishment. Bagaric and Amarasekara argue that the use of remorse in judicial sentencing cannot be justified in terms of either consequentialist or retributive theories of punishment.<sup>11</sup> They state that deterrence, rehabilitation, and incapacitation all require that remorse be associated with future behavior but point out that there is currently very little empirical evidence to support that assumption. As for retribution, although remorse may be relevant to character-based deontological desert, it has little to do with vengeful desert, which focuses on the wrongfulness of the act irrespective of the qualities of the actor.

Further critiques of the "remorse principle" of punishment highlight the practical difficulties of accurately discerning remorse in human expression and differentiating it from other emotions. In a series of case studies, Duncan argues that the indicators of remorse, and particularly, lack of remorse, that courts use can be readily interpreted in ways that have little, if anything, to do with remorse.<sup>12</sup> She describes seven children, aged 9 to 17 years old, who had killed one or more people and whose legal outcomes were strongly influenced by their perceived remorselessness. Judges, police, psychologists, and

others identified behaviors that included avoidance or denial of the facts, joking remarks about killing someone, laughing, silence, an absence of sorrow, peaceful sleep following homicide, an impassive facial expression, and apparent sophistication or intelligence in plotting a crime. Duncan maintains that each of these behaviors was ambiguous. Denial and humor are common defense mechanisms. Silence and an absence of sorrow could suggest a reluctance to display emotion publicly. Sleeping at the scene of a crime could be seen as an escape from an unpleasant reality or the expression of an unconscious desire to be caught. An impassive face may be a mask that does not reflect inner turmoil. And a child who can, in a sophisticated and intelligent manner, plot a crime may not necessarily possess the same degree of sophistication in moral introspection that would be a prerequisite to developing remorse. Moreover, Duncan notes that the role of child and adolescent development is often overlooked as a significant confounding factor in the expression of remorse because children may lack the social, emotional, and cognitive maturity to display remorse in a manner expected by courts.

In an expansive review of the legal literature, Ward takes a similar view that genuine remorse is nearly impossible to ascertain and that courts' efforts to take remorse into account are doomed to inconsistency at best and unjust rulings at worst.<sup>2</sup> Defendants' statements, actions and conduct during the legal process, and conduct prior to and following the crime, as well as inferences about defendants' inner motivations, have all been considered even though they are ambiguous, imprecise, and potentially unreliable as indicators of remorse. Ward especially objects to courts' failure to reconcile defendants' Fifth Amendment rights against self-incrimination with the frequent view that silence or a profession of innocence signifies a lack of remorse. Relatedly, Etienne notes that judges

may misconstrue zealous challenges to criminal charges, pursuant to the advice of defense counsel, as reflecting remorselessness on the defendant's part.<sup>13</sup> And Weisman observes that the wrongfully convicted are not only punished for a crime they did not commit, but also punished more harshly for failing to be remorseful.<sup>14</sup>

Those who believe that remorse should matter in the administration of criminal law acknowledge these weaknesses but emphasize the value of remorse in a social relational context. They maintain that remorse is a moral good worthy of civic recognition: when a judge alters a punishment on the basis of remorse, she acknowledges the offender's self-conception and honors his autonomy.<sup>1</sup> They also suggest that outside of the courtroom, the expression of remorse can have powerful reconciliatory healing effects for offenders and victims and that these effects can even extend to the community at large by reaffirming social norms and morally educating the public.<sup>15</sup>

### *Remorse in empirical research*

Despite the ongoing theoretical debate regarding the role of remorse, the existing empirical literature, though limited, generally agrees that remorse, in practice, does have an impact on perceptions and judgments about an individual. The Capital Jury Project was a multi-state study in which jurors on death penalty cases were randomly chosen to be interviewed using a 51-page questionnaire. The data included information about the facts of the crime; the handling of the case by defense counsel, prosecution, and judge; defendant, victim, and juror demographics; the process of juror deliberation; jurors' perceptions of aggravating and mitigating factors; and jurors' attitudes about the death penalty. Analysis of the South Carolina arm of the study showed that of 17 aggravating

and mitigating factors relating to the defendant, failure to express remorse was the third most aggravating factor, after prior history of violent crime and future dangerousness. When a defendant did not show remorse, almost 40% of jurors were slightly more or much more likely to vote for death.<sup>16</sup>

Further analysis of this dataset showed that when jurors believed that the crime involved preparation or planning (i.e., “calculated” or “cold-blooded”), they judged the defendant to be less remorseful. Conversely, defendants were judged more remorseful when their defense claimed that the crime was unintentional, impulsive, an accident, or a mistake. During trial, appearing sorry and being sincere and honest were associated with remorse, while appearing bored, indifferent, or remote signified an absence of remorse. In addition, characterological judgments influenced perceptions of remorse, such that individuals who were thought to have loved their families and were therefore good people who made bad decisions were believed to have remorse, while defendants who were deemed dangerous, having a history of violence and crime, and lacking in basic human instincts were believed to have less remorse. Finally, factor analysis and multivariate logistic regression revealed that remorse had the greatest impact in convincing a jury to impose a life sentence rather than the death penalty only when the crime was not extremely vicious. When viciousness was high, remorse did not save the defendant from the death penalty.<sup>17</sup> Many of these findings were replicated in the California arm of the Capital Jury Project.<sup>9</sup>

Remorse has also been found to be important in less serious offenses. One survey of over 1,000 American and Canadian drivers asked participants to recall the last time they had been pulled over by police for speeding. Their responses to police, speed over

the limit, and penalty incurred were recorded. Expression of remorse was shown to be the most effective way to decrease the cost of a ticket and was associated with a \$34 reduction.<sup>18</sup>

The effects of remorse have been shown not only in retrospective survey studies, but also in controlled experimental psychological research. Numerous studies have employed a between-subjects design in which participants are randomly assigned to view different versions of the same scenario, one featuring an offender who expresses remorse and another featuring an offender who does not. Gold and Weiner, for instance, demonstrated that people attributed more positive qualities and were more tolerant of a remorseful spy caught divulging sensitive information than a remorseless spy. Participants in the remorse condition were significantly more sympathetic toward the spy, rated the spy more moral and less likely to recidivate, and suggested more lenient punishment.<sup>19</sup> Proeve and Howells used a scenario in which a man engaged in sexual intercourse with a reluctant woman and was subsequently charged with rape. Participants who read the version in which the man showed remorse rather than no strong feelings about his actions perceived him to be less likely to have acted similarly in the past, less likely to recidivate in the future, and more likely to respond well to treatment.<sup>20</sup> Rumsey showed that people recommended prison sentences that were four to seven years shorter when the narrative indicated that a drunk driver involved in a negligent homicide was remorseful rather than not.<sup>21</sup> Maclin and colleagues found that participants were more likely to return a “manslaughter” instead of a “second-degree murder” verdict when they viewed a photo of the defendant’s face that was remorseful instead of angry.<sup>22</sup>

Other research has had mixed results. In one study asking participants to assess an ostensible rapist, although fewer negative personal attributes were ascribed when the rapist was remorseful, there was no significant difference in length of recommended prison sentence.<sup>23</sup> Likewise, another study showed that remorse in a drunk driving case was associated with higher ratings of personal responsibility and sensitivity, but there was no effect on punishment (monetary fine or prison sentence).<sup>24</sup> Indeed, some studies have shown that defendants who express remorse are likelier to receive a guilty verdict, suggesting that the potential reduction in punishment may come at a cost of increased culpability.<sup>25</sup> Others have discovered a more complex interaction effect in which a remorseful defendant would be deemed less guilty only if participants believed the charge to be unfair and overly severe.<sup>26</sup>

Of note, many of these studies touch upon perceptions of remorse and their relation to a person's character and likelihood of rehabilitation or recidivism; they do not assess the true predictive value of remorse for either personality traits or future behavior. Some studies have shown that remorse is indeed associated with reduced rates of recidivism, particularly in juvenile populations, but the data are sparse at this time.<sup>27</sup>

#### **PURPOSE OF THE INVESTIGATION**

The complexities of remorse in the law are challenging from both theoretical and practical standpoints. Debate continues about the proper role of remorse in mitigation and aggravation of criminal sentences. At the same time, jurors, laypersons, and others intuitively apply perceptions of remorse when they judge defendants and decide on punishments. One notable gap in the literature concerns judges, who not only preside



over criminal proceedings but also make the vast majority of sentencing decisions. A second notable gap concerns the subgroup of defendants who are afflicted with mental illness and are at increased risk of being arrested and sent to jail or prison.<sup>28-30</sup> Given that psychiatric disorders can alter both the experience and expression of remorse, persons with mental illness may be further disadvantaged in this regard.

Forensic psychiatrists are frequently asked to assess remorse, either directly or indirectly, in criminal cases. Forensic psychiatric evaluations that explore individuals' appreciation of wrongfulness, their insight into their own behavior, or even their appreciation of the charges against them often require an exploration of intent and reflections regarding the criminal act. During these discussions, offenders may reveal aspects of themselves pertaining to remorse that are hidden to other courtroom actors. Therefore, forensic psychiatrists are uniquely positioned to provide courts with a fuller understanding of the psychology of remorse and the variations in its expression, both in general and with respect to persons with mental illness in particular.

Thus, the present research aims to address these two lacunae through qualitative methods and analysis. Using a series of semi-structured interviews with judges, I present judges' views of remorse: Why and how much should genuine remorse (or its absence) affect the outcome of a case? How do judges gauge whether an offender is sincerely remorseful? Do judges view someone with mental illness differently with regard to remorse? The answers to these questions will be useful for jurists, as well as for psychiatric experts tasked with crafting reports for, consulting with, and educating judges who seek their help.

## METHODS

Larry Davidson, PhD, an expert in qualitative methodology, consulted with the principal investigator and research team on the sampling and conduct of this study. Thirty-two of 124 seated judges (26%) in the Connecticut State Superior Court Criminal Docket were contacted through email with an explanation of the investigation and a copy of the university's IRB exemption. Twenty-three judges (69%) responded and agreed to participate. Participants had between seven and 30 years of experience as seated judges. The sample was comprised of 19 men and four women.

The recruitment employed "snowball" sampling, in which participants were asked to refer other individuals as potential participants.<sup>31</sup> Initial recruitment was targeted toward judges familiar with the Yale School of Medicine Department of Psychiatry and its mission of clinical evaluation, consultation, education, and research. The technique of snowball sampling is frequently used in qualitative research for both its logistical convenience and methodological advantages. Logistically, direct referrals from peers allow researchers to gain access to otherwise insulated populations (such as judges). Methodologically, members of a group are often best positioned to identify other members who may contribute useful information. Of note, this methodology is not hypothesis-driven and does not permit use of quantitative or statistical analyses. The aim of such studies is to capture the range of possible responses and generate hypotheses.

The interviews were conducted at times and places of participants' choosing, usually in judges' chambers. Informed consent was obtained before each interview, and participants were told that their responses would be audio-recorded and de-identified. Interviews ranged in length from 35 to 129 minutes; most lasted approximately one hour.

Upon completion, participants were thanked and offered notification of the results. No reimbursement or other gratuity was offered.

The interview questions were developed in consultation with several legal scholars, including a judge, law professor, former prosecutor, and public defender. All interviews began with a definition adapted from Proeve and Tudor's discussion of remorse, reiterated here: *Remorse may be defined as a distressing emotion that arises from acceptance of personal responsibility for an act of harm against another person. Often, with further reflection, the remorseful individual may desire that the act had never occurred at all and wish to make restitution toward the victim.*<sup>7</sup>

Participants were asked whether they agreed with this definition and how they would change it. Participants then were asked a series of open-ended questions regarding their experiences with remorse in their legal practice, the role remorse plays in court cases and the courtroom setting, and how they assessed and used remorse at various stages of the legal process. The interview concluded with questions regarding the evaluation of genuine versus feigned remorse and the possible effect of mental illness on defendants' ability to experience and express remorse.

Interviews were transcribed and analyzed according to the phenomenological method.<sup>32</sup> This mode of analysis is usually applied to narratives (stories), reorganizing and condensing raw text into *narrative summaries*: coherent accounts of personal subjective experience, written in the first person and adapted from respondents' own language.<sup>33</sup> Of note, the present research did not seek to understand judges' experience of remorse as a subjective phenomenon per se. That is, summaries were not constructed with the singular goal of recounting episodic events; instead, the summaries were

organized according to major themes pertaining to remorse. The summarization process eliminated excess text and extracted useful meaning from frequently wide-ranging interviews.

Prior to the analysis phase, the research team received training from the methodology expert in the construction of narrative summaries. Then, I and one other rater from the team, consisting of a forensic psychiatrist, forensic psychologist, social worker, and two law professors, composed narrative summaries of each interview transcript. The common methodology training promoted consistency in the procedure of narrative summary generation. However, the research team was intentionally comprised of scholars from different disciplines to capture a variety of viewpoints and minimize rater bias stemming from idiosyncrasies of personal experience or training. The summaries were roughly two pages in length (condensed from an average transcript text of 14 pages) and provided thematically organized synopses of respondents' substantive views. Once the summaries were completed, the raters met under the direction of the methodology expert. This meeting presented a forum for the raters not only to conduct an analysis of common themes among interviews, but also to reach consensus regarding potential inter-rater inconsistencies.

## **RESULTS**

Judges generally concurred with the proposed definition of remorse, with some revisions and expansions: remorse is a "blending of emotions and belief or reason" or a "fundamental regret for self-accusatory consciousness of guilt"; remorse includes "an appreciation of the impact on the victim"; remorse can exist towards others beyond the

victim (e.g., the defendant himself, the defendant’s family, and hypothetical victims); and a remorseful individual “wishes to modify his or her behavior so that similar acts do not occur in the future.”

Beyond the initial definition, judges’ views about remorse—and the nature and extent of its role in their decision-making—varied greatly. I summarize their divergent positions here, grouping them into four broad thematic categories:

1. *The legal relevance of remorse in criminal justice*: the extent to which remorse or its absence ought to play a role in criminal justice.
2. *The time and place for remorse*: the relative importance of remorse or its absence with respect to different types of offenses and different stages in the criminal justice process.
3. *Expressions of remorse*: how judges determine whether defendants are expressing remorse and whether those expressions are sincere.
4. *Remorse and mental illness*: the relationship between remorse and psychiatric issues.

### *Legal relevance*

Judges disagreed about whether remorse was legally relevant in criminal justice, and responses ranged across the full continuum. As described later in this thesis, judges viewed remorse within the legal sequence of events as primarily relevant to the times of arraignment and sentencing. Those who viewed remorse as central to the criminal process stated: “it is one of the most important things I look for,” it “is a bedrock type of thing,” and “I am always looking for it.” Others indicated that remorse was irrelevant: “I do not

think remorse is, even as a matter of principle, terribly important. The only place where remorse really plays a role is at the time of sentencing, and even there, it is not as important as other considerations.”

Judges further differed about the justifications for taking remorse into account in their legal decisions. These discussions were typically couched in terms of the four theories of punishment: deterrence, incapacitation, rehabilitation, and retribution. One judge argued that remorse is relevant to all four approaches:

“Remorse is important because it fits well in terms of the major purposes of punishment: retribution, deterrence, rehabilitation, and incapacitation. How harshly do I have to treat somebody? How badly do I have to beat him up? Less if he accepts responsibility, more if he does not. In terms of deterrence, somebody who accepts responsibility knows what he did is wrong, wants to make amends, probably does not have to be punished for as long or as harshly as somebody who does not. With rehabilitation, somebody who is accepting of responsibility has a better chance of being able to be rehabilitated. And a person who says, ‘Son of a bitch deserved to die,’ is somebody I am probably going to lock up for a long time just because he needs to be warehoused, or he will do it again.”

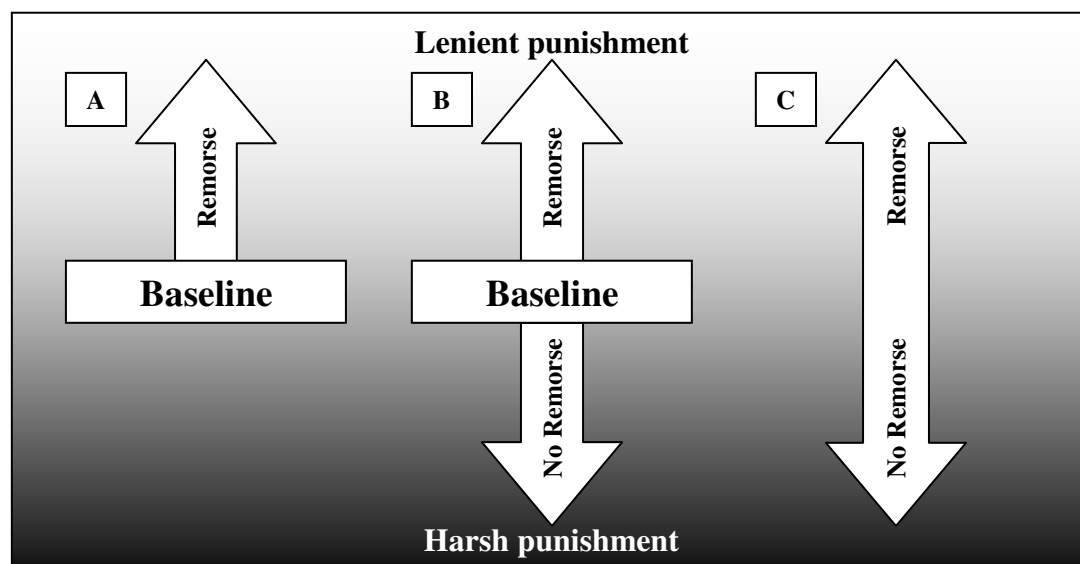
In contrast, another judge stated that remorse was relevant only in terms of retribution, stating, “To the degree that you are imposing a sentence strictly as a punitive measure—that is your primary or only goal—then whether the person is remorseful for his or her conduct could affect your decision.” Between these two poles, different judges claimed

that remorse was more or less applicable to each theory of punishment. Many did share the view that remorse is an indicator of personal character, which in turn predicts future behavior and the likelihood for rehabilitation versus recidivism. However, one stated that remorse is a poor “counterweight” to the various external pressures that push people toward additional criminal activity. One judge stated that the presence of remorse would weight his considerations toward the goals of rehabilitation and restitution while the absence of remorse would weight his considerations toward deterrence and protection of the community.

Indeed, the absence of remorse was a significant point of contention. Some judges believed that a lack of remorse indicated that a defendant was more dangerous, suggestive of sociopathy or increased criminality, more likely to recidivate, and less amenable to rehabilitation, all of which warranted harsher punishment. Others held that an absence of remorse is routine and expected or is acceptable unless there is overwhelming evidence that the defendant is guilty, at which point it would become unacceptable. For these judges, a display of remorse justified reduced punishment but a lack of remorse did not justify additional punishment, provided the evidence was not overwhelming. Still others noted that they would treat an expressionless defendant differently than one who actively endorsed his crime; only the latter would be punished more harshly. Finally, some judges argued that, on procedural grounds, the absence of remorse should never justify additional punishment. Because of the constitutional guarantee of due process, defendants must be free to assert their innocence, even in the face of a conviction by overwhelming evidence, and a defendant cannot be expected to show remorse if he does not even admit the crime.

The judges who did value remorse subscribed to one of three models of sentencing, as summarized in Figure 1. In Model A, the presence of remorse results in a lower than baseline sentence, but the absence of remorse would have no effect. These judges typically invoked the legal principles of due process and a defendant's right to assert innocence. In Model B, the presence and absence of remorse would effect a change from baseline in the respective direction—a more lenient sentence with remorse, harsher without. Model C is similar to B: the presence of remorse would push a sentence toward the lower range, while the lack of remorse would push it toward the more severe end of the range, but there would be no predetermined baseline sentence.

Figure 1. Effects of remorse on punishment



*Judges used one of three models of sentencing: presence of remorse reduces the baseline sentence; presence of remorse reduces the baseline sentence and absence of remorse increases the baseline sentence; or presence of remorse reduces the sentence while absence of remorse increases the sentence with no predetermined baseline.*



*Time and place for remorse*

Differences in the settings over which judges presided may have contributed to the variation in judicial experiences with remorse. For example, judges interviewed at a time when they were presiding over trials generally stated that they almost never encounter remorse and that defendants who contest their charges are not likely to be remorseful:

“While I would certainly like to see remorse, much as I would also like to find gold in the street, both are rare events. I virtually never see it because I preside over contested trials, where the defendant, by definition, claims that he is not guilty, and we give them the presumption of innocence.”

In contrast, judges who oversaw arraignments or sentenced defendants following guilty pleas observed remorse “on a day-to-day basis.”

Judges’ views varied widely with regard to both the types of crimes whose outcomes are most affected by expressions of remorse and the stages in the criminal justice process at which they are most likely to take remorse into account. Some judges placed greater importance on remorse in more serious cases: “I am always looking for it at sentencing in serious cases; I am not looking for it in sentencing just some stupid bar fight or something.” And in fact, remorse “could be a 10 or 20% discount off the sentence in a violent crime.” Nevertheless, they affirmed that some crimes are so serious and the punishments so severe that remorse could not have much of an effect on the sentence:

“There are some cases that are so serious that there is not much you can do: multiple homicides, multiple rapes. The overwhelming need to protect society discounts everything else. If you are convicted of triple homicide, and you are remorseful, and you won the Congressional Medal of Honor, I am still going to give you 150 years. If you did not win a Medal of Honor, were not remorseful, I might give you 180 years. But what is the difference?”

Other judges stated that leniency stemming from remorse is more meaningful in lesser crimes:

“Genuine remorse in a murder case, all that is going to do is shave off a very small period of time based upon the fact that the murder controls the remorse. In a misdemeanor, genuine remorse can wipe out the whole charge.”

Many judges pointed out that remorse applied more to crimes involving victims rather than victimless crimes, though at least one stated that a defendant even in a victimless crime could be remorseful with regard to the effect of the crime on the defendant’s own family (e.g., families of drug abusers) or hypothetical victims (e.g., police posing as underage girls accepting sexual solicitations on the internet). Crimes of negligence, recklessness, and impulsiveness rather than premeditated intent, such as drunk driving, accidents, domestic violence, and drug-motivated offenses, were also frequently volunteered as examples of cases in which expressions of remorse matter. Finally, some judges argued that remorse plays a larger role in property and financial

crimes because of the ability to make meaningful restitution; however, other judges disagreed, saying that “paying one’s way out of a problem is not necessarily evidence of true remorse.”

Turning to the particular stages in the criminal justice process at which remorse is or is not considered, judges agreed that remorse was generally not a factor during trial. Not only would a defendant’s right to maintain her innocence generally preclude displays of remorse, but also any expression of remorse would have no bearing on the tasks the trial judge must perform, such as ruling on the evidence and instructing the jury. Some judges, however, would note the presence or absence of remorse during trial and take it into account later during sentencing. A few also mentioned that certain types of defenses are more likely to allow a defendant to express remorse during the trial proceedings, and in those cases, the judge may take the expression of remorse into account. For example, in a self-defense case, the defendant may express remorse over the harm caused while still maintaining that he was forced to defend himself because of the circumstances.

Judges disagreed about the importance of remorse at other stages of the legal process. Some argued that arraignment was, legally, an inappropriate setting in which to consider remorse: “Remorse has little impact; arraignment is about setting bail, making sure there are grounds to support arrest, and seeing if people qualify for counsel.” Remorse “does not factor into most arraignments because of the presumption of innocence, the right to remain silent, lack of any real knowledge about the case.” “In fact, if a defendant starts to express remorse, I will stop them.” “I am most concerned about whether somebody is likely to flee, and is there an immediate risk of committing some serious additional crimes.” Thus, in setting bond, “the primary determinants are the

severity of the crime and the criminal history of the offender.” Other judges viewed arraignment as a time when other psychological and emotional factors were barriers to the expression of remorse: “Things are still too raw,” and “you are more likely to see regret and crying and emotions, but gauging whether it is remorse is just impossible at that stage.”

In contrast, other judges regarded remorse as having an impact at arraignment: “Remorse has a huge impact on what kind of bond I set, and it plays a bigger role than it does almost at any other stage in the procedure, even sentencing, because if you can leave somebody out [of jail], and they are going to be capable of staying out of trouble, then the chances of going into jail [later on] are lower and lower.” “It affects what bond and what conditions of release I set because I am factoring remorse into whether he is going to obey my orders to stay away or to not do what he has been doing.” “I might reduce the bond or give them a program because remorse gives me a better feel that there is something you could work with [in] this person. Maybe you could save or help him instead of just locking him up.”

There was less variation in the judges’ attitudes about remorse at plea entry. Indeed, many identified the type of plea as an indication of remorse or lack thereof. A frequent opinion was that a “straight guilty is the best way to indicate remorse.” Judges also tended to recognize the legal rationale for entering a plea of *nolo contendere* (“no contest”) in appropriate circumstances (i.e., to minimize subsequent civil liability), such as cases of drunk driving resulting in a death, in which it was clear that the aggrieved party would bring a civil suit. However, they differed in their interpretation of the *Alford* plea. An *Alford* plea is a variant of a guilty plea in which a defendant does not admit

factual guilt but concedes that the prosecution could likely convince the jury of his guilt.<sup>34</sup> Some judges argued that like a plea of *nolo*, the *Alford* plea “serves its own purpose and is not an indicator of the presence or absence of remorse, in and of itself.” Rather, “what is being said is that if there is a dispute over certain allegations and that instead of taking the matter to trial, the person decides to take the offer.” It is a “tactical decision.” But other judges viewed an *Alford* plea as “the opposite of remorse, a face-saving mechanism, a calculated way to minimize punishment driven principally by self-interest but has nothing to do with feeling sorry or regret.” Indeed, an *Alford* plea “undermines real remorse because truly remorseful people do not think like that.” Instead, it “shows anti-remorse: ‘Not only didn’t I do it, I am getting screwed, but they can prove it.’” One judge wondered, “If they are remorseful, why don’t they agree with the facts?”

Sentencing, many judges agreed, “is the Big Kahuna,” “the time when remorse comes into play,” and “the best and most evident opportunity for someone to make a statement of remorse.” Nevertheless, judges differed in the reported frequency with which they encountered remorse. When explaining the manner in which they decided on a sentence, many judges noted that they referred to the pre-sentence investigation report for additional information regarding the defendant’s remorse or lack thereof: “I give a lot of credence to observations [of remorse] made by probation.” Observations made by experienced probation officers were deemed especially valuable. Other judges used the reports as launching points for their own assessments: “The probation officer says, ‘I think this is genuine remorse,’ I might want to try to find out more myself, probe the person, try to talk to him, engage him on the record.” Still others recognized the limitations of a probation interview—“they are only meeting this person for an hour”—

and that the usefulness of an officer's observations depended on "the nature and quality of the contact that that officer has with that individual." These judges preferred either to "figure for myself" or to use the report as a way to "reaffirm my impression." Lastly, one judge specified that expressions of remorse are less meaningful when not given in open court: "It is one thing to sit across from a probation officer who is preparing a pre-sentence investigation report and say you are sorry. Can you do it in open court when you have to and when the words mean the most?"

*Expressions of remorse: "More an art than a science"*

Judges varied in their level of confidence in assessing remorse, ranging from a high degree of confidence to no confidence that genuine remorse can be distinguished from feigned remorse. Those confident in their ability often cited their experience: "I do not find it difficult to judge remorse. I get people." "After 40 years of dealing with people, it is not hard for me to make a call about remorse. I am pretty good at picking out the fakers. I am in the credibility business." In contrast, other judges emphasized the difficulty of determining true remorse: "[The signs of remorse] can all be faked. Go to the theatre or the movies—people make a living out of it!" One judge strongly opposed the incorporation of remorse in judicial decisions, in part because of the complexity of assessing it:

"[Assessment of remorse] is very difficult, especially for judges who are just seeing bits and slices when the person appears in these very formalized, stylized settings. For judges to think, sitting up on the bench, that they can really figure

out whether this guy is remorseful, is remorseful enough, and is it real, it is the height of arrogance.”

Many stated that remorse was difficult to evaluate but that a decision was nonetheless required: “It is difficult, but you got to read, either wrongly or rightly. Otherwise, you do not belong there. Get another job.”

In the assessment of remorse, judges disagreed widely with regard to indicators of genuine remorse as opposed to insincere remorse or the absence of remorse. Many of the behaviors that indicated the presence of remorse to some judges indicated the absence of remorse to other judges. The responses can be classified into six categories—statements, non-verbal cues, attitude or demeanor, actions or conduct, corroborating sources, and gestalt—and judges ascribed varying meanings and degrees of reliability to each.

*Statements* consisted of oral or written communications that indicated a “recognition of wrongdoing,” “acceptance of responsibility” (as in “I did it; I am sorry”), or articulations of “the beliefs and the understanding of why an act is harmful or in what way you’ve really damaged or hurt somebody.” Apologies (letters or direct address in court) and empathic statements also fit within this category. Conversely, defendants could remain silent, make denials, or endorse their crimes. They could speak in a way that “minimizes the consequences to themselves” or suggests that they “do not care about the consequences of their actions.” They could blame or threaten the victim, witnesses, lawyers, or courtroom personnel. They could lie, reciting “rote remorse” “in the language of [their] attorney” as if “looking at a 3 by 5 card in the sky.” One judge stated that greater levels of detail were often indicative of greater levels of sincerity, and another

claimed that indirect statements (e.g., “I am sorry about what happened”) were less sincere than those made in the active voice (e.g., “I am sorry for what I did”).

*Non-verbal cues* were interpretations that judges made of defendants’ behaviors. Judges assessed defendants’ emotional states (e.g., being overwhelmed, breaking down, not paying attention, being distant) as cues to the presence or absence of remorse. Some also looked for specific behaviors, such as crying, facial expression, leering, sneering, remaining expressionless, tone of voice, eye contact, lack of eye contact, head hanging, putting one’s head down, looking up, looking down, looking around, and fidgeting.

*Attitude or demeanor*—one’s global manner of behavior and address before the court—was perceived as an indicator of remorse. Defendants’ respect (or lack thereof) for the judicial process and court personnel was often cited:

“Someone stands up straight during the proceedings, speaks respectfully, that means one thing. If you are standing with your head at a cocky angle, with a ‘let’s get this over with’ look on your face, that will impact me.”

“You come out here before a judge, you want to show that you are a nice person, you are remorseful: ‘Yes sir,’ ‘No sir.’ When they come out here, they see people and their family in the gallery, they wave like they are a celebrity.”

“If the defendant is looking back to his buddies in the audience and acting up or disinterested, that is the kind of body language and lack of remorse that eliminates any possibility of a lesser sentence.”



Judges looked with disfavor on what they perceived to be arrogance, narcissism, belligerence, hostility, defiance, aggressiveness, and lack of interest or caring: “They will stand there with one hand on the hip, looking at you like, ‘Why you are bothering me, judge, with these questions?’ That attitude that ‘I can’t be bothered, I have places to go, I have things to do.’” In fact, “criminals, especially at the higher level, understand the rules. If they are acting out in front of you—negative body language, turning around in their chair, speaking out loud, getting aggressive—they are acting out in defiance of the rules.” In contrast, a “forthright disposition, calm, cold, cool, and collected” would be consistent with a remorseful stance.

*Actions or conduct* referred to behaviors beyond the courtroom that indicated remorse or its absence. Judges examined past criminal records and how defendants “live their life”; compliance or violation of current court orders; behavior in jail or lockup; making restitution; enrollment in treatment for drug, alcohol, or psychiatric problems; community service; and volunteering. Two judges exemplified this sentiment with the comment, “It is not just talking the talk; it is walking the walk.”

*Corroborating sources* were recognized by some judges as offering useful information about remorse. Surrogates, such as family members, significant others, clergy, Alcoholics Anonymous or Narcotics Anonymous sponsors, or coaches, were mentioned as potentially influencing a judge’s belief or disbelief of a defendant’s claims of remorse.

Finally, several judges relied on a *gestalt impression*, described variously as a “gut instinct, general feel for people”; “your intuition, your experience, your common sense”; a “holistic” approach; “looking at defendants from every possible point of view”;

an examination of “all the facts and circumstances”; a “sense from the totality of the circumstances”; a “composite of what you say, how you say it, and the attitude you exemplify when you say it.”; and “you know it when you see it.” These judges alluded to the fact that “it’s more of an art than a science” or that “it’s not a science,” and “there is no tool, no radar” that can unerringly discern genuine remorse.

Underscoring the lack of any precise, generally agreed-upon method for identifying remorse or its absence, judges disagreed about how to interpret some specific behaviors. For instance, silence was perceived as an indication of shyness, fear, poor public speaking skills, or mental illness on the one hand, or remorselessness, disengagement, or distraction on the other. Some judges believed that putting one’s head down or hanging one’s head was a sign of respect. Others said that it indicated an absence of remorse. Similarly, eye contact or lack thereof could be construed as either respectful or disrespectful. Judges had particularly polarized views of letters of apology:

“Being able to put yourself into the victim’s shoes is an important intellectual exercise. It is also useful if the offender expresses disappointment or regrets what he has done to his own family.”

“I am very big on apologies because it is restorative justice. Particularly in the juvenile delinquency setting, I will order defendants to write a sincere letter of apology so the victim will know that he has manifested sorrow for what he did. That might be of some solace to the victim.”

“I never order a person to write a letter of apology. Why would you ever order that? It makes no sense whatsoever. If someone wants to apologize, they apologize.”

“Other things that may seem like remorse are not, like letters of apology to victims, which can be counterproductive. Those are frowned upon because victims find them to be intimidating. Sometimes they can be worded with meaning within meaning.”

Judges also disagreed about how to interpret a defendant’s apparent change of heart. Some doubted that the belated expression of remorse was genuine:

“To know whether a person is genuinely remorseful, I think it is really timing. If they hang tough through the whole thing, like at a trial, and then when they get convicted and all of a sudden they find God, they think that is going to make an impression on me.”

Furthermore, “sociopaths can very easily change their demeanor to hopefully get a particular outcome.”

Other judges, however, believed that people can genuinely reform while awaiting disposition, often because their behavior improves with proper management:

“People. Can. Change. If somebody has acted like a complete jerk every time he has been in front of me and then suddenly changes into this incredibly polite, nice man, I have to think he might be acting. But it can also be because they are given the right medication, or they have been detoxed from alcohol and drugs, or they have had counseling.”

“People can change and that can work to their favor. We frequently see people at their very worst, and with the benefit of incarceration, intervention, or treatment, they may progress and make an expression of remorse or show an indication of reforming their conduct.”

#### *Remorse and mental illness*

Although one judge professed to have “not the slightest idea” about the nature of the relationship between mental illness and remorse, most believed that the presence of mental illness essentially altered the consideration and relevance of remorse: “When you get into mental illness, it is a whole different ballgame.” “Your ability to be able to put yourself in someone else’s shoes is clouded by your mental illness.” “If somebody is severely mentally ill, then their thought processes might be skewed, and their judgment, ability to understand, and differentiate from reality and non-reality might be impaired.” Mental illness “will deeply affect someone’s ability to communicate and may affect their whole worldview.” A mentally unstable person is “not even going to be appreciating what is going on around them.” Judges tended to view mental illness as a categorical

factor—a person was either mentally ill or not—and once mental illness was present, neither its type nor its severity influenced their assessments of its effect.

Most commonly, judges made statements to the effect that mental illness “almost neutralizes” remorse. That is, with regard to defendants with mental illness, judges would discount or disregard both the presence and absence of remorse: “I would almost throw remorse out the window.” “You take remorse out of the picture.” “It becomes a non-issue.” “If mental illness were present and legitimately related to the presence or absence of remorse, remorse would be much less of a factor going both ways.” Rather, mental illness requires a “whole different” approach, looking “through a different lens,” and “changes the dynamics of the analysis” so that it becomes the dominant factor in decision-making. The issue of psychiatric medications similarly eclipsed other considerations: “I will first ask, ‘What drugs are you on?’ and that is a powerful factor that takes precedence over remorse.” “You could be medicated with side effects, in zombie-like states.”

Those judges that did view remorse as relevant to their decisions regarding a defendant with mental illness indicated that they adjusted their expectations: “Expecting them to act in a certain way would be unfair; you have to have lesser expectations for them to show remorse.” “If a person is so mentally impaired that he or she is incapable of expressing remorse, I certainly cannot hold that against an individual.” Nevertheless, if remorse were to be expressed, some judges would regard it in the same way as they would for a normal individual: “I would not think, by virtue of the mental illness, that the expression of remorse was more or less reliable.” “I would not hold their mental illness against them if they appeared to be genuine in their expression.” Others, meanwhile,

questioned the validity of what appeared to be an expression of remorse by a person with mental illness:

“Do they remember what they did? Do they have any real current understanding of what happened before to the point where they can honestly show remorse? Or is it that they are sorry for what they did and they would not have done it if they have been well? I do not know. I do not know whether that is being feigned or if it is true because now they are better.”

Judges also disagreed about whether psychiatrists would be helpful in assessing remorse. Some believed that psychiatrists’ training and experience could be effectively leveraged in this regard: “Given psychiatrists’ training, they may have a better sense of whether expressed remorse is the real McCoy.” These judges credited psychiatrists with a heightened ability to detect “real versus unreal” remorse and the “genuineness of emotions.” Indeed, psychiatrists “are supposed to have good bullshit detectors,” and “they have heard it all.” Furthermore, unlike judges, psychiatrists have an opportunity to perform their evaluations “in a different, less confrontational setting.” Therefore, remorse “would be a good thing to know about in a psychiatric evaluation” because “remorse clearly plays a role in terms of the stuff that a psychiatric evaluator would want,” and “a psychiatrist would deem remorse to be a factor in their analysis of someone.”

Nevertheless, these judges tempered their belief in psychiatry with the qualification that “some psychiatrists are very good, some people are mediocre, and some people are worth nothing.”

“If you just have one of the hired whores, it does not carry any weight. There are psychiatrists I have absolutely no respect for at all, and there are other ones that I do. And some of them will write anything! Others, you can bank on them.”

Other judges did not value psychiatrists’ input about remorse. Oftentimes, these judges viewed the role of psychiatrists as answering specific questions: “If I get a psychiatric report, it is on the question of competency to stand trial, and on that question, the presence or absence of remorse would have no bearing.” “In psychiatric evaluation reports, I give observations of remorse little or no consideration; I read them for background information and psychiatric diagnosis information, but I am not looking for remorse.” Other judges in this group doubted whether psychiatrists’ training was of any use in determining remorse: “You do not need a professional degree to judge remorsefulness; it is more based on experience.” “Having a psychiatrist evaluate whether someone is remorseful is not something that would really sway me; you really need to see it from someone’s actions and what they say themselves.” Finally, there were judges who believed that a psychiatric interview was an inadequate setting for the assessment of remorse: “I would be a little uncomfortable with somebody saying, ‘I met this kid for an hour and I can tell you, he is really sorry, and it is a deep-seated, sustained remorse.’” “I look at expert testimony with a wary eye because they just do not have that much time with these people; whether I give weight to psychiatrists’ observations of remorse depends on the neutrality of it, the nature of the observations, how long [the observations] were, [and] when they were.”

## DISCUSSION

The key finding in this study was that judges did not express uniform views about the nature of remorse, its assessment, or its relevance to the judicial process. They also disagreed about the effect of mental illness on remorse and whether psychiatrists could offer any insight about remorse in people afflicted with psychiatric disorders. These numerous discordances manifested most prominently when judges deemed similar expressions, mannerisms, or behaviors to have opposite meanings. Considered in conjunction with existing critiques regarding remorse, particularly with respect to the possible impingement on Fifth Amendment rights that other scholars have described, my data cast doubts on the usefulness of how remorse is currently taken into account in the criminal justice system. At the same time, it was evident from my interviews that judges viewed remorse as a valid and frequently important legal construct. However, confusion arose once the issue of mental illness was introduced. Judges exhibited limited familiarity with psychiatric disorders and their signs and symptoms, which may lead to oversimplifications and misunderstandings. Thus, it appears that defendants with mental illness are particularly disadvantaged when it comes to remorse, and consequently, the role for forensic psychiatrists and other mental health professionals becomes clear. Given the complex interplay that can exist between remorse and mental illness, psychiatrists must use their expertise to educate and inform the courts about how a person's psychiatric disorder is affecting his or her thinking and presentation. This type of involvement would promote fairness and justice under the law for individuals with mental illness.



*Remorse, character, and punishment*

With respect to the relevance of remorse in the criminal justice process generally, judges drew upon the theories of punishment. Many shared the common intuition that remorse or its absence predicts future behavior, so that a remorseful defendant would be less dangerous, less likely to recidivate, and more amenable to rehabilitation. In this regard, judges' intuitions about the predictive value of remorse mirrored those of jurors and laypersons.<sup>16,17,20</sup> Indeed, consistent with other empirical research, judges frequently expressed an effort to look beyond the law and the specifics of the crime to determine something about the person before them, using remorse as a proxy for overall character.<sup>19</sup>

The evaluation of personal character thereby served as a mediator between observed remorse and conferred punishment. Remorseless persons possessed character flaws, deserving greater punishment not only to punish the intrinsic immorality of remorselessness but also because remorselessness suggested further deficiencies that would predispose those persons towards future criminality. Conversely, remorseful persons possessed more virtuous character, meriting less punishment by the state. A remorseful person was frequently construed as an otherwise normal individual who made a mistake and was therefore a candidate for leniency and rehabilitation. In this way, remorse contributed to the classification of offenders into (career) criminals versus unfortunate everymen.

These types of inferences about a person's fundamental character based on their reactions to events are described by affect control theory, which relates emotions, social interactions, and identities.<sup>35</sup> When a perpetrator reacts remorsefully to an offense in a manner that is socially expected, that behavior confirms our assumption that the person's

true identity is essentially good. When a perpetrator reacts without remorse, then the behavior disconfirms such an assumption and instead becomes evidence that the person's true identity is essentially evil. Using mathematical path modeling to simulate these cognitive processes, Robinson and colleagues showed that people do deduce identity from emotional displays of remorse following a drunk driving accident and then use that deduction to arrive at sentencing recommendations.<sup>36</sup>

*Discounting procedural constraints on the expression of remorse*

While it may be unsurprising from a psychological perspective that judges intuitively rely on remorse in decision-making, my findings further showed that this reliance can be legally problematic. Despite judges' relative lucidity concerning their preference for the good behavior and good character they believed was reflected by remorse, surprisingly few mentioned the procedural considerations that may impede defendants from expressing remorse. For example, many held that the *Alford* plea was indicative of remorselessness—and such remorselessness might then be taken into account in sentencing—even though an *Alford* plea may be strategic and advised by counsel with minimal input from the defendants themselves. Indeed, other important legal goals that have nothing to do with a defendant's willingness to accept responsibility are achieved when defendants use the *Alford* plea, including improved efficiency of time and resources, increased freedom of choice in determining legal course of action, reduced uncertainty of outcome, and better, more open attorney-client relationships.<sup>37</sup>

That the process of criminal justice can interact with and hinder the expression and/or observation of remorse was a recurring theme in my interviews. To begin with, as

other scholars have noted, communicating remorse is poor legal strategy and generally counseled against because admitting remorse is tantamount to admitting guilt.<sup>2</sup> Even when defendants wish to reach out to the court or to victims, defense attorneys may caution them against making any kind of statement, let alone one that implies culpability. Prudent legal practice aside, the mere fact of entering the criminal justice system creates practical barriers to proving remorse to the courts. For instance, a defendant who is unable to make bail and is jailed will have very few opportunities to make restitution, perform community service, or perform other actions that many judges considered indicative of remorse. Similarly, in the highly structured setting of the courtroom, defendants may not behave as they would in other less formalized venues. Interestingly, despite failing to account for all of these factors, judges were able to recognize the procedural importance of ignoring remorse during trial. Perhaps the trial, with its procedural safeguards, emphasizes in a way that other stages of the criminal justice process do not that an individual is innocent until proven guilty. Thus, judges may have been able to account more easily for the situational constraints on the expression of remorse at trial than they were with regard to those other stages. In contrast, at arraignment or sentencing, judges often viewed a lack of remorse unfavorably, setting higher bail or harsher sentences, essentially punishing defendants for exercising their Fifth Amendment right to remain silent.

#### *Difficulties in identifying remorse*

Judges in my study determined whether a defendant was genuinely remorseful on the basis of particular verbal or non-verbal behaviors, more global impressions, and

patterns of conduct, as well as information obtained from other actors. These sources were consistent with those found in Weisman's examination of 127 Canadian criminal cases. In that paper, he asserts that courts most frequently used the act of pleading guilty as an indicator of remorse, and the earlier the plea, the more likely it would be taken as such an indication. Other signs included: conduct following a crime (e.g., returning stolen money, calling an ambulance, immediate reactions to police); visible suffering of the offender (e.g., being tearful, distraught); and fundamental changes in a defendant's self or personal identity (e.g., experiencing religious conversion, undergoing therapy).<sup>38</sup>

Judges varied in the level of confidence with which they judged remorse; some were very confident and others not at all. They also varied in the degree of emphasis they placed on certain types of expressions of remorse. But most importantly, they varied in how they interpreted those expressions. Certain indicators are obvious: defendants who happily endorse their crimes leave little doubt that they are not remorseful. However, ambiguous behaviors, such as eye contact (or its absence) and perceived attitude, often elicited a range of reactions depending on the judge. In addition, judges also tended to view the absence of evidence of remorse as evidence of the absence of remorse. In other words, though a few recognized that an expressionless person conveys no information at all, many took a failure to endorse remorse as a sign that the person did not experience remorse internally.

Many judges were sensitive to the uncertainty inherent in judging remorse and were curious about whether this study would provide some insight into discerning sincere versus insincere remorse. Though the present research will perhaps alert judges to some strategies used by their peers that they themselves may not currently employ, my

methodology does not permit any inferences about which strategies may be more reliable than others. Another recent study more directly addresses this question. Participants were asked to describe two events in their lives, one in which they felt intense remorse and another in which they felt no remorse. With regard to the latter, participants were asked to describe the event and feign remorse. By systematically analyzing facial expressions and body language, the experimenters found that false remorse was associated with more diverse facial expressions, particularly surprised or angry faces, rather than simply sad ones.<sup>39</sup> This information may be especially pertinent given that regardless of what people consciously say, research suggests that nonverbal rather than verbal cues are given more weight in the assessment of remorse.<sup>40</sup>

#### *Oversimplified views of mental illness and its effects on remorse*

Against this backdrop of legal challenges and practical difficulties, judges struggled to describe the effect of mental illness on judgments of remorse. Judges seemed to view the presence of mental illness as requiring an alteration of their usual assessments. They were willing to make allowances for mental illness, but their responses suggest a categorical view; that is, defendants were either mentally ill or not. If they were mentally ill, then they merited a wholly different judicial approach, but if not, then they were treated in the usual manner. Few judges indicated that they recognized either a spectrum of severity of mental illness or the differences in the types of psychiatric disorders (e.g., mood, psychotic, anxiety, personality, autism spectrum, etc.).

This lack of nuance is problematic because of the tremendously varied ways in which these disorders can manifest. Not only are different diseases associated with

different constellations of symptoms, but also two individuals carrying the same diagnosis can present dissimilarly. Schizophrenia, for example, may manifest as paranoia, disorganization, or intrusive thoughts and hallucinations. Major depression can give rise to an increase or a decrease in neurovegetative symptoms. Moreover, schizophrenia and depression, though potentially overlapping in some ways, are two entirely different classes of illness. Thus, “mental illness” is not an umbrella term that can capture all aspects of every psychiatric disorder, much as “theft” would not capture the distinction between stealing a pack of bubblegum from a Walmart store and embezzling millions of dollars from the Walmart company. Rather, a case-by-case analysis of the particulars of a disease is needed.

Judges’ views of mental illness informed their beliefs about how to treat defendants with mental illness who communicated remorse. Some thought that mental illness as a factor in decision-making was so overwhelmingly powerful that all other factors fell by the wayside. Others felt that the presence of mental illness called into question the authenticity of everything a defendant said, including statements about remorse. Still others believed that remorse could be considered with respect to defendants with mental illness. Of these judges, some stated that they altered their expectations for defendants’ remorse, while others did not alter their expectations.

Regardless of the position taken, however, when asked directly, judges generally underestimated the ways in which remorse—and the resulting effect on sentencing—could be affected by a psychiatric disorder. The affective flattening of severe depression or psychosis can easily be construed as uncaring and distant (and remorseless), while the brash self-confidence of mania can give the impression of arrogance and narcissism (and

remorselessness). Persons afflicted with attention deficit hyperactivity disorder may be fidgety and easily distracted (and appear remorseless). Those whose delusions cause them to believe that they are justified in their crimes may not even experience remorse in the first place. And so on.

But perhaps the most trouble arises in defendants whose psychiatric disorders are undiagnosed or underdiagnosed or who do not wish to be identified as having a psychiatric disorder. In those situations, an all-or-nothing representation of mental illness may result in misattribution of bad behavior or bizarre cognitions to bad character rather than to medical disease or some other external influence.

#### *Implications for forensic psychiatry*

Currently, unless specifically requested, an assessment of remorse is not regularly included in most forensic psychiatric reports. However, my results suggest that remorse ought to be addressed more often. Despite the significance many judges place on remorse, judicial clarity and consistency remain lacking. Moreover, the courts' conceptions of mental illness are overly rigid. Psychiatrists possess the skills and knowledge necessary to supplement judges' current understanding of remorse in general and in the context of mental illness in particular. More informed decisions by courts would then allow for more equitable treatment of defendants with mental illness.

A psychiatric assessment of remorse would be an extension of current practices, in which defendants, over the course of an evaluation, are frequently asked to reflect upon their experiences. Psychiatrists are well-equipped to interpret comments about remorse. Their training exposes them to a wide range of human expression, and they must

often judge truthfulness versus malingering, especially in forensic populations. Critics might argue that without an agreed-upon standard by which to assess remorse, psychiatrists are no better than judges at making this determination. However, the presence of remorse as a Diagnostic and Statistical Manual criterion in the diagnosis of antisocial personality disorder implicitly assumes that psychiatrists are able to discern remorse at least somewhat reliably, just as they do for other complex emotions and attitudes.<sup>41</sup>

Of course, it does not follow that remorse must be included in every report of every kind. Nevertheless, forensic psychiatrists should be sensitive to the fact that it is a prominent issue for many judges. One might even argue that with respect to sentencing and disposition, defendants' other attitudes about their offenses (e.g., happiness, regret, shock, denial, etc.) may be important to judges only insofar as they lend insight into defendants' degree of remorsefulness.

Some judges recognized the value of psychiatric consultants, explicitly stating that forensic evaluations and testimony would be helpful and welcome in the assessment of remorse. At the same time, other judges preferred to rely on their own independent assessments of remorse. They perhaps viewed a psychiatrist's opinion as impinging upon a type of personal "ultimate question" and thus beyond the scope of psychiatry.

Taken together, these opposing views delineate a role for forensic psychiatrists regarding remorse that may be analogous to other types of forensic evaluations. In most reports, the evaluator attempts to sway the court, offering professional opinion supported by evidence in the form of interview quotes, descriptions of observed behavior, and collateral sources. While the psychiatrist may favor one or another position, the ultimate



decision lies with the court.<sup>42</sup> An assessment of remorse could follow a similar structure by describing the defendant's behaviors and cognitions and offering explanations for how those behaviors and cognitions might reflect the presence or absence of remorse. The psychiatrist would also comment on whether any concomitant mental illness would interfere with or alter the defendant's experience or expression of remorse. Essentially, the report would focus on the phenomenology of the defendant's remorse while allowing the judge to be the final arbiter of whether remorse is truly present. This approach would preserve the educational and informational aspect of the consultation without overstepping professional bounds.

#### **LIMITATIONS**

The present research implemented a qualitative interview method that relied on snowball sampling. Several methodological limitations were inherent in the study. First, the interviews were all conducted by one researcher and thus heavily dependent on his interviewing skills and style. Furthermore, interviews, by their nature, rely on reflective self-report. Though judges have great experience in detailing their own decision-making process, they nonetheless remain vulnerable to the biases of self-report. Namely, they could not report unconscious influences, they might be reluctant to divulge inappropriate thoughts, their responses were based on memory, and their stated intentions and actions may have differed from actual practice. The snowball sampling method also exposed the study to bias. When relying on references within an in-group, those with opposing views could be systematically overlooked, though I believe the risk is low, given the range of responses reported in the Results. In generating narrative summaries, raters were not

blind to the study design. Also, the summaries were subject to the particularities of each rater. Nevertheless, the research team attempted to minimize this problem by having everyone undergo the same training and then meeting together as a group to discuss the summaries. Finally, the generalizability of the research may be limited, given that only a small sample from one state was obtained. The judges, however, tended to express concepts central to criminal law that are likely applicable to a wide range of jurisdictions.

### **FUTURE RESEARCH**

The present research was a qualitative study designed to examine the range of criminal judges' views about remorse. I was able to identify a host of behaviors that judges deemed important in their assessments. One next step might be to create quantitative survey instruments and systematically investigate the degree of agreement between judges. Such a study would require a much larger sample of judges, ideally taken from a number of jurisdictions.

A second avenue of inquiry would be to probe the use of remorse in civil courts, where injuries stemming from negligence or recklessness are common; one would expect remorse to figure prominently in those situations. Indeed, one study has already shown that the timing of defendants' expressed remorse in mock medical malpractice cases can affect the amount of money awarded to plaintiffs.<sup>43</sup> Any research on the role of remorse in civil cases would have to take into account differences between the civil and criminal contexts, such as the role of non-professional juries rather than judges as decision-makers.

## CONCLUSION

Judging people based on their actions, reactions, and emotions is a basic part of human nature. Remorse is a universal emotion that people tend to believe provides information about a person's character and likely future actions. Thus, it seems commonsensical that judges should assess criminal offenders' remorse or lack of it in sentencing and other judgments. The results of the present research confirm that judges are thoughtful about remorse. Most considered it a relevant and even essential factor in their decisions about sentencing; most expressed some doubts about their ability to assess genuine remorse; and most saw a role for contributions from forensic psychiatric experts, especially in the complicated context of mental illness. Unfortunately, given that the use of remorse in criminal justice judgments still stands on contested theoretical ground, particularly with respect to potential interference with Fifth Amendment rights; given the inconsistency with which judges identify and apply remorse in their decisions; and given the myriad barriers in legal procedure and in life in general that can block the expression or observation of remorse, it is my view that judges ought to give remorse much less weight than they do. At the very least, inferences about the *absence* of remorse should not figure at all into determinations of punishment. But human intuition is difficult to stifle, and judgments based on remorse are likely to continue. Until such time as we can effectively remove the consideration of remorse from criminal justice decisions, psychiatrists and other cognitive science experts are best positioned to inform and educate courts and to minimize the errors that are made, especially in cases in which mental illness is involved.

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