

JUDGING REMORSE

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ABSTRACT

The role of offenders' remorse in criminal justice remains controversial. This research examined criminal judges' views about remorse, its assessment, and its relevance in their decision-making. Judges were interviewed, and transcriptions of these sessions were analyzed using a qualitative methodology known as narrative summary. The results showed that judges varied widely in their views about the assessment of remorse and its relevance in judicial decision-making. Although they generally agreed that remorse was a valid legal construct, they disagreed about for 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 frequently lacked a nuanced understanding of psychiatric disorders. These findings shed light on the courts' current treatment of a complex phenomenon and suggest that judges should give remorse, and especially the absence of remorse, much less weight than they currently do.

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I.

INTRODUCTION

Remorse on the part of criminal defendants has long been held to be an appropriate consideration for courts, particularly during the sentencing phase of criminal proceedings.¹ Yet, legal scholars continue to debate the theoretical justifications for taking offenders' remorse into account at all.² Moreover, even if consideration of offenders' remorse can be justified in general, the justice of weighing remorse or its absence in any given case may be undermined by differences in opinion as to exactly what remorse means, the difficulty of ascertaining whether an offender is truly remorseful, and the problems judges face in determining what effect remorse should have on sentencing or other decisions.³ All of these issues are further complicated with regard to individuals with psychiatric illness, as their behavior and cognitions may deviate in unexpected ways from those of people without psychiatric illness.

Although debate continues about the proper role of remorse in the mitigation and aggravation of criminal sentences, jurors, laypersons, and others apply perceptions of remorse when they are asked to determine a defendant's appropriate punishment.⁴ However, no study has yet assessed what sitting judges

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1. See, e.g., Steven Tudor, *Why Should Remorse Be a Mitigating Factor in Sentencing?*, 2 CRIM. L. & PHIL. 241, 241 (2008).

2. See, e.g., Mirko Bagaric & Kumar Amarasekara, *Feeling Sorry? – Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing*, 40 HOW. J. CRIM. JUST. 364, 367–73 (2001) (arguing that remorse is irrelevant in sentencing regardless of the underlying theory of punishment adopted); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 101–03 (2004) (discussing the different attitudes toward remorse taken by proponents of different theories of punishment); Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 139–40 (2006) (discussing the many different justifications identified by commentators to support the use of remorse); see also *infra* Part II.B.

3. See Ward, *supra* note 2, at 133–36, 138–40.

4. See, e.g., Michael G. Rumsey, *Effects of Defendant Background and Remorse on Sentencing Judgments*, 6 J. APPLIED SOC. PSYCHOL. 64, 66 (1976) (showing that students tend to impose more lenient sentences when faced with trial transcripts describing remorseful, as opposed to remorseless, defendants).

think about remorse and its role in sentencing and other decisions, or when and how those judges actually take remorse into account. Nor has any study addressed the subgroup of defendants who are afflicted with mental illness and are at increased risk of being arrested and sent to jail or prison.⁵ Given that psychiatric disorders can alter both the experience and expression of remorse, persons with mental illness may be further disadvantaged in this regard.

This article aims to address these two lacunae through qualitative methods and analysis and presents an original ethnography of remorse in the criminal justice system. Through a series of semi-structured interviews, it delineates actual state court 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 in crafting theoretical arguments as well as in the practical administration of criminal justice.

Part II first defines the concept of remorse before exploring both the theoretical underpinnings of applying remorse to the law and the empirical research concerning remorse. The ethnographic study itself is then presented in Parts III (methodology) and IV (results). Notably, the data reveal that judges have dramatically varied views of remorse, its relevance to the legal system, and the indicators that suggest its presence or absence. The implications of these findings—in terms of the psychological understanding of remorse, the procedural and practical difficulties of applying remorse in criminal court, and the particular effects of taking remorse into account when offenders suffer from mental illness—are discussed in Part V. The article concludes in Part VI and argues that, given the ongoing theoretical debates, practical limitations, and potential for unfairly treating people with mental illness, judges should take offenders' remorse into account much less than they currently do.

5. See, e.g., Pamela M. Diamond, Eugene W. Wang, Charles E. Holzer III, Christopher Thomas & des Anges Cruser, *The Prevalence of Mental Illness in Prison*, 29 ADMIN. & POL'Y MENTAL HEALTH 21, 36 (2001) (finding higher rates of mental illness in prisons and jails than among the non-incarcerated population); Henry J. Steadman, Fred C. Osher, Pamela Clark Robbins, Brian Case & Steven Samuels, *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 761 (2009) (same); see also V.A. Morgan, F. Morgan, G. Valuri, A. Ferrante, D. Castle & A. Jablensky, *A Whole-of-Population Study of the Prevalence and Patterns of Criminal Offending in People with Schizophrenia and Other Mental Illness*, 43 PSYCHOL. MED. 1869, 1878–79 (2013) (questioning whether mental illness's overrepresentation among offenders is due to mental illness itself or confounding factors).

II.

BACKGROUND

A. Definitions of Remorse

The confusion surrounding remorse begins with its definition. Authors, poets, theologians, psychologists, philosophers, and jurists have all attempted to characterize it, with varying results. According to the Oxford English Dictionary, remorse is “deep regret or guilt for doing something morally wrong,”⁶ and its forebear is the Latin *remordēre*, which means “to bite back” or to “vex persistently, gnaw.”⁷ These etymological overtones of biting suggest the gnawing discomfort and pull on one’s conscience so often ascribed to remorse. Other sources have highlighted additional facets of remorse. For instance, the philosopher Irving 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.⁸ Meanwhile, law professor Jeffrie Murphy suggests that an element of atonement—some form of restitution or penance—is important in distinguishing true remorse from other forms of guilt.⁹

Defined in this way, remorse is an ancient concept. In the New Testament, Matthew 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.”¹⁰ 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.¹¹ Although they are successful in their plot, they are gradually overcome by the burden on their consciences.¹² Macbeth becomes increasingly murderous and paranoid,¹³ 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!”¹⁴ Eventually, she is driven to suicide.¹⁵

Although these texts help illustrate some of the central ideas of remorse, they hardly articulate a thorough, coherent conception. Indeed, Professor Bryan H. Ward’s review of the literature reveals a variety of definitions; most are

6. *Remorse Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/162286> (last visited Nov. 17, 2014).

7. *Remord Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/162279> (last visited Nov. 17, 2014).

8. I. Thalberg, *Remorse*, 72 MIND 545, 545–46 (1963).

9. Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 430–32 (2007).

10. *Matthew* 27:3–5 (New International).

11. WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 7.

12. *See id.* act 2, sc. 2.

13. *Id.* act 5, sc. 3.

14. *Id.* act 5, sc. 1, at 142 (Burton Raffel ed., Yale Univ. Press 2005).

15. *See id.* act 5, sc. 5.

vague, some have different focuses, and some even conflict outright with others.¹⁶ Recently, forensic psychologist Michael Proeve and legal scholar Steven Tudor have sought to synthesize the wide range of intellectual inquiry concerning remorse into a more precise and well-developed characterization of the concept, which may be summarized as follows: *Remorse may be defined as a distressing emotion that arises from acceptance of personal responsibility for an act of harm against another person.*¹⁷ *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.*¹⁸

Several elements of this definition are notable. Remorse is not merely discomfort. It is a combination of an emotion (the uncomfortable sensation) and the cognitions about the circumstances giving rise to that emotion. Those cognitions encompass such notions as responsibility, causation, and morality. “Acceptance of personal responsibility” includes not only intentional acts of harm but also harm resulting from reckless, negligent, or unintentional behavior.¹⁹ There must be an act or an active failure to act. (The mere thought of causing harm, in contrast, 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, say, “society” as a whole.²⁰ 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, the focus will be primarily on harm to actual persons.

B. Remorse in Legal Theory

The consideration of remorse or its absence as a mitigating or aggravating factor during criminal sentencing is accepted in both federal and state courts.²¹

16. Ward, *supra* note 2, at 133–34 (contrasting the nuances and connotations ascribed to various definitions of remorse).

17. See MICHAEL PROEVE & STEVEN TUDOR, REMORSE: PSYCHOLOGICAL AND JURISPRUDENTIAL PERSPECTIVES 29–70 (2010) (formulating a multidisciplinary understanding of remorse).

18. See *id.*

19. Though not addressed here, some philosophers distinguish between *regret* for actions that innocently cause harm as opposed to *remorse* for actions that involve some form of culpability and moral responsibility. See, e.g., THOMAS NAGEL, MORTAL QUESTIONS 28–29 (1979) (“[Consider] the truck driver who accidentally runs over a child [I]f he is entirely without fault, [he] will feel terrible about his role in the event, but will not have to reproach himself. Therefore, this example of agent-regret is not yet a case of *moral* bad luck.”).

20. Exceptions abound, though remorse toward specific victims is the most intuitive, prototypical example. Perpetrators of genocide may indeed feel remorse toward the societies they destroy. Contrast this with a victimless crime, such as drug abuse, which may be construed as morally reprehensible and an affront to society as a whole. It is much less clear that one can be remorseful for using drugs.

21. See Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: *The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*,

Modern jurisprudential justifications for this practice have generally been framed in terms of the four standard theories of punishment: deterrence, rehabilitation, incapacitation, and retribution. Deterrence, rehabilitation, and incapacitation are often grouped together as consequentialist or utilitarian, in which punishment aims to achieve some other good, while retribution sees punishment as an end in itself.²²

Deterrence takes two forms: specific deterrence, which aims to deter offenders from repeating their offenses, and general deterrence, which aims to deter other potential offenders.²³ Deterrence holds that punishment should be scaled according to the severity of a crime, since greater potential harm justifies a greater barrier in the form of threatened punishment.²⁴ At the same time, punishment should be parsimonious so that offenders do not encounter a situation in which the punishment is so drastic that the marginal cost of committing additional crimes is small (e.g., “Under the ‘three strikes’ rule, this bank robbery is my third offense and I will go to jail for life, so I may as well kill every witness.”).²⁵ 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 proffers punishment as a means or opportunity to reform an offender and reduce or remove that person’s desire or need to commit crimes.²⁶ Frequently, rehabilitative interventions take the form of medical treatment, therapy or counseling, education, or training programs.²⁷ As with deterrence, to the extent that rehabilitation may be more or less readily attained when a defendant is remorseful or remorseless, corresponding levels of (rehabilitative)

91 NW. U. L. REV. 1507, 1523–42 (1997) (comparing appellate and district federal court implementations of a Federal Sentencing Guidelines provision that allows for a reduction in sentence for a defendant who “clearly demonstrates acceptance of responsibility for his offense”). Cf. Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1558–60 (1997) (exploring how jurors in California capital cases used remorse when deciding between the death penalty and life without parole).

22. See PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 1 (2008). Consequentialism in the context of moral philosophy holds that the right action should depend only on the consequences of that particular act. Walter Sinnott-Armstrong, *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/archives/spr2014/entries/consequentialism/>. The prototypical consequentialist theory is utilitarianism, which can be summarized as “the greatest happiness for the greatest number,” in which one aims to maximize pleasure and minimize pain. *Id.* Notable proponents of utilitarianism include Jeremy Bentham and John Stuart Mill. *Id.* Although punishment is inherently painful, consequentialists usually argue that the overall balance of pain is reduced when offenders are prevented from committing future crimes. See *id.*

23. ROBINSON, *supra* note 22, at 7.

24. *Id.* at 7–8.

25. Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2394–95 (1996).

26. ROBINSON, *supra* note 22, at 9.

27. *Id.*

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.

As its name implies, incapacitation involves disabling an individual's ability to commit crimes. Convicted offenders should be prevented from re-engaging in criminal acts by imprisonment, execution, or otherwise making it impossible for them to re-offend.²⁸ Again, if one believes 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 a less severe sentence 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.²⁹ Although there are many varieties of punishment as retribution, retributive theories tend to share the view that offenders should be punished in a way that reflects the crime, either literally or, more commonly today, proportionately to the wrong done.³⁰ Retributive theories fall into two broad categories: act-based and character-based.³¹ Act-based retribution focuses solely on punishing the offender with the same or equivalent harm, while character-based retribution also takes into account the moral blameworthiness of the offender.³² While the offense itself may be part of the assessment of blameworthiness, other factors, including state of mind, external conditions, or the person's past life, may also come into play.³³ Under character-based accounts of retribution, a remorseful person may not be as blameworthy as a remorseless person and therefore deserves less punishment.

Although the consideration of remorse is arguably justified by all four theories of 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. Jurists Mirko Bagaric and Kumar Amarasekara argue that "there is no justifiable doctrinal basis for according a sentencing discount to offenders who evince regret for what they have done."³⁴ For remorse to be relevant to the utilitarian goals of specific deterrence, rehabilitation, and incapacitation, remorse would have to be associated with effects on future behavior; however, according to Bagaric and Amarasekara, there is "no evidence

28. ROBINSON, *supra* note 22, at 8. In its purest form, incapacitation 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. *Id.*

29. *See id.* at 9.

30. *See* Bagaric & Amarasekara, *supra* note 2, at 368.

31. *See* ROBINSON, *supra* note 22, at 107–11.

32. *See id.*

33. *Id.* at 109.

34. Bagaric & Amarasekara, *supra* note 2, at 364.

to suggest that contrite offenders are less likely to reoffend.”³⁵ As for retribution, although remorse may be relevant to character-based desert, it has little to do with act-based desert, which focuses on the wrongfulness of the act irrespective of the qualities of the actor.³⁶

Further critiques of the “remorse principle” of punishment highlight the practical difficulties of accurately discerning human expression, imputing internal remorse, and differentiating it from other emotions. Based on a series of case studies, Professor Martha 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.³⁷ She discusses seven children, aged nine to seventeen, who had committed serious crimes and whose legal outcomes were strongly influenced by their perceived remorselessness.³⁸ Judges, police, psychologists, and others identified behaviors believed to reflect remorse or its absence.³⁹ These included avoidance or denial of the facts,⁴⁰ joking remarks,⁴¹ laughing,⁴² silence or an absence of sorrow,⁴³ peaceful sleep following homicide,⁴⁴ an impassive facial expression,⁴⁵ and apparent sophistication or intelligence in plotting a crime.⁴⁶ Duncan maintains that each of these behaviors is ambiguous. She states that denial and humor are common psychological defense mechanisms that serve as a means of coping with conflicting emotions or thoughts.⁴⁷ Silence and an absence of sorrow could suggest a reluctance to display emotion publicly.⁴⁸ 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.⁴⁹ An impassive face may be a mask that does not reflect inner turmoil.⁵⁰ 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.⁵¹ Moreover, Duncan notes that judges and other evaluators often

35. *Id.* at 375.

36. *See id.* at 368 (noting that, under act-based desert, “the amount of punishment should be in proportion to the severity of the offence”).

37. *See* Martha Grace Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1472–73, 1520 (2002).

38. *See id.* at 1473.

39. *Id. passim.*

40. *Id.* at 1477.

41. *Id.* at 1480–81.

42. *Id.* at 1503.

43. *Id.* at 1482–84.

44. *Id.* at 1486.

45. *Id.* at 1498–99.

46. *Id.* at 1516–17.

47. *Id.* at 1472, 1485.

48. *Id.* at 1482–83.

49. *Id.* at 1488–89.

50. *Id.* at 1500.

51. *Id.* at 1518–19.

overlook the role of child and adolescent development as a significant confounding factor in the expression of remorse; specifically, children may lack the social, emotional, and cognitive maturity to display remorse in a manner that judges expect.⁵²

In an expansive review of the legal literature, Professor 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 result in inconsistency at best and unjust rulings at worst.⁵³ Judges have considered defendants' statements, their actions during the legal process, and their conduct prior to and following the crime and have made inferences about defendants' inner motivations even though all of these behaviors and inferences are ambiguous, imprecise, and potentially unreliable indicators of remorse.⁵⁴ Ward especially objects to courts' failure to reconcile defendants' Fifth Amendment right against self-incrimination with the frequent view that silence or a profession of innocence signifies a lack of remorse.⁵⁵ Relatedly, judges may misconstrue zealous challenges to criminal charges, pursuant to the advice of defense counsel, as reflecting remorselessness on the defendant's part.⁵⁶ And the wrongfully convicted are not only punished for a crime they did not commit but also punished more harshly for failing to be remorseful.⁵⁷

Those who believe that remorse should matter in the administration of criminal law acknowledge these weaknesses, but some nevertheless emphasize its value as a method for acknowledging a moral good worthy of civic recognition.⁵⁸ When a judge alters a punishment on the basis of remorse, she acknowledges the offender's self-conception, honors his autonomy, and assigns value to his civic action.⁵⁹ Proponents of taking remorse into account 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.⁶⁰ Indeed, "restorative justice," a process

52. *Id.* at 1520.

53. *See generally* Ward, *supra* note 2 (arguing that remorse should not be considered in criminal rulings).

54. *Id.* at 142–54.

55. *Id.* at 157–64.

56. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2107 (2003).

57. *See* Richard Weisman, *Showing Remorse: Reflections on the Gap between Expression and Attribution in Cases of Wrongful Conviction*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 121, 127 (2004).

58. *See, e.g.*, Tudor, *supra* note 1, at 247–48.

59. *Id.* at 251.

60. *See* Bibas & Bierschbach, *supra* note 2, at 112–18.

whereby stakeholders meet to repair harm caused by criminal acts, is an emerging theory of punishment.⁶¹

C. Remorse in Empirical Research

The existing empirical literature, though limited, generally agrees that offenders' remorse, in practice, does have an impact on legal decision-makers' perceptions and judgments about them. The Capital Jury Project was a multi-state study in which randomly selected jurors on death penalty cases were interviewed using a 51-page questionnaire.⁶² 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.⁶³ Analysis of the South Carolina arm of the study showed that of seventeen aggravating and mitigating factors that jurors might consider about a defendant, failure to express remorse was the third most aggravating factor, after prior history of violent crime and future dangerousness.⁶⁴ When a defendant did not show remorse, almost forty percent of jurors were slightly more or much more likely to vote for death.⁶⁵

A second analysis of the Capital Jury Project investigating remorse in particular showed that, when jurors believed that the crime involved preparation or planning (i.e., when it could be described as "calculated" or "cold-blooded"), they judged the defendant to be less remorseful.⁶⁶ Conversely, defendants were judged more remorseful when their defense claimed that the crime was unintentional or impulsive.⁶⁷ During trial, being sincere, appearing sorry or uncomfortable, or demonstrating a change in mood after the guilty verdict were associated with remorse, while appearing bored, indifferent, or remote signified an absence of remorse.⁶⁸ In addition, character judgments influenced perceptions of remorse, such that individuals who were thought to have loved their families or who seemed to be "good [people] who got off on the wrong foot" were believed to have remorse, while defendants who were deemed dangerous, had a history of violence and crime, or who appeared to lack basic human instincts

61. John Braithwaite, *Restorative Justice and De-Professionalization*, 13 GOOD SOC'Y 28, 28 (2004).

62. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1601-02 (1997-1998) (describing the methodology of the Capital Jury Project).

63. *Id.* at 1602; Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1551 (1998).

64. Garvey, *supra* note 63, at 1559-61.

65. *Id.* at 1560.

66. Eisenberg, Garvey & Wells, *supra* note 62, at 1611, 1613.

67. *Id.* at 1616.

68. *Id.* at 1617-18.

were believed to have less remorse.⁶⁹ Factor analysis and multivariate logistic regression then revealed that remorse had the greatest impact in convincing a jury to impose a life sentence rather than the death penalty in cases when the crime was categorized as less than extremely vicious.⁷⁰ When viciousness was high, however, even remorse could not save the defendant from the death penalty.⁷¹ A number of these findings were replicated in the California arm of the Capital Jury Project.⁷²

Remorse has also been found to be important in less serious offenses. One survey of over 1000 American and Canadian drivers asked participants to recall the last time they had been pulled over by police for speeding.⁷³ Their responses to police, speed over the limit, and penalty incurred were recorded.⁷⁴ Expressing remorse was shown to be the most effective way to decrease the cost of a ticket and was associated with a thirty-four dollar reduction.⁷⁵

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. Gregg Gold and Bernard Weiner, for instance, demonstrated that people attributed more positive qualities and were more tolerant of a spy caught divulging sensitive information when the spy was remorseful.⁷⁶ 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

69. *Id.* at 1619–21.

70. *Id.* at 1633–36. Factor analysis is a statistical technique used to simplify large sets of variables. It takes advantage of covariation among variables to cluster them into “latent variables,” or factors, which in theory are the underlying causes of the measured variables. *See* Frank J. Floyd & Keith F. Widaman, *Factor Analysis in the Development and Refinement of Clinical Assessment Instruments*, 7 *PSYCHOL. ASSESSMENT* 286, 286–87 (1995) (introducing and explaining the principles underlying factor analysis). For example, one might measure arm length, leg length, head circumference, height, and weight in a group of people and find that these variables are closely correlated. Factor analysis may group them together; one could call this latent variable “size.” Logistic regression is a method of statistical analysis that relates a dichotomous outcome variable (e.g., whether a juror believes a defendant is remorseful) with one or more independent predictor variables (e.g., viciousness of the defendant, degree of intentionality, etc.). *See generally* Chao-Ying Joanne Peng, Kuk Lida Lee & Gary M. Ingersoll, *An Introduction to Logistic Regression Analysis and Reporting*, 96 *J. EDUC. RES.* 3 (2002) (explaining the principles underlying logistic regression).

71. Eisenberg, Garvey & Wells, *supra* note 62, at 1633–36.

72. Sundby, *supra* note 21, at 1560–70.

73. Martin Day & Michael Ross, *The Value of Remorse: How Drivers' Responses to Police Predict Fines for Speeding*, 35 *LAW & HUM. BEHAV.* 221, 224–31 (2011).

74. *Id.* at 225, 229.

75. *Id.* at 227, 230.

76. *See* Gregg J. Gold & Bernard Weiner, *Remorse, Confession, Group Identity, and Expectancies About Repeating a Transgression*, 22 *BASIC & APPLIED SOC. PSYCHOL.* 291, 293–95 (2000) (reporting the methods and results of a vignette-based study).

punishment.⁷⁷ Michael Proeve and Kevin Howells used a scenario in which a man engaged in sexual intercourse with a reluctant woman and was subsequently charged with rape.⁷⁸ 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.⁷⁹ Michael 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.⁸⁰ Kimberly MacLin and her colleagues found that participants were significantly more likely to return a verdict of “not guilty” or “manslaughter” instead of “second-degree murder” after seeing a photo of the defendant’s face that was remorseful instead of angry.⁸¹

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.⁸² 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).⁸³ Indeed, some studies have shown that defendants who express remorse are more likely to receive a guilty verdict, suggesting that the potential reduction in punishment may come at a cost of increased culpability.⁸⁴ Others have discovered a more complex interaction effect in which a remorseful

77. *Id.* at 294–95.

78. Michael J. Proeve & Kevin Howells, *Effects of Remorse and Shame and Criminal Justice Experience on Judgements About a Sex Offender*, 12 PSYCHOL. CRIME & L. 145, 150–51 (2006).

79. *Id.* at 152–53.

80. Rumsey, *supra* note 4, at 66–67.

81. M. Kimberly MacLin, Corynn Downs, Otto H. MacLin & Heather M. Caspers, *The Effect of Defendant Facial Expression on Mock Juror Decision-Making: The Power of Remorse*, 11 N. AM. J. PSYCHOL. 323, 327 (2009).

82. Chris L. Kleinke, Robert Wallis & Kevin Stalder, *Evaluation of a Rapist as a Function of Expressed Intent and Remorse*, 132 J. SOC. PSYCHOL. 525, 531–32 (1992).

83. Christy Taylor & Chris L. Kleinke, *Effects of Severity of Accident, History of Drunk Driving, Intent, and Remorse on Judgments of a Drunk Driver*, 22 J. APPLIED SOC. PSYCHOL. 1641, 1650 (1992).

84. *E.g.*, Alayna Jehle, Monica Miller & Markus Kimmelmeier, *The Influence of Accounts and Remorse on Mock Jurors’ Judgments of Offenders*, 33 L. & HUM. BEHAV. 393, 393 (2009). The authors conducted a study in which participants viewed one of eight brief mock trial videos concerning a man charged with shooting his neighbor. *Id.* at 396. The videos varied according the verbal account of the crime by the actor and whether the actor displayed remorse. *Id.* at 396–97. Participants were then asked to render a verdict, recommend the degree of punishment, and rate the actor on a series of personal characteristics. *Id.* Actors who expressed remorse but provided no explanation or provided an excuse were more likely to be found guilty. *Id.* at 398. Actors who denied committing a crime were more likely to be found not guilty. *Id.*

defendant would be deemed guiltier only if participants believed the charge to be fair and appropriate to the case.⁸⁵

It is important to note that 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.⁸⁶ Thus, the existing research does not adequately address whether the judicial consideration of remorse is justified in terms of deterrence, incapacitation, or rehabilitation, all of which rely on punishment's effect on future behavior.

III. METHODS

A. Sample

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 of the thirty-two contacted (72%) responded and agreed to participate. Participants had between seven and thirty years of experience as seated judges. The sample was comprised of nineteen men and four women.

The recruitment employed "snowball sampling," in which participants were asked to refer other individuals as potential participants.⁸⁷ Initial recruitment targeted judges with prior experience collaborating with the Yale School of Medicine Department of Psychiatry. All were familiar with its mission of clinical evaluation, consultation, education, and research. Snowball sampling methods are frequently used in qualitative research for both 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 aims of such studies are to capture the range of possible responses and to generate hypotheses.

85. Keith E. Niedermeier, Irwin A. Horowitz & Norbert L. Kerr, *Exceptions to the Rule: The Effects of Remorse, Status, and Gender on Decision Making*, 31 J. APPLIED SOC. PSYCHOL. 604, 610–11 (2001).

86. See Hennessey Hayes & Kathleen Daly, *Youth Justice Conferencing and Reoffending*, 20 JUST. Q. 725, 746 (2003).

87. Rowland Atkinson & John Flint, *Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies*, 33 SOC. RES. UPDATE 1, 2 (2001) (defining the term "snowball sampling").

B. Procedure

All twenty-three interviews were conducted by the author at times and places of participants' choosing, usually in the 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 thirty-five 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.*⁸⁸ *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.*⁸⁹

Participants were asked whether they agreed with this definition and how they would change it. Participants were then 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.

C. Analysis

Interviews were transcribed and analyzed according to the phenomenological method.⁹⁰ This mode of analysis is usually applied to narratives, 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.⁹¹ 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

88. See PROEVE & TUDOR, *supra* note 17.

89. See *id.*

90. For an explanation of the theory and process of understanding narratives from a phenomenological perspective, see LARRY DAVIDSON, *LIVING OUTSIDE MENTAL ILLNESS: QUALITATIVE STUDIES OF RECOVERY IN SCHIZOPHRENIA* 93–125 (2003).

91. Dave Sells, Alain Topor & Larry Davidson, *Generating Coherence out of Chaos: Examples of the Utility of Empathic Bridges in Phenomenological Research*, 35 *J. PHENOMENOLOGICAL PSYCHOL.* 253, 255–56 (2004).

excess text and extracted useful meaning from frequently wide-ranging interviews.

Prior to the analysis phase, the research team, consisting of the author, a forensic psychiatrist, a forensic psychologist, a social worker, and two law professors, received training from a qualitative methodology expert in the construction of narrative summaries. Then the author and one other rater, who was chosen at random from the team, composed narrative summaries of each interview transcript. The common methodology training facilitated a consistent procedure of narrative summary generation. The research team was intentionally composed 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 and provided thematically organized synopses of respondents' substantive views. Once the summaries were completed, the raters met under the direction of the methodology expert. The meeting provided a forum for the raters not only to reach consensus regarding potential inter-rater inconsistencies but also to conduct an analysis of common themes among interviews.

IV. 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”⁹² or a “fundamental regret for self-accusatory consciousness of guilt”⁹³; remorse includes “the appreciation of the impact on the victim”⁹⁴; remorse can exist toward others beyond the victim (e.g., the defendant herself,⁹⁵ the defendant's family,⁹⁶ and hypothetical victims⁹⁷); and a remorseful individual “wishes to modify his or her behavior so that similar acts do not occur in the future.”⁹⁸

Beyond the initial definition, judges' views about remorse—and the nature and extent of its role in their decision-making—varied greatly. Their divergent positions are summarized here, grouped into four broad thematic categories:

92. Narrative Summary of Interview with “Judge 23,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 23].

93. Narrative Summary of Interview with “Judge 6,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 6].

94. Narrative Summary of Interview with “Judge 12,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 12].

95. *See, e.g.*, Narrative Summary of Interview with “Judge 21,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 21].

96. *See* Judge 12, *supra* note 94, at 1–2.

97. *See* Judge 23, *supra* note 92, at 1.

98. Narrative Summary of Interview with “Judge 20,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 20].

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.

A. 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 paper, judges who believed that remorse was relevant at all thought that it was pertinent primarily at arraignment and sentencing.⁹⁹ Those who viewed remorse as central to the criminal process stated: “it is one of the most important things that I have looked for in sentencing,”¹⁰⁰ it “is a very bedrock type of thing,”¹⁰¹ and “I am always looking for it.”¹⁰² Others who indicated that remorse was irrelevant stated: “I do not think remorse is even, as a matter of principle, terribly important. The only place where remorse really plays a role in the criminal justice process is at the time of sentencing. And even there, it is not as important as other considerations.”¹⁰³

Judges further differed about why it was proper to take remorse into account in their sentencing and other 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.

99. See, e.g., Judge 21, *supra* note 95, at 1–2; Judge 23, *supra* note 92, at 1–2.

100. Judge 23, *supra* note 92, at 1.

101. Narrative Summary of Interview with “Judge 1,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 1].

102. Narrative Summary of Interview with “Judge 22,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 22].

103. Narrative Summary of Interview with “Judge 10,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 10].

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.¹⁰⁴

In contrast, another judge stated that remorse was relevant only in terms of retribution, stating, “[t]o the degree that you are imposing a sentence strictly as a punitive measure, then whether the person is remorseful for his or her conduct could affect your decision.”¹⁰⁵ Between these two poles, different judges claimed that remorse was more or less justifiable in terms of each theory of punishment. Many shared the view that remorse is an indicator of personal character, which in turn predicts future behavior and the likelihood for rehabilitation versus recidivism,¹⁰⁶ although one stated that remorse is a poor “counterweight”¹⁰⁷ 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.¹⁰⁸

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 likely to recidivate, less amenable to rehabilitation, and more sociopathically or criminally dangerous—all of which warranted harsher punishment.¹⁰⁹ Others held that an absence of remorse is acceptable, routine, or expected.¹¹⁰ For these judges, a display of remorse justified reduced punishment, but a lack of remorse did not justify additional punishment,¹¹¹ except in cases of overwhelming evidence of guilt, at which point failure to show remorse would become

104. Narrative Summary of Interview with “Judge 15,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 15].

105. Judge 10, *supra* note 103, at 1.

106. *See, e.g.*, Judge 1, *supra* note 101, at 1; Narrative Summary of Interview with “Judge 9,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 9].

107. Judge 10, *supra* note 103, at 1.

108. *See* Judge 1, *supra* note 101, at 1.

109. *See, e.g.*, Judge 6, *supra* note 93, at 1; Narrative Summary of Interview with “Judge 18,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 18]; Judge 15, *supra* note 104, at 1; Judge 22, *supra* note 102, at 1.

110. *E.g.*, Narrative Summary of Interview with “Judge 13,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 13]; Narrative Summary of Interview with “Judge 14,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 14]; Judge 22, *supra* note 102, at 1.

111. *E.g.*, Judge 22, *supra* note 102, at 1.

unacceptable and would warrant harsher punishment.¹¹² 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.¹¹³ Finally, some judges argued that, on procedural grounds, the absence of remorse should never justify additional punishment.¹¹⁴ 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 she does not even admit the crime.¹¹⁵

The judges who did value remorse fit into one of three models of sentencing. In the first model, a judge would develop some notion of the degree of punishment to impose prior to the beginning of the sentencing phase (i.e., a baseline), and the presence of remorse would result in a lower-than-baseline sentence, but the absence of remorse would have no effect.¹¹⁶ These judges typically invoked the legal principles of due process and a defendant's right to assert innocence.¹¹⁷ In the second model, the presence and absence of remorse would effect a change from baseline in the respective direction—a more lenient sentence with remorse, harsher without.¹¹⁸ The third model is similar to the second: 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.¹¹⁹

B. Time and Place for Remorse

Differences in the court proceedings over which judges presided may have contributed to the variation in their 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,

112. *E.g.*, Narrative Summary of Interview with “Judge 11,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 11]; Narrative Summary of Interview with “Judge 16,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 16].

113. *E.g.*, Judge 20, *supra* note 98; Judge 21, *supra* note 95.

114. *See, e.g.*, Judge 12, *supra* note 94, at 2–3.

115. *See, e.g., id.*; Judge 11, *supra* note 112, at 1.

116. *E.g.*, Judge 22, *supra* note 102, at 1; Judge 23, *supra* note 92, at 2.

117. *E.g.*, Judge 12, *supra* note 94, at 2.

118. *E.g.*, Narrative Summary of Interview with “Judge 19,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 19].

119. *E.g.*, Narrative Summary of Interview with “Judge 3,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 3].

where the defendant, by definition, claims that he is not guilty, and we give them the presumption of innocence.¹²⁰

In contrast, judges who oversaw arraignments or sentenced defendants following guilty pleas observed remorse “on a day-to-day basis.”¹²¹

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 and usually ask about it in serious cases I am not looking for it in sentencing just some stupid bar fight but I am always open to it.”¹²² And in fact, remorse “could be a ten or twenty percent discount off the sentence in a violent crime.”¹²³ 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:

[T]here 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 the hell is the difference?¹²⁴

Other judges stated that leniency stemming from remorse has more meaning in lesser crimes: “[G]enuine 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.”¹²⁵

Many judges pointed out that remorse applied more to crimes involving victims rather than victimless crimes,¹²⁶ though some 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)¹²⁷ or on hypothetical victims (e.g., police posing as underage girls accepting sexual

120. Judge 11, *supra* note 112, at 1.

121. Judge 13, *supra* note 110, at 1.

122. Judge 22, *supra* note 102, at 1; *see also, e.g.*, Judge 14, *supra* note 110, at 1 (“In the more serious cases, remorse is a bigger factor because the consequences were so obvious.”).

123. Judge 22, *supra* note 102, at 1.

124. *Id.*; *see also* Judge 6, *supra* note 93, at 1.

125. Narrative Summary of Interview with “Judge 8,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 1 [hereinafter Judge 8].

126. *See, e.g.*, Judge 9, *supra* note 106, at 1.

127. Judge 12, *supra* note 94, at 1; Judge 21, *supra* note 95, at 1.

solicitations on the internet).¹²⁸ Crimes of negligence, recklessness, and impulsiveness, 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.¹²⁹ Finally, some judges argued that remorse plays a larger role in property and financial crimes because of the ability to make meaningful restitution,¹³⁰ however, other judges disagreed, saying that “paying one’s way out of a problem is not necessarily evidence of true remorse.”¹³¹

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 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.¹³² Some judges, however, would note the presence or absence of remorse during trial and take it into account during sentencing.¹³³ 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.¹³⁴ For example, in a self-defense case, a defendant may express remorse over the harm caused while still maintaining that she was forced to defend herself under the given circumstances.¹³⁵

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: “[R]emorse has little impact. Arraignment is about setting bail, making sure there are grounds to support arrest, and seeing if people qualify for counsel.”¹³⁶ 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.”¹³⁷ “In fact, if a defendant starts to express remorse [at arraignment], I will stop them.”¹³⁸ “I am most concerned about whether somebody is likely to flee, and is there an immediate risk of committing some serious additional crimes.”¹³⁹ In setting bond, “the primary

128. Judge 23, *supra* note 92, at 1.

129. *E.g.*, Judge 13, *supra* note 110, at 1–2; Judge 22, *supra* note 102, at 2. *But see* Judge 16, *supra* note 112, at 1 (“[Remorse] has less impact in drug cases.”).

130. *See, e.g.*, Judge 16, *supra* note 112, at 1.

131. Narrative Summary of Interview with “Judge 2,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 2].

132. *See, e.g.*, Judge 10, *supra* note 103, at 1.

133. *See, e.g.*, Judge 1, *supra* note 101, at 1; Judge 3, *supra* note 119, at 2.

134. *E.g.*, Judge 6, *supra* note 93, at 3.

135. *Id.*

136. Judge 6, *supra* note 93, at 2.

137. Judge 2, *supra* note 131, at 1.

138. Judge 16, *supra* note 112, at 3.

139. Judge 15, *supra* note 104, at 2.

determinants are the severity of the crime and the criminal history of the offender.”¹⁴⁰ Other judges viewed arraignment as a time when other psychological and emotional factors were barriers to the expression of remorse, observing that “[t]hings are still too raw”¹⁴¹ or “[y]ou are more likely to see regret and crying and emotions, but gauging whether it is remorse is just impossible at that stage.”¹⁴²

In contrast, other judges regarded remorse as having an impact at arraignment. “[R]emorse has a huge impact on what kind of bond I set, and it plays a bigger role there 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.”¹⁴³ “It affects what bond and what conditions of release I set [especially in domestic violence cases] 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.”¹⁴⁴ “I might reduce the bond or maybe 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.”¹⁴⁵

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.”¹⁴⁶ 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.¹⁴⁷ However, they differed in their interpretation of the *Alford* plea, 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.¹⁴⁸ 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.”¹⁴⁹ 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.”¹⁵⁰ It is

140. Judge 11, *supra* note 112, at 2.

141. Judge 10, *supra* note 103, at 2.

142. Judge 18, *supra* note 109, at 2.

143. Narrative Summary of Interview with “Judge 17,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 17].

144. Judge 22, *supra* note 102, at 2.

145. Judge 14, *supra* note 110, at 1.

146. Judge 22, *supra* note 102, at 2.

147. *E.g.*, Judge 21, *supra* note 95, at 3.

148. *North Carolina v. Alford*, 400 U.S. 25 (1970); *see also* WAYNE R. LAFAYE, *CRIMINAL LAW* 416 n.16 (4th ed. 2003).

149. Judge 2, *supra* note 131, at 2.

150. Judge 13, *supra* note 110, at 2.

a “tactical decision[.]”¹⁵¹ But other judges viewed an *Alford* plea as “the opposite of remorse [It’s] 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.”¹⁵² Indeed, an *Alford* plea “undermines real remorse because truly remorseful people do not think like that.”¹⁵³ One judge wondered, “If they are remorseful, why don’t they agree with the facts?”¹⁵⁴

Sentencing, many judges agreed, “is the big kahuna,”¹⁵⁵ “the time when remorse comes into play,”¹⁵⁶ and “the best and most evident opportunity for someone to make a statement of remorse.”¹⁵⁷ Judges differed in the reported frequency with which they encountered remorse at sentencing.¹⁵⁸ 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”¹⁵⁹ 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.”¹⁶⁰ Still others recognized the limitations of a probation interview—“they are only meeting this person for an hour”¹⁶¹—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.”¹⁶² These judges preferred either to “figure for myself”¹⁶³ or to use the report as a way to “reaffirm[] my impression.”¹⁶⁴ 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?”¹⁶⁵

151. Judge 17, *supra* note 143, at 2.

152. Judge 6, *supra* note 93, at 2.

153. *Id.*

154. Judge 8, *supra* note 125, at 2.

155. *Id.*

156. Narrative Summary of Interview with “Judge 5,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 5].

157. Judge 6, *supra* note 93, at 3.

158. Compare Judge 11, *supra* note 112, at 1 (“While I would certainly like to see remorse, much as I would also like to find gold in the street, both are rare events.”), with Judge 2, *supra* note 131, at 1 (“Remorse is a very common, routine, daily emotion that we encounter in courts of all disciplines.”).

159. Judge 3, *supra* note 119, at 2; see also Judge 10, *supra* note 103, at 2 (noting that observations by experienced probation officers are especially valuable).

160. Judge 14, *supra* note 110, at 2.

161. Judge 19, *supra* note 118, at 2.

162. Judge 13, *supra* note 110, at 2.

163. Judge 19, *supra* note 118, at 2.

164. Judge 21, *supra* note 95, at 2.

165. Judge 23, *supra* note 92, at 2.

C. 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."¹⁶⁶ "After forty 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."¹⁶⁷ In contrast, other judges emphasized the difficulty of determining true remorse: "[The signs of remorse] can all be faked. Go to the theater or the movies. People make a living out of it!"¹⁶⁸ 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.¹⁶⁹

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."¹⁷⁰

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.¹⁷¹ The responses can be

166. Judge 22, *supra* note 102, at 2.

167. Judge 18, *supra* note 109, at 1.

168. Judge 15, *supra* note 104, at 2.

169. Judge 10, *supra* note 103, at 1.

170. Judge 8, *supra* note 125, at 1.

171. Compare Judge 11, *supra* note 112, at 2 ("As for what are signs of remorse, a simple 'I am sorry' is at least a start. Those are words I rarely hear."), with Judge 15, *supra* note 104, at 1 ("There are plenty of cases where the remorse is less than genuine. We so often hear expressions like, 'I am sorry about what happened.' That is like saying, 'I am sorry I am in this jam and about to be sentenced by you,' or, 'I am sorry if anything that might have happened caused anybody offense.' That is just deflecting things."); compare Judge 6, *supra* note 93, at 1 ("Words can sound hollow or genuine. People can become overwhelmed and shut down, so even if they are not loquacious or emotive, I can see in their conduct an effort to take responsibility. Some offenders' silence is not calculated; they are just unable to talk. I do not hold that against them. I look for other things indicating that they are sorry. It is not always expressed. It can be implied from the circumstances."), and Judge 11, *supra* note 112, at 2 ("The more problematic determination is when a defendant is stone-faced, and I just have to use my best instinct. I try not to assume the worst. I try not to make inferences adverse to the defendant from that. Some people, for personal or cultural reasons, may not be able to show emotion, and I do not want to necessarily assume something that I cannot determine. But without a positive sign of remorse, it is not affirmatively helpful."), with Judge 3, *supra* note 119, at 2 ("When you see a person come before you, you could

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,”¹⁷² “acceptance of responsibility”¹⁷³ (as in “I did it, and I am sorry”¹⁷⁴), 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.”¹⁷⁵ 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”¹⁷⁶ or suggests that they “do not care about the consequences of their actions.”¹⁷⁷ They could blame or threaten the victim, witnesses, lawyers, or courtroom personnel. They could lie, reciting “rote remorse”¹⁷⁸ “in the language of [their] attorney”¹⁷⁹ as if “looking at a 3 x 5 card in the sky.”¹⁸⁰ One judge stated that greater levels of detail were often indicative of greater levels of sincerity,¹⁸¹ and another claimed that passive 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”).¹⁸²

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 indications of the presence or absence of remorse.¹⁸³ 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,

tell: how they walk, are they cocky or are they arrogant? They may be just that callous; they show no emotion. ‘Do you have anything to say?’ and they have nothing to say whatsoever. They are going to get the top number of the sentence range. If you are remorseful, ashamed of yourself, you walk up slowly, hang your head.”).

172. Judge 1, *supra* note 101, at 1.

173. *Id.*; see also Judge 3, *supra* note 119, at 1; Judge 10, *supra* note 103, at 2; Judge 16, *supra* note 112, at 1.

174. Judge 3, *supra* note 119, at 1.

175. Judge 23, *supra* note 92, at 1.

176. Judge 6, *supra* note 93, at 2.

177. *Id.*

178. Judge 8, *supra* note 125, at 1.

179. Judge 5, *supra* note 156, at 1.

180. Judge 15, *supra* note 104, at 1.

181. Judge 16, *supra* note 112, at 1.

182. Judge 15, *supra* note 104, at 1.

183. *E.g.*, Narrative Summary of Interview with “Judge 7,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 7]; Judge 17, *supra* note 143, at 2.

putting one's head down, looking up, looking down, looking around, and fidgeting.¹⁸⁴

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.¹⁸⁵

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.¹⁸⁶

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.¹⁸⁷

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.'"¹⁸⁸ In fact, "[c]riminals, 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."¹⁸⁹ In contrast, a "forthright disposition, calm, cold, cool, and collected"¹⁹⁰ 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 "lived their life"¹⁹¹; 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.¹⁹² Two

184. *E.g.*, Judge 5, *supra* note 156, at 1–2; Judge 15, *supra* note 104, at 2; Judge 17, *supra* note 143, at 2; Judge 22, *supra* note 102, at 2.

185. Judge 21, *supra* note 95, at 2.

186. Judge 3, *supra* note 119, at 2.

187. Judge 21, *supra* note 95, at 2.

188. Judge 12, *supra* note 94, at 2.

189. Judge 8, *supra* note 125, at 2.

190. *Id.*

191. Judge 18, *supra* note 109, at 2.

192. *E.g.*, Judge 5, *supra* note 156, at 2; Judge 6, *supra* note 93, at 2; Judge 7, *supra* note 183, at 1.

judges exemplified this sentiment with the comment, “[i]t is not just talking the talk; it is walking the walk.”¹⁹³

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 in a defendant’s claims of remorse.¹⁹⁴

Finally, several judges relied on a *gestalt impression*, described variously as a “gut instinct, general feel for people”¹⁹⁵; “your intuition, your experience, your common sense”¹⁹⁶; a “holistic” approach¹⁹⁷; “looking at defendants from every possible point of view”¹⁹⁸; an examination of “all of the facts and circumstances”¹⁹⁹; a “sense from the totality of the circumstances”²⁰⁰; a “composite of what you say, how you say it, and the attitude you exemplify when you say it”²⁰¹; and “[y]ou know it when you see it.”²⁰² These judges alluded to the fact that “[i]t’s more of an art than a science”²⁰³ or that “[i]t is not a science,”²⁰⁴ and “there is no tool, no radar”²⁰⁵ 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.²⁰⁶ Some judges

193. Judge 1, *supra* note 101, at 2; Judge 9, *supra* note 106, at 1.

194. *E.g.*, Judge 20, *supra* note 98, at 2; Judge 22, *supra* note 102, at 2.

195. Narrative Summary of Interview with “Judge 4,” Conn. Superior Court Judge (on file with the New York University Review of Law & Social Change), at 2 [hereinafter Judge 4].

196. Judge 12, *supra* note 94, at 1.

197. Judge 1, *supra* note 101, at 1; Judge 6, *supra* note 93, at 1.

198. Judge 5, *supra* note 156, at 1.

199. Judge 16, *supra* note 112, at 1.

200. Judge 8, *supra* note 125, at 1.

201. Judge 9, *supra* note 106, at 1.

202. Judge 16, *supra* note 112, at 1.

203. Judge 23, *supra* note 92, at 1.

204. Judge 7, *supra* note 183, at 2; Judge 12, *supra* note 94, at 1.

205. Judge 8, *supra* note 125, at 1.

206. Compare Judge 22, *supra* note 102, at 1 (“You cannot expect a defendant to talk. Most of them do not come from the talking classes. They will never be on Meet the Press. They are not public speakers 99% of the time.”), and Judge 9, *supra* note 106, at 1–2 (“[S]ometimes people say nothing because they are too scared.”), with Judge 23, *supra* note 92, at 2 (“At sentencing, I need to hear it from the defendant . . . [P]art of the remorse is a willingness to say words that are going to help heal somebody else and if you cannot do that, if you cannot put aside your own insecurities or your own concerns about your ability to express yourself, and at least try and say something that would express to another person, particularly when you have a real victim, that you are sorry and you understand the ramifications of what you have done, then you are not getting any credit for it.”), and Judge 3, *supra* note 119, at 1 (“He would never say anything. Even the lawyer said, ‘He won’t open up to me, he won’t talk about anything about it.’ He showed no remorse.”).

believed that hanging one's head was a sign of remorse.²⁰⁷ Others felt that it indicated an absence of remorse.²⁰⁸ Similarly, eye contact or lack thereof could be construed as either respectful or disrespectful.²⁰⁹ Judges had particularly polarized views of apologies:

I am always moved when people turn to the victim and look them in the eye and apologize and/or ask for forgiveness.²¹⁰

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.²¹¹

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.²¹²

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.²¹³

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.²¹⁴

Furthermore, "sociopaths can very easily change their demeanor to hopefully get a particular outcome."²¹⁵

207. *E.g.*, Judge 3, *supra* note 119, at 2 ("If you are remorseful, ashamed of yourself, you walk up slowly, hang your head.").

208. *E.g.*, Judge 13, *supra* note 110, at 1.

209. *Compare* Judge 2, *supra* note 131, at 1 (stating that making eye contact with the victim indicates remorse), *and* Judge 13, *supra* note 110, at 1 (stating that making eye contact indicates remorse), *with* Judge 3, *supra* note 119, at 2 (stating that defendants who make eye contact with the victim have no remorse), *and* Judge 5, *supra* note 156, at 1 (stating that *not* making eye contact indicates remorse).

210. Judge 2, *supra* note 131, at 1.

211. Judge 1, *supra* note 101, at 2.

212. Judge 19, *supra* note 118, at 1.

213. Judge 6, *supra* note 93, at 2.

214. Judge 3, *supra* note 119, at 2.

215. Judge 13, *supra* note 110, at 1.

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

[P]eople. 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.²¹⁶

People can change and that can work to their favor. . . . [W]e 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.²¹⁷

D. Remorse and Mental Illness

Although one judge professed to “not have the slightest idea”²¹⁸ 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.”²¹⁹ The ability “to put yourself in someone else’s shoes” can become “clouded” by mental illness.²²⁰ “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.”²²¹ Mental illness “will deeply affect someone’s ability to communicate and may affect their whole worldview.”²²² A mentally unstable person is “not even going to be appreciating what is going on around them.”²²³ 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 the judges’ assessments of its effect.

Most commonly, judges made statements to the effect that mental illness “almost neutralizes”²²⁴ remorse. That is, with regard to defendants with mental illness, judges would discount or disregard both the presence and absence of

216. Judge 9, *supra* note 106, at 2.

217. Judge 1, *supra* note 101, at 2.

218. Judge 15, *supra* note 104, at 3.

219. Judge 18, *supra* note 109, at 2.

220. Judge 23, *supra* note 92, at 2.

221. Judge 1, *supra* note 101, at 3.

222. Judge 6, *supra* note 93, at 3.

223. Judge 12, *supra* note 94, at 3.

224. Judge 8, *supra* note 125, at 2–3.

remorse: “I would almost throw remorse out the window.”²²⁵ “You take remorse out of the picture.”²²⁶ “[I]t becomes a non-issue”²²⁷ “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.”²²⁸ Rather, mental illness requires a “whole different”²²⁹ approach, looking “through a different lens,”²³⁰ and “changes the dynamics of the analysis”²³¹ 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.”²³² “You could be medicated with side effects, in zombie-like states.”²³³

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.”²³⁴ “If a person is so mentally impaired that he or she is incapable of expressing remorse, I certainly cannot hold that against an individual.”²³⁵ 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.”²³⁶ “I would not hold their mental illness against them if they appeared to be genuine in their expression.”²³⁷ 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 had 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.²³⁸

Judges also disagreed about whether psychiatrists would be helpful in assessing remorse. Some believed that psychiatrists’ training and experience

225. Judge 20, *supra* note 98, at 2.

226. Judge 5, *supra* note 156, at 3.

227. Judge 9, *supra* note 106, at 2.

228. Judge 19, *supra* note 118, at 2.

229. Judge 6, *supra* note 93, at 3.

230. *Id.*

231. Judge 8, *supra* note 125, at 2.

232. *Id.* at 3.

233. Judge 22, *supra* note 102, at 3.

234. Judge 6, *supra* note 93, at 3.

235. Judge 9, *supra* note 106, at 2.

236. Judge 21, *supra* note 95, at 3.

237. Judge 22, *supra* note 102, at 3.

238. Judge 5, *supra* note 156, at 3.

could be effectively leveraged in this regard: “[G]iven psychiatrists’ training, they may have a better sense of whether expressed remorse is the real McCoy.”²³⁹ These judges credited psychiatrists with a heightened ability to detect “real versus unreal”²⁴⁰ remorse and the “genuineness of emotions.”²⁴¹ Indeed, psychiatrists “are supposed to have good bullshit detectors,” and “[t]hey have heard it all.”²⁴² Furthermore, unlike judges, psychiatrists have an opportunity to perform their evaluations “in a different, less confrontational setting.”²⁴³ Therefore, remorse “would be a good thing to know about in a psychiatric evaluation”²⁴⁴ because “remorse clearly plays a role in terms of the stuff that a psychiatric evaluator would want,”²⁴⁵ and “a psychiatrist would deem remorse to be a factor in their analysis of someone.”²⁴⁶ 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.”²⁴⁷

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.”²⁴⁸ “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.”²⁴⁹ 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.”²⁵⁰ “[H]aving 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.”²⁵¹ 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.’”²⁵² “I look at expert testimony with a wary eye because they just do not have that much time with these people. Whether I give

239. Judge 15, *supra* note 104, at 3.

240. Judge 8, *supra* note 125, at 2.

241. Judge 10, *supra* note 103, at 3.

242. Judge 14, *supra* note 110, at 2.

243. Judge 21, *supra* note 95, at 3.

244. Judge 10, *supra* note 103, at 3.

245. Judge 17, *supra* note 143, at 2.

246. Judge 19, *supra* note 118, at 2.

247. *E.g.*, Judge 17, *supra* note 143, at 2.

248. Judge 11, *supra* note 112, at 2.

249. Judge 9, *supra* note 106, at 2.

250. Judge 16, *supra* note 112, at 3.

251. Judge 13, *supra* note 110, at 2.

252. Judge 20, *supra* note 98, at 2.

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."²⁵³

V.

DISCUSSION

The key finding in this study was that, although judges viewed remorse as a valid and frequently important legal construct, they varied considerably with regard to the nature of remorse, its assessment, and its relevance to the judicial process. They also disagreed about the effect of mental illness on remorse. Perhaps most strikingly, different judges deemed similar expressions, mannerisms, or behaviors to have opposite meanings.

Considered in conjunction with existing critiques of remorse, these data cast doubts on whether the current use of remorse in criminal courts serves the goals of justice. The "remorse principle" already stands on contested theoretical ground, particularly with respect to some critics' observations of possible impingement on Fifth Amendment rights.²⁵⁴ The wide variance in conceptions of and attitudes toward remorse among the sample of judges in this study confirms others' suspicions that remorse cannot be accurately identified in court.²⁵⁵ More fundamentally, substantial inconsistencies between judges conflict with the principle that similarly situated offenders should be dealt with similarly.

These problems are further exacerbated when the defendant suffers from mental illness. The issue of mental illness added to the variance in judicial attitudes and practices, and hence, to their divergence from norms of just punishment. Judges displayed limited familiarity with psychiatric disorders and their signs and symptoms,²⁵⁶ which may lead to oversimplifications and misunderstandings. Elsewhere, my colleagues and I have argued that psychiatrists consulting in criminal cases should strive to educate courts about the ways in which a defendant's mental condition and psychotropic medications can affect behavior and cognition so that judges do not unduly punish departures from expected modes of expression.²⁵⁷ Accordingly, judges and other legal personnel must be open to the idea that an external appearance of remorselessness may not necessarily reflect a defendant's internal milieu, and

253. Judge 19, *supra* note 118, at 2.

254. *See* Ward, *supra* note 2, at 157–64.

255. *See id.* at 166; Duncan, *supra* note 37, at 1474–75.

256. *E.g.*, Judge 10, *supra* note 103, at 3 (“Depending upon the person’s mental illness, I have to think it affects remorse in some way, but I have no expertise in mental illness.”).

257. Rocksheng Zhong, Madelon Baranoski, Neal Feigenson, Larry Davidson, Alec Buchanan & Howard V. Zonana, *So You’re Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY L. 39, 46–47 (2014).

that further investigation and consultation with experts may uncover reasons for an individual's outward presentation.

A. Remorse as a Proxy for Character to Justify Punishment

Many judges drew upon standard theories of punishment to justify their consideration of offenders' remorse during the criminal justice process. For instance, 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.²⁵⁸ In this regard, judges' intuitions about the predictive value of remorse mirrored those of jurors and laypersons.²⁵⁹ 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.²⁶⁰

The evaluation of personal character thereby served as a mediator between observed remorse and conferred punishment. Remorseless persons were perceived as possessing character flaws and therefore deserving of greater punishment, not only because the intrinsic immorality of remorselessness warrants punishment, but also because remorselessness suggested further deficiencies that would predispose those persons towards future criminality.²⁶¹ Conversely, remorseful persons were thought to possess more virtuous character, therefore meriting less punishment.²⁶² A remorseful person was frequently construed as an otherwise normal individual who had made a mistake and was therefore a candidate for leniency and rehabilitation.²⁶³ 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 her reactions to events are described by affect control theory (ACT). ACT asserts that actions occur in a social context and are performed by individuals with fundamental identities.²⁶⁴ Observers conceptualize a person's identity based on the person's actions compared to expectations arising from the social context.²⁶⁵ If an action is incongruent with a person's known identity or social expectations, observers will redefine one of these elements.²⁶⁶ For example, if one's best

258. See, e.g., Judge 9, *supra* note 106, at 1.

259. Eisenberg, Garvey & Wells, *supra* note 62; Garvey, *supra* note 63, at 1560–61; Proeve & Howells, *supra* note 78.

260. Gold & Weiner, *supra* note 76, at 298–99.

261. See, e.g., Judge 1, *supra* note 101, at 1.

262. See, e.g., Judge 18, *supra* note 109, at 1–2.

263. See, e.g., Judge 7, *supra* note 183, at 1.

264. See David R. Heise, *Affect Control Theory: Concepts and Model*, 13 J. MATHEMATICAL SOC. 1, 1 (1987).

265. See *id.* at 12–13.

266. *Id.*

friend were to kill a man in self-defense, one might maintain the same impression of the friend's character and accept the event as an anomaly.²⁶⁷ But if that was impossible (e.g., the murder was clearly unprovoked), then one might reassess the friend's character: she must be a bad person.²⁶⁸ In the case of remorse, when a perpetrator reacts remorsefully to an offense in a manner that is socially expected, that behavior confirms the assumption that the person's true identity is essentially good. When a perpetrator reacts without remorse, the behavior conflicts with that assumption and the person's true identity is reconceptualized as essentially evil. Using mathematical path modeling²⁶⁹ to simulate these cognitive processes, sociologist Dawn Robinson and colleagues showed that people deduce identity from emotional displays of remorse following a drunk driving accident and then use that deduction to arrive at sentencing recommendations.²⁷⁰ Thus, this research suggests that the conflation of remorse and character is not uncommon or even unexpected.

B. 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, the present findings showed that this reliance can be legally problematic. Despite judges' relative lucidity concerning their preference for the good behavior and good character they believe is reflected by remorse, surprisingly few mentioned the procedural considerations that may impede defendants from expressing remorse. For example, many believed that the *Alford* plea was indicative of remorselessness—and that 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.²⁷¹ 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.²⁷²

267. *Id.*

268. *Id.* at 13.

269. Path analysis is a statistical tool used to investigate causal relationships between variables in a system and is an extension of the regression model. See Kenneth C. Land, *Principles of Path Analysis*, 1 SOC. METHODOLOGY 3 (1969) (developing the tools of path analysis); see also Floyd & Widaman, *supra* note 70; Peng, Lee & Ingersoll, *supra* note 70.

270. Dawn T. Robinson, Lynn Smith-Lovin & Olga Tsoudis, *Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions*, 73 SOC. FORCES 175, 186–88 (1994).

271. See, e.g., Judge 6, *supra* note 93, at 3.

272. Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1072–74 (1986).

That the process of criminal justice can interact with and hinder the expression and/or observation of remorse was a recurring theme in the interviews. To begin with, as other scholars have noted, communicating remorse is poor legal strategy and generally counseled against because displaying remorse is tantamount to admitting guilt.²⁷³ 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.²⁷⁴ Prudent legal practice aside, the mere fact of entering the criminal justice system creates practical barriers to convincing a judge that one is remorseful. 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.²⁷⁵ 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.²⁷⁶ 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 view the trial as intrinsically placing more situational constraints on the expression of remorse than other stages of the proceedings. In contrast, judges often viewed unfavorably a lack of remorse at arraignment or sentencing, setting higher bail or issuing harsher sentences, and thereby punishing defendants for what may in fact be an exercise of the Fifth Amendment right to remain silent.²⁷⁷

C. Difficulties in Identifying Remorse

Judges in the 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 Professor Richard Weisman's examination of 127 Canadian criminal cases, in which the author 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

273. See Ward, *supra* note 2, at 157.

274. See Judge 11, *supra* note 112, at 1.

275. Cf. Judge 17, *supra* note 143, at 2 ("At arraignment, remorse has a huge impact on what kind of bond I set, and it plays a bigger role there than it does almost at any other stage in the procedure, even sentencing, because if you can leave somebody out, and they are going to be capable of staying out of trouble, then the chances of going into jail are lower and lower. If you are out of jail, go to work and are not in any trouble, then what is the point of putting you in jail a year later if you have not done anything criminal in the interim?"). Just as Judge 17 notes that making bail allows for opportunities to demonstrate remorse, restitution, and nonrecidivism, inability to make bail necessarily forecloses these opportunities.

276. See, e.g., Judge 18, *supra* note 109, at 2.

277. See, e.g., Judge 8, *supra* note 125, at 2; Judge 17, *supra* note 143, at 2.

indication.²⁷⁸ Other signs included conduct following a crime (e.g., returning stolen money, calling an ambulance, immediate reactions to police), the 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, gaining insight in therapy).²⁷⁹

Judges varied in the level of confidence with which they judged the degree of remorse; some were very confident and others not at all.²⁸⁰ They also varied in the extent to which they emphasized certain types of expressions of remorse.²⁸¹ But most importantly, they varied in how they interpreted those expressions.²⁸² 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 among judges.²⁸³ In addition, judges also tended to view the absence of evidence of remorse as evidence of the absence of remorse.²⁸⁴ In other words, though a few recognized that an expressionless person conveys no information at all, many took a failure to express remorse as a sign that the person did not experience remorse internally.

Many judges were sensitive to the uncertainty inherent in judging remorse.²⁸⁵ Though the present research will perhaps alert judges to some

278. Richard Weisman, *Detecting Remorse and Its Absence in the Criminal Justice System*, 19 *STUD. L. POL. & SOC'Y* 121, 126 (1999).

279. *Id.* at 126–27.

280. Compare Judge 12, *supra* note 94, at 1 (“I would like to think I am pretty good at sizing people up.”), with Judge 10, *supra* note 103, at 1 (“Completely apart from that is the problem of determining what is remorse and when are expressions of remorse genuine and when are they feigned for purposes of the court proceeding? That is very difficult, especially for judges who are just seeing bits and slices when the person appears in these very formalized, stylized settings.”).

281. Compare Judge 1, *supra* note 101, at 2 (“It is not just talking the talk, it is walking the walk.”), with Judge 23, *supra* note 92, at 1 (“There were lots of tears, but he was also very good at being able to articulate, not just feel, but articulate why what he did was so damaging and why what he did was so wrong.”).

282. Compare Judge 13, *supra* note 110, at 1 (“I often say, ‘Talk is cheap.’ They can say that they are remorseful, but have they taken steps to get themselves into treatment, to improve or better themselves?”), with Judge 23, *supra* note 92, at 2 (“I need to hear it from the defendant . . . [P]art of the remorse is a willingness to say words that are going to help heal somebody else . . .”).

283. Compare Judge 2, *supra* note 131, at 1 (“The absence of remorse is shown by silence, lack of eye contact, body language, lack of taking accountability for actions, denial of allegations that, at that point, have been proven true.”), and Judge 8, *supra* note 125, at 2 (“If a person does not display any outward signs, it is for me to figure out what is going on You look for eye contact, plausible stories and inferences, body language, thought process”), with Judge 5, *supra* note 156, at 1 (“Hispanic kids have a difficult time looking authority in the eye. They put their head down and say they are sorry. Some people take that as being offensive, but I do not.”), and Judge 16, *supra* note 112, at 1 (“The way he communicated, his body language, he had a difficult time while talking about it looking up.”).

284. *E.g.*, Judge 3, *supra* note 119, at 2; Judge 15, *supra* note 104, at 3 (“If the person does not express anything, I would probably be inclined to believe that the person is not remorseful because one would expect that if you are going to express remorse, this is the time to do it.”).

285. *E.g.*, Judge 23, *supra* note 92, at 1 (“It’s more of an art than a science.”).

strategies used by their peers that they themselves may not currently employ, the methodology does not permit any inferences about which strategies may be more reliable than others. Another recent study more directly addresses this question.²⁸⁶ 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.²⁸⁷ With regard to the latter, participants were asked to describe the event and feign remorse.²⁸⁸ 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.²⁸⁹ 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.²⁹⁰

D. Oversimplified Views of Mental Illness and the Effects on Remorse

Against this backdrop of legal challenges and practical difficulties, and despite the importance of fairly treating a vulnerable and easily stigmatized subpopulation, 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.²⁹¹ 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.²⁹² If they were mentally ill, then they merited a wholly different judicial approach, but, if not, then they were treated in the usual manner.²⁹³ Few judges indicated that they recognized either a spectrum of severity of mental illness or differences in the types of psychiatric disorders (e.g., mood, psychotic, anxiety, personality, autism spectrum, etc.).²⁹⁴

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 individuals carrying the same diagnosis can present dissimilarly. Schizophrenia and other psychotic disorders, for example, may manifest as one or more but not necessarily all of:

286. Leanne ten Brinke, Sarah MacDonald, Stephen Porter & Brian O'Connor, *Crocodile Tears: Facial, Verbal and Body Language Behaviours Associated with Genuine and Fabricated Remorse*, 36 LAW & HUM. BEHAV. 51, 51 (2012) (investigating the facial, verbal, and body language cues of true versus falsified remorse).

287. *Id.* at 54.

288. *Id.*

289. *Id.* at 57–58.

290. Emily P. Corwin, Robert J. Cramer, Desiree A. Griffin & Stanley L. Bordsky, *Defendant Remorse, Need for Affect, and Juror Sentencing Decisions*, 40 J. AM. ACAD. PSYCHIATRY & L. ONLINE 41, 46 (2012).

291. *E.g.*, Judge 2, *supra* note 131, at 2–3; Judge 5, *supra* note 156, at 3; Judge 8, *supra* note 125, at 2–3.

292. *E.g.*, Judge 8, *supra* note 125, at 2–3.

293. *E.g.*, Judge 18, *supra* note 109, at 2–3.

294. *E.g.*, Judge 8, *supra* note 125, at 2–3; Judge 12, *supra* note 94, at 3.

hallucinations (defined as perception in the absence of sensory stimuli), paranoia, other delusions (defined as overly valued, fixed, false beliefs insensitive to contrary evidence), disorganization of behavior or thought, social withdrawal, lack of motivation, paucity of speech, inability to experience pleasure, or cognitive deficits.²⁹⁵ Major depression frequently causes some combination of: decreased sleep or appetite, poor energy, poor concentration, diminished interest or pleasure, feelings of guilt, hopelessness, or worthlessness, and thoughts of suicide (so-called neurovegetative symptoms).²⁹⁶ But in some individuals, depression may actually be associated with *increases* in sleep and appetite.²⁹⁷ Moreover, schizophrenia and depression, though potentially overlapping in some ways (such as social withdrawal, difficulties concentrating, and inability to experience pleasure), fall under different classes of illness.²⁹⁸ Other classes include neurodevelopmental disorders (e.g., autism spectrum disorder),²⁹⁹ anxiety disorders (e.g., panic disorder, phobias),³⁰⁰ trauma- and stressor-related disorders (e.g., post-traumatic stress disorder),³⁰¹ eating and feeding disorders (e.g., anorexia nervosa),³⁰² substance-related and addictive disorders (e.g., alcohol use disorder, gambling disorder),³⁰³ and personality disorders (e.g., borderline personality disorder).³⁰⁴ Thus, “mental illness” is not an umbrella term that captures all aspects of every psychiatric disorder, much as “theft” would not capture the distinction between stealing a pack of bubblegum from an individual Wal-Mart store and embezzling millions of dollars from Wal-Mart Stores, Inc. 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 including mental illness as a factor in decision-making was so overwhelmingly powerful that all other factors indicating remorse (or lack thereof) fell by the wayside.³⁰⁵ Others opined that the presence of mental illness called into question the authenticity of everything a defendant said, including statements indicating the absence of remorse.³⁰⁶ Still others believed that remorse could be considered

295. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87–88 (5th ed., 2013).

296. See *id.* at 160–61.

297. *Id.* at 163.

298. Compare *id.* at 87–88 (outlining the key features of schizophrenia spectrum and other psychotic disorders), with *id.* at 155 (discussing common features of depressive disorders).

299. See generally *id.* at 31–86.

300. See generally *id.* at 189–233.

301. See *id.* at 265–90.

302. See *id.* at 329–54.

303. See *id.* at 481–589.

304. See *id.* at 645–84.

305. E.g., Judge 8, *supra* note 125, at 2–3.

306. See, e.g., Judge 13, *supra* note 110, at 2.

with respect to defendants with mental illness.³⁰⁷ Of these judges, some stated that they altered their expectations for defendants' remorse if mental illness was present, while others did not alter their expectations.³⁰⁸

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 emotional blunting exhibited by patients with depression or psychosis can easily be construed as uncaring and distant (and remorseless), while the brash self-confidence of mania and hypomania 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). Individuals suffering from post-traumatic stress disorder may be irritable, easily agitated, and quick to anger. Offenders on the autism spectrum may have difficulty expressing empathy, responding appropriately to social cues, and conveying emotions, thereby giving the impression of callousness and imperturbability. Personality disorders may manifest as aggression, self-aggrandizement, or emotional instability. Those whose delusions cause them to believe that they are justified in their crimes may not even experience remorse in the first place. It should also be noted that the inverse could occur: a tearful, emotionally labile defendant may be deemed remorseful when in fact not.³⁰⁹

But perhaps the most trouble arises in defendants whose psychiatric disorders are undiagnosed or under-diagnosed, 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.

Unless specifically requested, an assessment of remorse is not regularly included in forensic psychiatric reports.³¹⁰ However, psychiatrists do routinely

307. *E.g.*, Judge 21, *supra* note 95, at 3.

308. *Compare* Judge 6, *supra* note 93, at 3 (“If I am aware that someone has been diagnosed and maybe receives antipsychotic medicines, I see them in a whole different way, through a different lens.”), *with* Judge 21, *supra* note 95, at 3 (“If someone with mental illness expresses remorse, I would treat that the same way that I would the expressions of remorse from a normal person.”).

309. The examples provided here are but a brief sampling of potential misinterpretations. A full description of the various mental illnesses is beyond the scope of this paper. However, for interested readers, see MICHAEL J. MURPHY, RONALD L. COWAN, & LLOYD I. SEDERER, *BLUEPRINTS PSYCHIATRY* (5th ed. 2009), for an introductory text about mental illness aimed at medical students; see also 1 KAPLAN & SADOCK'S *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY* (Benjamin J. Sadock, Virginia A. Sadock, & Pedro Ruiz, 9th ed. 2009) for a comprehensive reference text about mental illness aimed at psychiatrists and other mental health professionals.

310. *See, e.g.*, Douglas Mossman, Stephen G. Noffsinger, Peter Ash, Richard L. Frierson, Joan Gerbasi, Maureen Hackett, Catherine F. Lewis, Debra A. Pinals, Charles L. Scott, Karl G. Sieg, Barry W. Wall & Howard V. Zonana, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 *J. AM. ACAD. PSYCHIATRY & L. ONLINE* S3, S51

assess emotion, cognition, and behavior, and, as mentioned earlier, my colleagues and I have urged psychiatrists to highlight instances in which someone's mental condition may affect his presentation.³¹¹ Ultimately, the questions of whether a defendant is truly remorseful and how much weight should be accorded to remorse are for the judge to determine, but decision-makers should be mindful that factors beyond a defendant's personal character can affect apparent remorse or apparent lack of remorse.

E. Limitations

Several methodological limitations are 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 processes, 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 that risk seems to be low in this study, 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.

F. Future Research

One next step in research 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 and degree of defendants' expressed remorse in mock medical malpractice cases can affect the amount of money

(2007) (specifying that reports of competence to stand trial evaluations—one common forensic psychiatric task—should not contain “gratuitous comments” about lack of remorse).

311. Zhong, Baranoski, Feigenson, Davidson, Buchanan & Zonana, *supra* note 257, at 46–47.

awarded to plaintiffs.³¹² 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.

VI. CONCLUSION

Judging people based on their actions, reactions, and emotions is a basic part of human nature. Remorse is a common emotion that people tend to believe provides information about a person's character and likely future actions. Thus, it seems sensible 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 consider it a relevant and even essential factor in their decisions about sentencing; most express some doubts about their ability to assess genuine remorse; and most see a role for contributions from forensic psychiatric experts, especially in the complicated context of mental illness.

Unfortunately, the use of remorse in criminal justice judgments still stands on contested ground, particularly with respect to potential interference with Fifth Amendment rights, the inconsistency with which judges identify and apply remorse in their decisions, and the myriad barriers in legal procedure and life in general (such as mental illness) that can block the expression or observation of remorse. Thus, serious questions remain about whether judges taking offenders' remorse into account at all serves the cause of justice. The various controversies surrounding remorse highlighted in this paper suggest that judges should give remorse much less weight than they do. At the very least, inferences about the *absence* of remorse should not figure 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 are one resource courts can call upon to obtain information and education so that errors are minimized, especially in cases in which mental illness is involved.

312. See Brian H. Bornstein, Lahna M. Rung & Monica K. Miller, *The Effects of Defendant Remorse on Mock Juror Decisions in a Malpractice Case*, 20 BEHAV. SCI. & L. 393, 405 (2002) (describing the findings of a study in which participants were asked to judge scenarios that varied according to whether and when remorse was expressed by a physician sued for negligence).