Remorse, Demeanor, and the Consequences of Misinterpretation

The Limits of Law as a Window into the Soul

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Abstract

Although there is a rich legal literature on whether remorse should play a role in the criminal justice system, there is little discussion of how remorse can be evaluated in the legal context. There is ample evidence that perceptions of remorse play a powerful role in criminal cases. Yet the most basic question about the evaluation of remorse has received little attention: is remorse something that can be accurately evaluated in a courtroom? This article argues that evaluation of remorse requires a deep assessment of character, or of the condition of the soul, and that the legal system may not be capable of such evaluation. At the same time, the article acknowledges that remorse is so closely intertwined with judgments of culpability, it may not be feasible to bar decision-makers from considering it. Assuming that evaluation of remorse is ineradicable, the question becomes: what can be done to improve upon an evaluative process riddled with error and bias?

Keywords

emotion – remorse – punishment – empathy – demeanor – cognitive bias

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1 Introduction

Although it occurred over a decade ago, the story of the first encounter between former U.S. President George W. Bush, and Russian President Vladimir Putin, still elicits amused derision. The former president famously said about Putin: “I looked the man in the eye. I found him to be very straightforward and trustworthy and we had a very good dialogue. I was able to get a sense of his soul.”

The notion of looking into Putin’s eyes and seeing his soul met with substantial scorn in part because of a widespread consensus that former President Bush had misread President Putin’s soul, but also because the entire soul-reading enterprise sounds mystical, irrational, and inappropriate for questions of governance. And so perhaps it is surprising how much stock the legal system places in the ability to resolve questions of deep character by looking into the eyes of litigants and witnesses, reading their body language, and evaluating other aspects of what the legal system calls “demeanor” and credibility.

Most common law systems place tremendous faith in the importance of live witness testimony. In the U.S., the preference for live testimony, given in open court, is enshrined in the Sixth Amendment’s Confrontation Clause and in the Federal Rules of Civil Procedure. The right of confrontation and the attendant ability to assess the demeanor of witnesses are central features of the right to a fair trial in common law jurisdictions more generally. Live testimony is less marked in inquisitorial systems, in line with common law adversarial tradition, exhibits a strong preference for oral as opposed to documentary evidence. Inquisitorial systems tend to exhibit a preference for documentary evidence, with the Dutch system often cited as one that most strongly favors documentary over oral, immediate evidence. See, e.g., Martha L. Komter and Marijke Malsch, “The Language of Criminal Trials in an Inquisitorial System: The Case of the Netherlands”, in Peter Tiersma and Lawrence Solan (eds.), The Oxford Handbook of Language and Law (2012), 408–409.


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6 See, e.g., Police v. Razamjoo, [2005] DCR 408; 2005 NZDCR LEXIS 3 (14 Jan. 2005); The Queen and Anwer Shah Wafiq Sayed (19 Aug. 2010, District Court of Western Australia); Davis v. R., UKHL 36 (18 June 2008).
testimony has, since its inception, been intimately tied to a belief that personal observation is essential to the ability to evaluate demeanor. It has been tied to a belief in the importance of demeanor in the assessment of credibility, character, and other attributes important to the decision maker. Demeanor evidence is often described as an “elusive and incommunicable imponderable” and as relying on “sense impressions.” It relies heavily on the interpretation of facial expression and body language.

This article turns to one particular use of demeanor evidence that assumes outsized importance in criminal cases: the evaluation of a defendant’s remorse. In the criminal justice context, critically important decisions about life and liberty hinge on whether decision-makers find offenders to be appropriately remorseful. Several studies have found that in capital cases the remorsefulness of the defendant is a crucial factor, and in a significant majority of cases the crucial factor, in determining whether the defendant is sentenced to death. Perceptions of remorse can also affect the determination of guilt or innocence. In a murder case, for example, a defendant’s “cold, unemotional demeanor” in the courtroom while the evidence of the crime is presented may be “taken as evidence that she was the kind of person who could have committed such a crime and could potentially repeat it.” Scott Peterson’s murder conviction is a recent example of the effect of the failure to look remorseful; as the New York Times reported, “the prosecution had portrayed his unflinching behavior [at trial] as the cool calculation of a killer.”

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9 Ibid. quoting Judge Learned Hand in Dyer v. MacDougall, 201 F.2d 265, 268–269 (2d Cir. 1952).

10 See infra notes 52–57.

11 The archetypal story of a criminal sentenced to death for his lack of observable remorse, both at trial and before, is Meursault in Camus’ novel The Stranger. For discussion of real-life examples of this dynamic, see e.g. Dawn T. Robinson, Lynn Smith-Lovin, and Olga Tsoulis, “Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions”, 73 Social Forces (1994), 175, 176 (discussing the case of Pamela Smart in the U.S.) In a case in which the degree of homicide, rather than the identity of the perpetrator, is at issue, such as a vehicular homicide case, the defendant’s lack of visible distress during the crime may also influence the verdict. Ibid.

Remorse affects assessments of guilt and punishment in several other criminal justice contexts as well. The lack of remorse is viewed as a primary indicator of a psychopathic personality or antisocial personality disorder. The lack of remorse can lead to more punitive sentences, more restrictive prison conditions, and denial of parole, pardon, or clemency. In the juvenile context, it can lead to transfer of an adolescent accused of a felony from juvenile to adult court. The demand for remorse has had an especially pernicious effect on the wrongly convicted, whose persistent refusal to admit to a crime can lengthen and worsen their sanctions.

Decision-makers attempting to evaluate a defendant’s remorse may have access to various sources of information, depending on the type of proceeding. In a criminal trial, for example, the defendant may testify. He may talk to forensic psychologists, probation officers, or others who can attempt to evaluate his state of mind. The defendant’s conduct during or after the crime may give rise to inferences about his level of remorse. In capital cases, however, the defendant rarely takes the stand. In such cases, the defendant’s facial expression and body language, as he or she sits silently in court, is one of the most influential factors in the jury’s evaluation of remorse.

15 Robinson, Smith-Lovin and Tsoudis, supra note 11.
18 For example, his acceptance of responsibility at the guilt phase, or an early confession, or actions taken after the commission of the crime that suggest a desire to help the victim. See Scott Sundby, “The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty”, 83 Cornell L. Rev. (1998), 1557, 1563.
The evaluation of remorse by the criminal justice system raises difficult theoretical questions. The most prominent question is why remorse should be a factor in punishment. Remorse, unlike apology, connotes an internal state—a condition of the soul. As Jeffrie Murphy argues, the determination that one is appropriately remorseful is more a judgment of what he calls “deep character,” or a condition “of the very soul,” than an evaluation of state of mind. It certainly does not seem to describe a transient emotion. Instead, it suggests a state that is ongoing and reflective, one that promises a hard look at one's past transgressions and a desire to atone for them in the future. As discussed in more detail below, the term “remorse” requires even more fine-grained distinctions about the offender’s response to wrongdoing. Both Murphy and John Deigh suggest that remorse is distinct from guilt or shame. Deigh, for example, argues that unlike guilt or shame, remorse is evoked by a transgression of one's internal moral code, rather than by the violation of external moral or legal rules. Murphy argues that remorse is a “painful combination of guilt and shame” that connotes both responsibility for a serious wrong and a desire to repent and become a better person.

The evaluation of remorse also raises the practical question of whether the legal system is capable of discerning and evaluating deep character of this nature. In particular, is it capable of evaluating remorse, or of distinguishing it from guilt or shame? There is no good reason to believe that remorse can be accurately evaluated in the courtroom based on outward indicia like facial expression and body language, and yet juries in capital cases quite frequently assume they can do just that. Even when the defendant speaks, during testimony or otherwise, there is ample reason to be concerned about evaluating remorse in the courtroom.

Despite concerns with evaluating remorse in the courtroom, the solution to the problem is not obvious. Though it might seem tempting to simply remove remorse from the punishment equation, it is not clear that the legal system is capable of evaluating blameworthiness without reference to remorse. Ultimately, I argue for minimizing the role of remorse where possible, for clarifying why remorse is important and addressing those goals more directly, and for using jury instructions, expert witnesses, and other tools to channel and educate decision makers on the limitations and pitfalls of evaluating remorse.

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21 Jeffrie G. Murphy, Punishment and the Moral Emotions (2012), 152.
Evaluating Character through Demeanor

The U.S. judicial system, in line with a deeply rooted common law tradition, regards the ability of the witness to express non-verbal cues and the ability of the fact-finder to observe them as crucial to the right of confrontation. A victim who testifies from behind a barrier, so that her facial expressions cannot be seen, deprives the defendant of his right of confrontation. A defendant who, because of psychotropic drugs, is unable to communicate facial expressions, behavior, manner, and emotional responses such as compassion and remorse, has been deprived of the right of confrontation. As Justice Kennedy observed, sentencers must attempt to "know the heart and mind of the offender." The assumption is that the face is a window into the heart and mind. A defendant who cannot reveal by his demeanor that he is "remorseful for his actions" has been deprived of a fair trial. Likewise, the ability of the fact-finder at the trial level to observe these non-verbal cues is one of the primary reasons for appellate court deference to the findings of the trial court. The appellate court is confined to the "cold record," but the trial court can observe facial expression, attitude, body language, and other such cues at close range.

22. See, e.g., Coy v. Iowa, 487 U.S. 1012 (1988) (holding that the confrontation clause was violated when a witness testified from behind a screen). The right is, nevertheless, not absolute. See Maryland v. Craig, 497 U.S. 836 (1990) (holding that the confrontation clause was not violated when the witness testified via closed-circuit television).
23. Coy, ibid.
25. The use of testimony via videoconferencing raises interesting issues in this regard. Although it arguably permits the expression and evaluation of demeanor, there is evidence that remoteness affects evaluation of the witness adversely. Moreover, videoconferencing, like other visual evidence, involves choices in framing, close-ups, angle and other aspects of filming that may affect the presentation to the trier of fact. Ann Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant", 78 Tulane L. Rev. (2004), 1089, 1119.
26. Riggins, 504 U.S. at 142. See also Atkins v. Virginia, 536 U.S. 304, 320-321 (2002), in which the Court exempted the mentally retarded from the death penalty in part because "they are typically poor witnesses and their demeanor may create an unwarranted impression of lack of remorse for their crimes."
27. Riggins, ibid.
28. See, e.g., Goodwin v. MTD Products, Inc., 232 F.3d 600, 606-607 (7th Cir. 2000) ("While this court's review is confined to the 'cold pages' of an appellate transcript, the jury had an opportunity to observe the verbal and non-verbal behavior of the witnesses, including the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture and body movements.")
The question of what precisely is conveyed by facial expression has been placed in sharp relief by cases in which witnesses or parties seek to cover all or part of their faces. The issue arises, for example, in cases involving confidential informants or other witnesses who don articles of clothing like sunglasses or disguises like fake beards to conceal their identity. Similarly, it arises when vulnerable witnesses, such as victims in child sexual abuse cases, seek to testify from behind a screen to avoid facing an accuser who may intimidate or induce further trauma. One fascinating context in which the issue has arisen is the situation in which a Muslim woman seeks to wear a burqa (an article of clothing that covers the entire body from the top of the head to the ground) or niqab (a scarf and veil covering the entire face except for the eyes) while testifying. For example, a civil suit was dismissed on the rationale that the judge could not determine the veracity of the plaintiff's testimony without seeing her face.

Demeanor evidence is often described as an "elusive and incommunicable imponderable" and as relying on "sense impressions." Yet demeanor evidence is not a black box. Acknowledging its emotional content opens up a rich vein of inquiry. For example, in a fascinating article, the neuropsychologist Jonathan Cole discusses the importance of the face for the ability to understand the inner states, motives, and intentions of others. The understanding that others possess inner states, motives, and intentions different from our own is often called "theory of mind." In that regard, theory of mind overlaps with the capacity for empathy. Empathy also encompasses the ability to infer the internal states of others (the latter may also be called "empathic inference"). It is an essential capacity for interpersonal relations.

30 See, e.g., Coy v. Iowa, supra note 7 and Maryland v. Craig, supra note 22.
33 Ibid, quoting Judge Learned Hand in Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952).
Cole observes that at the early stages of evolution the way into the minds of others was not through the development of knowledge of another’s cognitive states. Instead, as increasingly complex inner states evolved, they were revealed, expressed, and in part experienced through the body as an affective domain. Similar findings have been reported about the function of body language as a means of conveying subjective states such as motive and intention. Cole concludes that “the face... may have evolved not simply to display complex affective inner states but for those to influence the observer to feel the same.” This is a powerful explanation for the value added by demeanor evidence and in-court testimony more generally. They elicit empathy. Empathy is a capacity that has been much studied in recent years. There is a growing store of knowledge that can be used to evaluate its dynamics, its limitations, and the conditions under which it best advances the goals of justice.

Empathy has a significant effect on legal judgment. For example, juror expression of empathy toward defendants and victims influences decision-making in criminal cases, as shown in cases involving both mock and actual juries. Thus, it is a matter of concern to the legal system that not everyone possesses empathic capacity in equal measure. Some have more empathic accuracy than others. Some are more aware of their empathic limitations than others. It is a matter of particular concern that empathic inaccuracy is exacerbated by several factors that ought to be irrelevant to legal decision-making. Empathy is selective. It tends to flow most easily toward those like us, or toward those in whose shoes we can imagine ourselves.

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37 Cole, supra note 34 at 51 (discussing the findings of Peter Hobson on theory of mind and autism).
39 Cole, supra note 34 at 54–55.
40 Ibid. at 51.
41 For example, there is evidence that when a witness or defendant appears via videoconferencing, fact-finders view him less favorably than when viewing live testimony. Viewers find live witnesses more attractive, intelligent, honest, and trustworthy than remote witnesses. Ann Bowen Poulin, supra note 25 at 1119.
44 See, e.g., Ickes, supra note 36.
45 John R. Chambers and Mark H. Davis, “The Role of the Self in Perspective-Taking and Empathy: Ease of Self-Simulation as a Heuristic for Inferring Empathic Feelings”, 30 Social Cognition (2012), 153 (most theories of empathy argue that “the self is a template that...
own internal states to those they perceive as similar, but “employ stereotypes to infer the internal states of those they view as dissimilar.”46 There is also evidence that “depth of processing” (the willingness to draw inferences about others’ subjective attributes) suffers when people are confronted with faces different from their own.47 That is, empathy is negatively affected by difference.48 This has been documented in regard to race,49 ethnicity,50 age,51 and mental disability.52

observers apply to the target during perspective-taking,” ibid. at 154, but in addition it is possible that observers are more empathic when they can easily imagine themselves in the same situation.)

Ibid. at 154. See also Jennifer L. Eberhardt, Paul G. Davies, Valier J. Purdie-Vaughns, and Sheri Lynn Johnson, “Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes”, 17 Psychol. Sci. (2006), 383 (reporting that stereotypes, such as the belief that black people are more criminally inclined, can affect jurors’ evaluation of credibility and blameworthiness).


Recent work on implicit bias also sheds light on how negative stereotypes affect the evaluation of evidence. Levinson and Young, for example, describe the dynamics of “priming: “the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context.” Justin D. Levinson and Danielle Young, “Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence”, 112 W. Va. Lev. (2010), 307, 326.


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In short, facial expression may be an essential indicator of intent, motivation, and other inner states, but it is often a deeply flawed indicator. Much of what is being "read" in facial expression and body language is highly ambiguous and cannot be interpreted without reference to pre-existing schemas and assumptions.

3 Remorse: A Window into the Soul

There is substantial evidence that perceptions of a defendant's remorse have a causal effect on judgment: jurors, judges, parole boards, probation officers, and other decision makers treat remorse as one of the determinative factors in their decisions. In some of these venues, the decision maker has access to the individual's own description of his emotions and attitudes (for example, through in-court testimony, forensic interviews, or pre-sentence reports). In some situations, evidence of the defendant's behavior during or after the incident in

honest but not reliable, and that expert testimony can help ameliorate prejudicial assumptions).


56 Everett and Nienstedt, supra note 47.

57 Although lack of remorse is linked to detrimental outcomes in almost every context, there is some evidence that when a defendant shows remorse before culpability has been established, his remorse may be taken as an indicator of guilt. Bornstein, supra note 13.

58 For example, courts have inferred lack of remorse when defendants made efforts to destroy evidence, hide evidence, or flee the scene, and have inferred remorse from defendants’ efforts to aid the victim. See Bryan H. Ward, “Sentencing without Remorse”, 38 Loyola University Chicago Law Journal (2006), 131.
question may bear on remorse. But in many cases—especially capital cases—the defendant’s in-court demeanor is the primary determinant of whether he is adjudged appropriately remorseful. In most capital cases, the defendant does not testify, which makes the question of how jurors assess remorse all the more complex. Indeed, the United States Supreme Court explicitly recognized the importance of remorse and of facial expressions as a means of demonstrating remorse, observing in a capital case that "serious prejudice could result if medication inhibits the defendant's capacity... to demonstrate remorse or compassion... In [capital cases] assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the defendant lives or dies."60

As I discuss below, there is a growing body of evidence about what can go wrong with the process of evaluating remorse. Conversely, there is little or no evidence that remorse can be accurately evaluated based on demeanor or body language.61 This state of affairs—in which life or death decisions are based on folk knowledge that is at best unsubstantiated and at worst demonstrably wrong—leads to several pressing questions. First, what is it precisely that is being evaluated, and how adept are decision makers at evaluating it? Second, even assuming a remorseful countenance can be accurately identified, what significance should this have for the criminal justice system? And finally, if evaluation of remorse is an ineradicable feature of the criminal justice system, what can be done to improve upon an evaluative process that is demonstrably riddled with error and bias?

Unfortunately, even when the term “remorse” appears in judicial or legislative contexts, it is not defined. It is necessary to turn to sources like interviews with judges and jurors to understand what decision makers mean by the term “remorse.”62 Or more precisely, to understand “what expectations ...these decision-makers have for the display and communication of remorse.”63

A comparison between apology and remorse places the difficulty of evaluating remorse in sharp relief. An apology is an outward manifestation, generally verbal in nature. Its existence is externally ascertainable. An apology might be sincere or insincere, and these underlying motivations are far less ascertainable,

59 For example, Murphy quotes former California governor Schwarnegger's refusal to grant clemency to Stanley Williams, based partly on his post-arrest and post-conviction conduct, including planning a violent escape from custody. Murphy, Punishment and the Moral Emotions, supra note 21 at 162.
61 The topic is ripe for research by affective scientists and social scientists.
but this may not matter. For example, legal scholar Brent White has argued that in some situations, as in the case of a court-mandated apology by a public entity or official for a violation of civil rights, it is primarily the content and public nature of the apology that matters to the litigant. Whether the apology rests on sincere emotion may be entirely irrelevant to the goals of the litigation.64

Remorse, however, is an internal state, and therefore far less susceptible to measurement. Richard Weisman provides an articulate description:

> While an apology may refer to the anguish and pain that the offender feels at having broken the norms of community, an expression of remorse shows or demonstrates this pain by making the suffering visible. Conventional usage in law and psychiatry describes expressions of remorse as “signs,” “symptoms,” “manifestations,” or “demonstrations.” What this suggests is that remorse is communicated through gestures, displays of affect, and other paralinguistic devices. Both the apology and the expression of remorse can be communicated through simple linguistic formulae such as “I am sorry.” With the former, we are likely to attend to the words. With the latter, we focus on how the words are expressed, the feelings that accompany the words; expressions of remorse are shown rather than stated.65

Jeffrie Murphy succinctly identifies the problem: to evaluate remorsefulness is to claim to be able to evaluate one's “deep character”66 or one's soul.67 The evaluation of deep character requires some fine distinctions. Most prominently, the remorse the offender displays must be remorse for the harm caused by the crime, not for getting caught or having to suffer the consequences.68 The expression of suffering for the wrong one has done to others must be regarded as sincere rather than instrumental. This demand for sincere, non-instrumental remorse presents an obvious challenge in legal settings, in which a defendant

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65 Weisman, “Showing Remorse” supra note 17 at 125.


67 See also Riggins v. Nevada at 143–144 (Kennedy, J., concurring) (sentencers must attempt to “know the heart and mind of the offender.”)

68 Weisman, “Being and Doing” supra note 63 at 58 (“He must be suffering for the suffering he caused; not the suffering he endured.”)
has every incentive to appear remorseful, and where a convincing show of remorse may be a matter of life or death. Indeed, it might be argued that the very act of advocating for a more lenient sentence calls the sincerity of the offender’s remorse into question. This has been called one of the “central paradoxes” of factoring remorse into the punishment calculus.

Identifying appropriate remorse may require even more subtle distinctions. At bottom, the value of remorse to the decision maker seems to be that it separates the act from the offender, that is, it helps identify the situations in which the act is a deviation from the offender’s character rather than an expression of it. Painful feelings arising from violating societal norms or legal rules may not meet the criteria for remorse. As mentioned earlier, for example, John Deigh distinguishes remorse from guilt and shame. He views guilt as occasioned by a violation of external rules and shame as occasioned by a violation of social norms. Only remorse indicates a violation of deeply held values, a kind of injury to oneself. Murphy views remorse as a “painful combination of guilt and shame:” an acceptance of responsibility for serious injury as well as a feeling that one has violated one’s own standards and ideals. Remorse is both forward- and backward-looking: it should lead to atonement and “the resolve to become a new and better person.”

In short, remorse as a window into character must possess certain attributes: sincerity, a sense that one has violated deeply held personal values, and a desire to take future actions both on behalf of the victim and for one’s own betterment. The question raised here is: is it reasonable to expect that facial expression and body language will reflect those attributes?

4 The Theater of Contrition

Make eye contact with the jury, but not homicidal maniac eye contact.

Can remorse be ascertained by observing demeanor? The question urgently requires an answer because decision makers (as well as the media, which

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69 Ibid. at 53. Some argue that if indeed the remorseful offender suffers for the harm he caused and sincerely wishes to atone for it, he ought to welcome punishment, not use his remorseful state as a means of reducing it.

70 Ibid. at 50.

71 Deigh, supra note 20.

72 Murphy, Punishment and the Moral Emotions, supra note 21 at 152.

shape public perception about crime and punishment) believe that remorse can be ascertained in this manner, and as discussed, serious legal consequences flow from this belief. Indeed, facial expression and body language are regarded as spontaneous, “natural,” and non-manipulable, and thus as windows into true feelings of remorse.74

For now, I will set aside the question of whether remorse is a state that ought to be germane to legal decision-making and address the practical question of how remorse is ascertained in a courtroom and in the criminal justice system more generally. The available evidence makes it clear that there are no consistent criteria by which remorse is currently measured, that instead remorse is often in the eye of the beholder, and that when criteria are articulated, they are often based on inaccurate folk knowledge. These problems are not confined to juries: they extend to judges, parole officers, and other legal actors as well. There is also ample evidence that evaluation of remorse is heavily influenced by factors such as race, ethnicity, mental disability, and age.

Studies of jury decision-making consistently show that a defendant’s display of remorse is correlated with a jury’s willingness to grant mercy, and that lack of remorse is often cited as justification for condemning the defendant to death. Craig Haney, in his study of California capital jurors, reported that one of the most important factors in their decision was “whether or not the defendant expressed remorse (based only on in-court observations of the defendant).” In the opinion of most of the jurors, capital defendants simply did not express appropriate emotion during the penalty-phase proceedings.75

Note that defendants cannot simply opt out of this evaluative process. The prevailing assumption is that “what is not shown is also not felt.”76 Juror interviews are rife with statements along the lines of “I was waiting for the defendant to express remorse for what he had done. I did not hear any of that remorse.”77 As Scott Sundby reports,

Jurors scrutinize defendants through the trial and are quick to recall details about demeanor, ranging from attire to facial expressions... Mostly

74 Weisman, Showing Remorse, supra note 55.
75 Haney, Sontag, and Constanzo, supra note 53 at 163. See also Michael E. Antonio, “Arbitrariness and the Death Penalty: How the Defendant’s Appearance During Trial Influences Capital Jurors’ Punishment Decision”, 24 Behavioral Sciences and the Law (2006), 215, 223 (finding that when jurors viewed the defendant in the courtroom as emotionally involved, sorry, and sincere they were much more likely to favor a life sentence than when they viewed the defendant in the courtroom as emotionally uninvolved and bored.
76 Weisman, “Remorse and Psychopathy” supra note 14 at 203.
77 Ibid.
jurors deduced remorselessness from the defendant’s general demeanor—mainly his lack of emotion during the trial as the prosecution introduced horrific evidence. The defendant’s perceived boredom or indifference made jurors angry. Some saw them as cocky and arrogant, indicating they lacked human compassion.78

Thus, much rides on an appropriate showing of remorse, but exhibiting appropriate remorse through facial expression poses a challenge. Author Beverly Lowry gives this description of Karla Faye Tucker’s attempt to follow her lawyer’s instructions during her murder trial:

[Her lawyer] had told her to try to look dignified and calm and so she was trying to look unmoved by the proceedings and when she did they said she was cold and when she looked out into the courtroom and smiled at [her father] Larry Tucker, the press reported that she had smiled at someone else, and so she never looked out in the courtroom again.79

Alex Kotlowitz, in an account of capital jury deliberations based on his post-trial interviews with the jurors, described how growing understanding and empathy toward a defendant can transform a jury’s interpretation of demeanor. A jury of men and women who strongly favored the death penalty came to spare the life of Jeremy Gross, a capital defendant whom they had convicted of a brutal murder.80 Kotlowitz recounts how the jury, learning about Gross’s own brutal childhood, gradually came to understand him and even to empathize with various aspects of his life. At first, jurors could not look him in the eye, and they adjudged him to be cold and indifferent. As they got to know more about him, they began to view what they initially thought was indifference as shame. This rereading of his demeanor was crucial to their eventual decision to spare him.81

Decision-makers are far less adept at evaluating demeanor than they believe they are and than the legal system assumes them to be.82 Moreover, the

80 Note that in this case both jurors and defendant were white. Email from Alex Kotlowitz to Susan Bandes, 12 Sept. 2003. Thus, the aforementioned problem of an empathic divide based on race was absent.
problems of lack of articulable or consistent criteria, reliance on inaccurate folk knowledge, and the influence of irrelevant or pernicious variables are not confined to the jury. A recent ethnographic study, consisting of interviews with 23 sitting judges, found the judges in substantial disagreement about the indicators of remorse. “Behaviors that suggested remorsefulness to some judges suggested remorselessness to others.”\(^\text{83}\) In addition, some judges were confident of their ability to perceive remorse, while others believed that true remorse is difficult to ascertain. Some judges placed great weight on demeanor or body language, but interpreted specific indicators quite differently. For example, “Some judges believed that putting one’s head down or hanging one’s head was a sign of respect. Others said that it indicated an absence of remorse. Similarly, eye contact or lack thereof could be construed as either respectful or disrespectful.”\(^\text{84}\)

The problem of reading remorse is greatly exacerbated by empathic divides in situations where demeanor must be evaluated across cultural,\(^\text{85}\) ethnic\(^\text{86}\) or racial lines,\(^\text{87}\) or where juvenile\(^\text{88}\) or mentally impaired\(^\text{89}\) defendants are being judged. Bill Bowers, Marla Sandys, and Ben Steiner found, for example, that the empathic divide between the white juror and the black defendant is deep, pervasive, and tenacious. As they reported:

Observing the same defendant and interpreting the same mitigating evidence, black jurors saw a disadvantaged upbringing, remorse, and sincerity, while white jurors saw incorrigibility, a lack of emotion, and deceptive behavior. They discovered that “where a white juror sees black witnesses as faking or putting on, a black juror sees them as sincere. Where a white female juror interprets the black defendant’s demeanor as hard and cold, a black male juror sees him as sorry. Even when a white female juror

\(^{83}\) Zhong et al, supra note 54.

\(^{84}\) Ibid.

\(^{85}\) Duncan, supra note 16 at 1499 (discussing problems of judging demeanor of juveniles in homicide cases).

\(^{86}\) See Everett and Nienstedt, supra note 47 (finding that both race and ethnicity affected evaluations of expressions of remorse).


\(^{88}\) Duncan, supra note 16.

sympathizes with the anguish of the black defendant’s mother, she blames the defendant for it and rationalizes that his execution will be in his mother’s best interest.”

Another study focused on the operation of the Federal Sentencing Guidelines, specifically on the question of whether the incidence of downward departures based on the defendant’s “acceptance of responsibility” differs according to the race or ethnicity of the offender. The researchers found a pronounced difference in sentencing outcome based on race and ethnicity. Although the information available to the decision-makers in these cases went well beyond demeanor evidence, it was clear that court actors responsible for sentencing, including prosecutors, judges, and probation officers, placed significant emphasis on demeanor. The authors posited that cultural differences may affect the court officials’ ability to perceive genuine remorse when it is expressed differently than in their own culture. They also observed that some “culturally defined inhibitions [may] preclude the open demonstration of certain emotional expressions.”

For example, a judge in a region with a large Hispanic population commented on Hispanic males’ difficulty in openly and publicly admitting guilt, “to look you in the eye and say they’re sorry.” Cultural values inculcated in certain racial/ethnic minorities may prohibit such required displays of remorse, just as a judge’s cultural values may preclude him or her from perceiving a valid expression of remorse from a member of a different racial/ethnic group.

Cultural and social norms and display rules also create a problem for those evaluating the remorse of adolescents who are accused of serious crimes. As Martha Grace Duncan explains, remorse becomes a factor at a very early and significant stage in juvenile proceedings: the decision whether to try the

90 Bowers, et. al., supra note 49 at 244–252.
91 USSC 1991: 259. Although “acceptance of responsibility” is not defined, the second application note mentions remorse as a relevant consideration in applying the guideline. Everett and Nienstedt supra note 47 at 101 n2. See also Murphy, Punishment and the Moral Emotions supra note 21 at 156 n34 (discussing the import and rationale of the “acceptance of responsibility” criterion.)
92 Ibid. at 117.
93 Ibid. at 117–118.
accused as a juvenile or as an adult. Since remorse is viewed as a sign that rehabilitation may be possible, it is also viewed as consistent with the “Juvenile Court’s historical mission of rehabilitation.” Remorse plays a similarly significant role at trial and sentencing. Unfortunately, the folk knowledge view of what remorse looks like fails to account for several aspects of adolescent development. First, comprehension of the nature and gravity of the crime may be long delayed, appearing well after the commission of the crime and also well after trial and sentencing. Second, facial expression is likely to be a very poor measure of remorse. Duncan describes a case in which the judge at the juvenile transfer hearing relied heavily on his own perception of the demeanor of a 14-year-old boy accused of murder in concluding that the boy was remorseless (noting “the lack of any expression of emotion or remorse,” characterizing his face as “impassive,” and concluding that he was “amoral.”) Yet as one child psychiatrist put it, “Fourteen-year-olds do not appear remorseful, almost categorically. They feel relatively powerless within the system and react by rebelliousness, which feels authentic to them.” An indifferent or tough front may be a protective shell. In many adolescent circles, youth may “be required to be tough, alien, and mean,” qualities “diametrically opposed to the qualities needed for remorse.”

Mental disability poses an additional set of problems for the evaluation of remorse. As the Supreme Court has noted, psychotropic drugs may affect demeanor and interfere with a defendant’s ability to exhibit appropriate remorse. Mental illness or disability may itself render the defendant’s facial expression or body language an unreliable indicator of his level of remorse. More to the point, the trier of fact, whether judge or jury, may not be cognizant of the effects of mental illness or medication on demeanor and body language generally, or on the ability to display what is considered appropriate remorse.

94 Duncan, supra note 16 at 1476.
95 Rachel Aviv, “No Remorse”, The New Yorker, 55, 63, January 2, 2012. This is problematic when investigative, mental health or legal personnel interpret the lack of “same day contrition” as evidence of remorselessness. Duncan, ibid., at 1491.
96 Duncan, ibid. at 1499.
97 Duncan, ibid.
98 Ibid.
99 Riggins, 504 U.S. at 142.
100 Zhong, supra note 54.
5 Remorse and the Purposes of Punishment

In the previous section I discussed several serious problems with reading remorse from facial expression and body language. It is possible, as I discuss below, that these concerns can be partially met through jury instructions, expert testimony, voir dire, judicial training, and other such interventions. But there are two basic antecedent questions. Are there any external observable indicia that can be said to reflect “actual remorse?” And even if genuine remorse can be read in this way, what relevance does it have to legal concerns?

In the affective sciences, there is a thriving field focusing on the interpretation of facial expressions and “micro” expressions (expressions difficult for the untrained eye to recognize). It is controversial whether internal emotions are ever precisely identifiable by physical indicia like expression or body language, or by physiological signals like flushing or blushing, and whether these indicia remain constant across cultures and contexts for any group of emotions.101 Paul Ekman and others have argued that some emotions, such as anger, fear, pride or shame,102 do have physiological correlates. Others argue, to the contrary, that all emotions are cultural and social constructs, rather than “natural kinds.”103 But even among those who believe in the existence of basic, cross-cultural, physiologically identifiable emotions, there is disagreement about how many such basic emotions exist. In other words, it may be possible to identify positive or negative expressions generally, or even basic expressions

101 The field encompasses two prominent approaches to measuring facial expression: the component approach, which involves objective description and measurement of changes in facial behavior (see, e.g., Ekman, Friesen, and Ancoli, “Facial signs of emotional experience”, 39 Journal of Personality and Social Psychology (1980), 1125), and the judgment approach, which builds on Darwin’s work (see, e.g., “The Expression of Emotions in Man and Animals” (1872)), and which explores the assumption that facial expressions for certain emotions are innate and universal (see, e.g., Ekman, “Argument for basic emotions”, 6 Cognition and Emotion (1992), 169.)


103 Lisa Feldman Barrett wrote a seminal and much debated article in which she argued that emotions are not “natural kinds,” that is, they cannot be reliably correlated with physiological criteria, but are variable constructs, shaped by cultural and social context. Lisa Feldman Barrett, “Emotions as natural kinds?”, 1 Perspectives on Psychological Science, 28 (2007).
such as happiness, anger, fear, surprise, disgust, and sadness, but other emotions may be too variable or too culturally influenced to be universally identifiable. As it stands, there is scant evidence about the facial expressions, body language, or other physiological markers of remorse.

Remorse is regarded as a measure of whether the defendant’s act is consistent with his general character or a deviation from it. According to Weisman, successfully expressed remorse communicates the message that “the self that condemned the act is more real than the self that committed the act.” A failure to communicate remorse indicates that “the self that committed the offending act is the true self.” Remorse is often grouped with the emotions of guilt, shame, and regret. Michael Prove and Steven Tudor, in their comprehensive study of remorse, refer to these emotions, as well as contrition and repentance, as “retractive” emotions. They define these as emotions that involve a retreat from a particular action that would be “otherwise seen as belonging to or associated with the self.” They conclude that remorse has been the least investigated of this group of emotions, and that thus far there is “little evidence of a distinct profile for remorse.”

One study, for example, investigated the ability to distinguish among embarrassment, shame, and guilt as discrete, identifiable emotions. Embarrassment was defined as a reaction to transgression of social norms; shame as a reaction to the failure to live up to central personal expectations; and guilt as a reaction to violation of obligatory moral standards. As discussed above, some of these definitions overlap with some definitions of remorse—for example Deigh’s definition of remorse is similar to this definition of shame, and Murphy’s definition of remorse includes elements of both guilt and shame, as defined here. The study found that whereas embarrassment and shame may be associated

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107 Michael Prove and Steven Tudor, Remorse: Psychological and Jurisprudential Perspectives (2010), 31.
108 Ibid. at 70.
with distinct facial displays, there is no evidence that there is an identifiable facial display of guilt as a discrete emotion. A more recent article surveyed the scholarship on the distinction between shame and embarrassment, and found no consensus about how to distinguish or even define the two concepts, and no consensus on the facial displays associated with either one.\footnote{W. Ray Crozier, “Differentiating Shame from Embarrassment”, 6 Emotion Review (2014), 267. A number of definitions of shame included “the involvement of core aspects of the self, and the impact upon the self. Ibid. at 270. This injury to one’s core conception of oneself is also a feature of many definitions of remorse.} One important lesson conveyed by such studies is that there is no consistent, widely accepted terminology for emotional states. All the definitions used in these studies, however variable, fall within the realm of common usage as well as accepted scholarly usage. This poses a problem for the criminal justice system, in which emotional states like “remorse” have no consistent meaning and no articulated criteria, and yet wield tremendous power.

But the problem with identifying remorse is greater still. First, even if shame and remorse both arise from a failure to live up to personal expectations, remorse generally implies a grave wrong and an understanding of that gravity. It is unlikely that this kind of understanding can be inferred from outward manifestations like facial expression. Even more problematic, remorse generally describes a complex and dynamic process, consisting of not only a backward-looking reaction to the wrongdoing, but also a forward-looking desire to atone for it. If remorse is valued for its likelihood to lead to atonement, it becomes important to distinguish it from an emotion like shame, which may instead lead to a withdrawal from society and continued antisocial behavior.\footnote{Proeve and Tudor supra note 107 at 70. Empirical studies show that shame is associated with an increased likelihood of recidivism, as compared to guilt. Ibid. at 90–91.}

In short, remorse appears to be more than simply an emotion. If it is an emotion, it is not a transient one. We might describe a defendant as appearing angry or cold or sad as he sits in the courtroom. Our description may or may not be accurate, but it is plausible that we can discern these emotional states based on observation. Perhaps even regret or shame can plausibly be discerned by observing demeanor. The term remorse, however, implies a less transient state, and even if fleeting remorse is possible, it hardly seems to be an attitude that should prompt leniency. Instead, remorse is a complex state, or attitude, consisting of reflection on one’s past acts, an abiding sense of distress, and a desire to take future actions. It does not seem plausible that this complex and unfolding state can be discerned from demeanor at a single point in time.
Note that this is not a point about fakery or sincerity. Fakery is always possible in the courtroom; the problem of insincere performance (often abetted by coaching) is hardly confined to remorse. The point, rather, is that even assuming that one is experiencing genuine, sincere remorse, it is doubtful that remorse is a quality that can be conveyed solely by facial expression and body language. This objection to reading remorse from demeanor shares some common ground with several of the powerful arguments Jeffrie Murphy has made against the legal uses of remorse. With typical dry wit, Murphy observes:

Issues of deep character are matters about which the state is probably incompetent to judge—it cannot even deliver the mail very efficiently, after all—and which, for that reason and others, might well be regarded as simply none of the state's business.¹¹²

Murphy’s objections, both normative and practical, are premised on the notion that remorse is an aspect of deep character. One of these objections concerns the invasion of dignity and autonomy: the law may ask us to conform our behavior to certain norms, but it should have no dominion over our thoughts, desires, and souls.¹¹³ The related practical objection is more germane to this article: even if it were permissible for the state to pass judgment on deep character, it has no viable means of discerning that character.

Is it normatively justifiable or desirable for decisions on guilt or punishment to hinge on such fine-grained judgments about deep character, or in more theological terms, about the condition of the soul of the accused? Addressing this question requires examination of the purposes of punishment. Is a demand for remorse, or a penalty for the lack of remorse, consistent with the standard deterrent, rehabilitative, or retributive aims of punishment? Is it consistent with the more recent focus on the expressive aims of punishment or on restorative justice?

In the case of retributivism keyed to the harm caused by the crime (grievance retributivism), remorse appears irrelevant to the calculus. As to retributivism

¹¹² Murphy, “Remorse, Apology, and Mercy”, supra note 66 at 437.
¹¹³ Murphy also makes the important point that injecting arguably religious inquiries about the state of one's soul into the secular realm of criminal justice may corrupt not only the criminal justice system but also the religious realm. Once the outcome of criminal matters is made to depend on spiritual matters, there is the temptation to confuse "genuine repentance with soul-damaging fakery, hypocrisy, and self-deception." Murphy, Punishment and the Moral Emotions supra note 21 at 150.
keyed in part to the character of the offender, however (character retributivism), remorse might be relevant. Note that this focus on developing character seems to require the decision maker to take into account the offender’s behavior and attitude post-sentencing (for example, Karla Faye Tucker’s turn to remorse during her years on death row).114 This would be a substantial departure from current practice, and would present a variety of practical problems that would need to be addressed.

Remorse suggests that a defendant will strive to avoid such aberrant and concededly wrong behavior in the future rather than pose a continuing danger to society. In other words, the argument is that he does not need specific deterrence, or does not need to be incapacitated—at least not for as long as the unrepentant offender. Whether remorse affects the general deterrence calculus is a difficult issue. The question appears relevant only if the goal is to deter crimes unaccompanied by remorse more strongly than crimes accompanied by remorse. As Murphy points out, deterrence is directed at fear and self-interest, “not moral and spiritual rebirth.”115

Remorse, at least when articulated publicly, has expressive value: it signals to the victim and to society that although there has been an injury to the social fabric, there has also been an acceptance of responsibility and even repentance. For example, Stephen Garvey, following Jean Hampton, speaks of the “annulment” theory, which “sees punishment as the institutional means by which the organized community condemns wrongdoing and vindicates the value of those members whom other members have wronged.”116

Under expressive theories of punishment, the unrepentant offender may necessitate a more emphatic expression of community opprobrium than a remorseful one, though Proeve and Tudor convincingly argue that the “self-reproach inherent in remorse cannot serve as a simple substitute for the [formal] denunciation or censure” of a judge.117 This focus on repairing the rupture that the harm has caused to the community has been supplemented in recent years by a more particular focus on repairing the harm to the victims and their families. This general movement toward incorporating the viewpoints and needs of victims and survivors into the criminal justice system has included some specific efforts to incorporate the communication of remorse. Victim-centered theories of punishment and theories associated with the restorative justice approach may emphasize the effects of a defendant’s remorse on the

115 Murphy, “Remorse, Apology, and Mercy”, supra note 66 at 43.
117 Proeve and Tudor, supra note 107 at 121.
well-being of victims or survivors, or of the community more broadly. For example, Stephanos Bibas and Richard Bierchbach propose better integrating remorse and apology into the criminal justice system. They advocate face-to-face interactions between offender and offended both to impress upon the offender the real world consequences of the crime and to help victims “learn why the crime happened, receive needed assurance that it was not their fault, overcome their resentment, and see offenders as redeemable human beings.” They argue that the focus on remorse and apology would “teach offenders lessons, vindicate victims, and encourage communities to welcome wrongdoers back into the fold.”

The above arguments can be framed more critically. Evaluating remorse may be a flawed proxy for more relevant inquiries. We may believe that the remorseful defendant is less likely to recidivate. Indeed, Weisman refers to a “widespread belief that there is a correlation between remorse and recidivism.” Judge Posner, for example, expressed this common notion in United States v. Beserra, observing that: “A person who is conscious of having done wrong, and who feels genuine remorse for his wrong... is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are.” But this is an empirical question. Does remorse correlate with changed behavior in practice? The empirical evidence on the connection between remorse and recidivism is mixed, and there is no firm evidence supporting the view that remorse predicts reduced recidivism. As Murphy points out, even for the genuinely remorseful, there is a real danger of backsliding. Likewise, we may believe the

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118 See Stephanos Bibas and Richard A. Bierschbach, “Integrating Remorse and Apology into Criminal Procedure”, 114 Yale L.J. 85 (2004), 114-115 (arguing for the importance of face-to-face interaction as a means of conveying the offender’s remorse and other emotions to the victim).


120 Bibas and Bierschbach supra note 118 at 115.

121 Bibas and Bierschbach, ibid. at 90.

122 At least one set of studies supports the conclusion that the importance accorded to remorse is based in large part on the assumption that the remorseful defendant is less likely to repeat the offending behavior. Gregg J. Gold and Bernard Weiner, “Remorse, Confession, Group Identity, and Expectancies about Repeating a Transgression”, 22 Basic and Applied Social Psychology (2000), 291.

123 Weisman, Showing Remorse, supra note 55.

124 967 F.2d 254, 256 (7th Cir. 1992) quoted in Bibas and Bierschbach, supra note 118 at 95.

125 Weisman, “Showing Remorse” supra note 17 at 7. Proeve and Tudor supra note 107 at 90, 120-12, though Pr.

126 Murphy, “Remorse, Apology, and Mercy”, supra note 66 at 439.
remorseful defendant poses less danger to society. This too is an empirical question. Although I know of no studies on the correlation between remorse and future dangerousness, there is ample evidence of the difficulty of predicting dangerousness,\textsuperscript{127} and of the pernicious influence of racial stereotypes (including “stereotypical racial appearance”) on predictions of dangerousness.\textsuperscript{128} Finally, the restorative justice movement generally and victim-offender mediation in particular raise a host of theoretical, practical, and empirical questions to which I cannot begin to do justice here. Most basically, they raise two important sets of questions. First, do face-to-face encounters bring about the desired results? Second, what effect do they have on the fairness of the trial as a whole and on the constitutional protections the defendant is guaranteed?\textsuperscript{129}

A full discussion of the theoretical justifications for involving the criminal justice system in the evaluation, elicitation, and communication of remorse is beyond the scope of this article.\textsuperscript{130} For my purposes, the point is a narrower one. All the theories and justifications addressed above are premised on the power of genuine remorse. They all assume that the evaluation of genuine remorse is a task that not only should but also can be accomplished in a courtroom. Bibas and Bierschbach, for example, explain that to comply with their proposal, “the offender should both feel sorry and express this sorrow.”\textsuperscript{131} To return to the language of the Supreme Court, the trier of fact attempts not just to evaluate or predict behavior, but “to know the heart and mind of the offender.”\textsuperscript{132} There is no evidence that deep character of this sort can be assessed or illuminated by observing the facial expressions and body language

\textsuperscript{129}See Proeve and Tudor supra note 107 at 187-205 for an excellent discussion of remorse and restorative justice.
\textsuperscript{130}There are particular theoretical problems arising from the evaluation of remorse at the guilt stage, when these justifications for punishment are, naturally, irrelevant. Reading a cold, arrogant demeanor as evidence that the defendant was likely to have committed the charged crime (quite apart from the practical problem of accuracy) is arguably a form of inadmissible character evidence; a focus on the defendant’s supposed character rather than on his acts. See Levenson, supra note 89.
\textsuperscript{131}Bibas and Bierchbach supra note 118 at 90.
\textsuperscript{132}Riggins, 504 U.S. at 142.
of a defendant sitting silently in a courtroom. There is ample evidence that such assessments can be distorted by a host of factors, such as race, age, class, and ethnicity. Even when additional clues, such as verbal testimony, are available, there is reason to be extremely skeptical of the ability of the legal system to gauge genuine remorse.

Murphy takes the view that for these reasons and others remorse should carry little weight in sentencing (although he does believe that it can play a legitimate role in clemency decisions). Granting his point about the difficulties of evaluation, there remains the separate question of whether remorse can be kept off-limits. I doubt that it is possible for the criminal justice system to simply put questions of remorse aside when assessing guilt and punishment. Feelings of remorse are often difficult to separate from other emotions an offender is expected to feel if he is to be treated with respect or leniency, such as empathy or compassion toward the victim or his family, shame at the act, or a desire to learn and change (i.e., to begin work on his rehabilitation). Remorse is deeply ingrained in the fabric of judgments of criminal culpability and sentencing. Ultimately, the appropriate role of remorse in assessing punishment is difficult to disentangle from the question of why we punish—a question that is essential to debate, but that is unlikely to be definitively resolved.

6 Solutions

I have argued elsewhere, in response to Murphy, that evaluation of remorse, in some form, is probably impossible to forbid, and that we should therefore concentrate on guiding decision-makers on how to improve their evaluative

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133 Stephanos Bibas and others who would like to integrate remorse and apology into the criminal justice system have argued for the importance of face-to-face apologies to crime victims, in part because they permit the communication of facial expression and body language. See Bibas and Bierchbach supra note 118 at 114–115. Their argument contemplates verbal apologies, in which the defendant's facial expression and body language are one component of sincere communication and of the effort to put the offender's crime in context.

134 See, e.g., Murphy, Punishment and the Moral Emotions, supra note 21 at 161. Murphy notes that he remains ambivalent about the role of remorse in sentencing.

135 Weisman, “Remorse and Psychopathy”, supra note 14 at 204.

abilities and understand their limitations.\textsuperscript{137} I now turn to the question of how the legal system might address these issues.

Although it may not be possible to take remorse off the table entirely, it is important to note that criminal justice systems have many choices about how much weight to accord to remorse. To take a clear example, statutes such as the Federal Sentencing Guidelines in the U.S.\textsuperscript{138} and the Canadian Criminal Code\textsuperscript{139} offer a sentence reduction for a convincing showing of remorse, and many U.S. state courts have explicitly found the absence of remorse to be an appropriate aggravating factor when calculating criminal punishment.\textsuperscript{140} The failure to display remorse and therefore accept responsibility for one’s crime and its consequences is often an explicit reason for more severe probation recommendations, denial of parole,\textsuperscript{141} or other decisions penalizing defendants and prisoners. Indeed, as Weisman has documented, one of many hurdles for the wrongfully convicted is their inability to satisfy the demand that they accept responsibility for their crimes. He notes: “A long list can be compiled from among the annals of the wrongfully convicted in Canada, in which parole was denied or temporary absences refused because of a continued assertion of innocence.”\textsuperscript{142} Even when denial of parole is not expressly justified by lack of remorse, it may be based on the failure to participate in therapeutic or rehabilitative programs that accept only those inmates who take responsibility for their crimes, thereby barring those who continue to assert their innocence on the basis that they refuse to express remorse.\textsuperscript{143}

Regimes that emphasize restorative justice place a premium on acceptance of responsibility, remorse, and apology. As Weisman demonstrates, in a restorative as opposed to a retributive regime, “expressions of remorse play a role in

\textsuperscript{137} Susan Bandes, “Evaluation of Remorse is Here to Stay: We Should Focus on Improving Its Dynamics”, in Robinson and Garvey, supra note 64, in response to Jeffrie Murphy, “Remorse, Apology, and Mercy”, at Robinson and Garvey, ibid. at 185.


\textsuperscript{139} Richard Weisman, “Detecting Remorse and Its Absence in the Criminal Justice System”, 19 Studies in Law, Politics, and Society (1999), 121, 123 citing Sec. 721(3)(a) of the Criminal Code, which prescribes that “willingness to make amends” be included in the report, a phrase which “has been interpreted as tantamount to requiring an evaluation of whether or not the offender shows remorse.”

\textsuperscript{140} Ward, supra note 58.

\textsuperscript{141} Robinson, Smith-Lovin, and Tsoudis, supra note 11.

\textsuperscript{142} Weisman, “Showing Remorse”, supra note 17 at 128.

\textsuperscript{143} Ibid.
whether to impose conditional sentences.”

But even in a more traditional retributive setting, prosecutors are generally permitted to comment on the defendant’s lack of remorse, despite the fact that when such comments are based on non-testimonial demeanor, they may be in significant tension with the defendant’s right not to testify. In short, whether or not remorse can be rendered irrelevant, legal systems have numerous opportunities to enhance or downplay its role in conviction, sentencing, and other decisions affecting life and liberty.

Assuming that evaluation of remorse continues to be a factor, other reforms should be examined. Decision makers can be educated about the appropriate role of remorse and about the difficulties of identifying remorse. One possibility is jury instructions. The Supreme Court has upheld the “anti-sympathy” instruction, which commanded capital juries in California to put their sympathy aside when determining the defendant’s sentence. Where appropriate, juries can be similarly instructed not to consider the defendant’s remorse or lack thereof. One critique of the anti-sympathy instruction is that it fails to define sympathy; an instruction on remorse could address this deficit. Juries can also be instructed about the relevance of remorse to various

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144 Ibid. at 123.
145 For a full discussion of the relevant law on this issue, see Levenson, supra note 89 at 609–614. For discussion of the problem in the capital context, see Jules Epstein, “Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding ‘Lack of Remorse’ Testimony and Argument in Capital Sentencing Proceedings”, 14 Temple Political & Civil Rights Law Review (2004), 45. It is generally agreed that a capital defendant is entitled to have the jury instructed that it should draw no adverse inference from his failure to testify at the guilt phase. See, e.g., Griffin v. California, 380 U.S. 609 (1965); Carter v. Kentucky, 450 U.S. 288 (1981) (general rule on instruction cautioning against adverse inference from failure to testify) and Caldwell v. State, 818 S.W.2d 790, 800 (Tex. Crim. App. 1991) (comments on failure to express remorse as a result of failure to testify violate the 5th Amendment, but the prosecutor may comment on testimony given during the guilt phase that denies responsibility for the crime). However, the doctrine is still unsettled on whether the prosecutor may comment on the defendant’s lack of remorse when the defendant did not testify in the penalty phase. See, e.g., Burns v. Secretary, 720 F.3d 1296 (1st Cir. 2013) (prosecutor may seek to demonstrate lack of remorse when defendant’s remorse was raised by his witnesses in mitigation at the penalty phase; this is not necessarily a comment on his failure to testify).
147 Susan A. Bandes, “Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty”, 33 Vermont L. Rev. (2009), 489, 495–498. Another critique is that it singles out one emotion as off-limits, implying that all other emotions elicited by the testimony may appropriately guide the decision of the penalty-phase jury. Ibid.
determinations, if any, and about what weight to accord it. An instruction on the limits of demeanor evidence is another possibility. Expert testimony can also be helpful on several issues. It could address the limits of demeanor evidence generally. More specifically, it could address the problems of assessing remorse based on facial expression overall, or in specific contexts, such as assessment of juveniles, assessment of the mentally disabled, or assessment across racial lines. Yet another reform that could help address some of the problems of assessing remorse across racial, ethnic, and cultural divides would be to work toward impaneling more diverse juries. Finally, it is important to remember that it is not only juries but also judges, parole officers, probation boards, and other decision makers who often take an “I know it when I see it” approach to remorse. In some cases discretion can be guided (or better guided) through the provision of more specific statutory or administrative criteria. In addition informing decision makers about psychological and sociological research on these issues is essential.

7 Conclusion

This article demonstrates that in the legal realm, serious consequences, including loss of life or liberty, hinge on whether a defendant displays what is regarded as appropriate remorse through facial expression and body language. It argues that there is currently no good evidence that remorse can be evaluated based on facial expression and body language, and that there is significant evidence that evaluation of remorse is influenced by racial, ethnic, and cultural divides, among other extra-legal or outright illegal factors. Nevertheless, it recognizes that as long as we adhere to the longstanding traditions of open courtrooms in which demeanor is evaluated, it will be difficult to entirely remove evaluation of a defendant’s remorse from the process of assessing guilt and assigning punishment. Therefore, it is crucial for emotion researchers to learn more about the dynamics of remorse, and it is crucial to reform the criminal justice system to better reflect our current knowledge and its limitations.

148 Levenson supra note 89 at 628–633.
149 See Duncan, supra note 16 at 1517–1518. Duncan cautions that though experts can be helpful, they are no panacea, in part because they may disagree.
150 Everett and Nienstedt, supra note 47 (discussing the contribution of mental health experts to the process of judicial evaluation of remorse displayed by mentally ill offenders); Stobbs and Kebbell, supra note 52.
Several steps need to be taken both by the legal system and by affective scientists and social scientists. Emotion researchers, particularly those working in the burgeoning field of facial expression, ought to make the study of remorse and related emotions a priority. The disconnect between legal claims and underlying scientific and social scientific evidence in this field underscores the importance of interdisciplinary research, and of apprising the legal system of the relevant results of that research. The legal system is operating based on unsupported folk knowledge. The influence of this folk knowledge about remorse on legal decision makers has been convincingly shown. It is time to thoroughly investigate its accuracy in light of findings from other disciplines. Is remorse something that can be identified or evaluated in a courtroom? When decision makers say that they are evaluating remorse, what do they mean? Is there any correlation between remorse and future behavior? The answers to these empirical questions can help inform the debate about the role of remorse. Ultimately, however, the legal system must consider what role remorse is meant to serve in the criminal justice system. The answer to this question depends on the particular legal context (e.g., parole hearing, clemency hearing, capital sentencing hearing) and on our notions of what ends punishment is intended to serve.

As I have argued above, the legal system has many choices about when to demand showings of remorse and when to penalize the lack of remorse. The available evidence establishes that evaluating remorse from facial expression and body language is imprecise if it is possible at all, and that the use of remorse as a factor in punishment permits or even encourages selective empathy based on race, mental disability, and other pernicious factors. In light of this evidence, the legal system ought to take every opportunity to minimize the occasions on which consequences hinge on such an evaluation. To the extent that this cannot be done, for example, when defendants are in an open courtroom and human nature leads decision makers to evaluate their remorse, there are a number of ameliorative steps available to the legal system, including jury instructions, judicial training, and use of expert testimony.