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The Double-Edged Sword of Remorse and Emotions in Research on Criminal-Legal Decision-makers

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Abstract

Across courtroom proceedings and particularly during sentencing, criminal-legal decision-makers often want to see that a defendant has recognized the harm they have caused and will take action to minimize the risks of it repeating. This prioritization of acknowledging, regretting, and repairing harm is frequently recognized through emotions, body language, words, and behaviors. Yet remorse, often the sought-after emotional response in criminal-legal contexts, is far more complicated. An emotion that conveys empathy, self-reflection, and growth could also communicate guilt, manipulation, and selfishness. Highlighting the multifaceted nature of remorse and its competing emotional interpretations, this chapter discusses how the allowance and evaluation of remorse in the criminal-legal system operates as a double-edged sword for defendants and decision-makers. Specifically, the methods and findings of our prior work with probation officers and judges help to extrapolate these emotional complexities.

Introduction

In the field of criminology, we look at how social and criminological theory intersect with and dictate the functions of criminal-legal institutions and their agents. Across these areas, affect and emotion become extremely important for both those in authority and those subordinated to the controls of such institutions. We want to control crime, yet ensure due process; we want to evaluate defendants and their crimes objectively, yet account for aggravating and mitigating factors; and we want to lead with facts and evidence, yet consider individual histories, emotions, trauma, and relative harm. The criminal-legal system is complex, and such complexities play essential roles, particularly for defendants.

While criminal trials are rooted in tradition and structure, the role of affect, particularly the expression of remorse in the courtroom, is often a stone left unturned. To gain deeper insight, we took qualitative approaches to examine how criminal-legal actors and agents–particularly probation officers and state court judges–use, account for, and adjudicate defendants' remorse in the criminal-legal system, specifically during sentencing. By focusing on affect, we encourage court actors, defendants, and their representation to engage further with remorse in criminal-legal proceedings.

State of the Art

Remorse has been influential in criminal-legal proceedings worldwide for quite some time (Rossmanith, 2015), with its impact on decision-making often hotly debated (See: Bagaric & Amarasekara, 2001; Bandes, 2014; Bibas & Bierschbach, 2004; Tudor, 2005). Accounting for

and assessing human emotion in criminal-legal proceedings is not easy, and its effects are often variable in relation to case outcomes (Proeve & Tudor, 2010). For these reasons, the role of emotion in the courtroom and the assessment of remorse, as an amorphous characteristic, has become one of the focal points of our work. While it is largely understood that expressions of genuine remorse can be indicators of rehabilitation and the likelihood of recidivism (Zhong, 2015; Bandes, 2014), receiving, judging, and assessing one's remorse remains a challenge for criminal-legal decision-makers.

As remorse may be subjectively perceived, a defendant's expression of remorse may be perceived as genuine by one person and insincere by another; this represents a leading concern for scholars who argue that the subjectivity in its assessment is a cause for removing remorse from consideration and weight in the courtroom, especially during sentencing (Bagaric & Amarasekara, 2001). Subjective and biased interpretations of remorse may stem from several sources, many of which appear to be related to recognizing when a person is showing "true" remorse. While some argue that assessing remorse is a "gut feeling" based on intuitively knowing someone is apologetic and condemns their behavior (Heumann et al., 2019), others suggest that we experience a certain level of "embodied affect" that can indicate another person's remorse (Rossmanith, 2015). However, there is great uncertainty in how to really "know" when someone is being sincere (Berryessa, 2021, 2022a; Weisman, 2009).

To account for the complexity, nuance, and relativity of remorse in the courtroom, we have utilized qualitative methods to engage with perceptions of remorse by criminal-legal decision-makers on a deeper level. Quantitative methods may not be best suited for capturing a wide range of emotions and how they are expressed, especially when utilizing inductive frameworks. Therefore, our methodology and data consist of semi-structured interviews with

those receiving a defendant's expressions of remorse to understand better how criminal-legal decision-makers assess these displays and use them to shape the sentencing process. Our research thus far has focused on the perceptions of probation officers and state court judges. Remorse is considered an extralegal factor in sentencing; probation officers may draw from it while recommending sentences (Berryessa, 2022a; 2022b), while judges may use it as a mitigating factor within sentencing guidelines (Proeve & Tudor, 2010; Tudor, 2008).

Although the existence of remorse as a sentencing factor has been previously explored, our research has focused on areas that have been minimally studied. How people communicate and demonstrate remorse can vary greatly, often shaped by their backgrounds, personality, mental health, cultural background, education, emotional intelligence, and other individual-level factors. Humans often are implicitly influenced by several psychological factors, such as biases, remorse bias, and fundamental attribution error, that can impact whether expressions of remorse by some defendants are perceived as more genuine or sincere than others (Berryessa, 2021). As such, the study of remorse, especially in sentencing, necessitates the intersection of affect theory, psychology, law, and criminology at large (Proeve & Tudor, 2010).

Further, logistical issues with legal procedures and representation (Zhong, 2015), alongside the courtroom environment (Carline et al., 2024), can complicate expressing remorse for defendants. We describe this complicated relationship as a double-edged sword, in which the expression of remorse may mitigate a sentence, but also indicate guilt; this could lead to self-incrimination and/or a loss of an appeal (Zhong, 2015). Additionally, although defendants may be expected to communicate remorse in certain situations, the intimidating courtroom environment may make such vulnerability difficult (Carline et al., 2024). As such, we strive to make theoretical and empirical contributions regarding the importance of affect and emotion for

both the defendant and criminal-legal actors. Thus, for the scope of our work, we draw from the perspectives of probation officers and judges to gain better insight and understanding into what factors they use to assess remorse and how they utilize it in their jobs and decision-making, especially during sentencing.

Showcase Your Own Research

Probation Officers

When contacting probation officers through the American Probation and Parole Association, we obtained interviews from 151 officers. During these interviews, the officers were asked questions stemming from 5 different categories rooted in Patton's (2015) questions to utilize when conducting interviews (Berryessa, 2022a; Berryessa, 2022b; Berryessa, 2023a). These categories consisted of how probation officers assess remorse in their clients, how they decide what factors are important in assessing remorse, what information they deem relevant to include about remorse in their recommendations, their utilization of remorse in making those recommendations, and finally, basic demographic information (Berryessa, 2023a).

Constant comparative methodology, also considered interpretive grounded theory, was used to analyze transcripts of the interviews (Boeije, 2002; Kolb, 2012; Olson et al., 2016). This methodology necessitates systematic analysis and multiple stages of coding to compare the data between interviews (Strauss & Corbin, 1994). This allows for the development of theory and the building of thick descriptions of how probation officers use remorse in their sentencing recommendations and evaluating defendants. For complete information on the methodology and findings, please refer to Berryessa (2022a; 2022b; 2023a; 2023b).

Results paint a complex picture of remorse and its utility for probation officers. In one of the first studies emerging from these interviews, Berryessa (2022a) examined the role of implicit

cognitive processes, specifically remorse bias, in a probation officer's evaluation of a defendant's remorse for violent offenses. Officers reported that documenting a defendant's remorse, or lack thereof, is essential to their presentencing recommendations. One officer even stated, "In my report, if a defendant is remorseful or not...is more important than looking at a person's background history" (Berryessa, 2023a).

However, when it came to how they actually evaluate remorse, several issues emerged. Officers appeared to rely on violence "signals," which are characteristics of defendants that suggested to them that a defendant has a high likelihood for violent such as maleness, culture, gang affiliation, a lengthy criminal record, or a history of substance abuse, when considering whether a defendant's remorse expressions were genuine; specifically, probation officers would link these characteristics to behaviors or qualities that may "signal" a potential for violence or recidivating (Berryessa, 2022a).

When evaluating defendants with violence "signals," officers also appeared to show a social cognitive bias that attributed a defendant's violence and criminality to internal and personality characteristics, as opposed to external or situational factors. This specifically emerged when officers discussed a defendant's "criminal thinking" and how they thought about the world (Berryessa, 2022a). When evaluating their remorse, officers also had issues empathizing and reading the emotions of defendants with violence "signals. For example, some female probation officers struggled with empathizing with and "feeling" the emotions of male defendants, which led to tremendous difficulties in assessing the remorse of male defendants (Berryessa, 2022a). Similarly, some had issues empathizing with those who were gang-involved because they come from vastly different "inner worlds" about how they view and interact with the world (Berryessa, 2022a). Through these cognitive processes, officers shaped negative

remorse-based narratives within their pre-sentencing recommendations and suggested the use of more punitive measures for these defendants in sentencing.

Berryessa (2022b) used these same data to formulate a qualitative framework for how probation officers use Therapeutic Jurisprudence, which considers how the law can achieve more therapeutic outcomes for defendants, in their evaluations of remorse and how it can serve as evidence for a defendant's potential for reconciliation and rehabilitation during sentencing. Results found that officers believe remorse can serve several therapeutic purposes during sentencing. First, remorse was viewed as therapeutic guilt–in which an individual acknowledges, regrets, and condemns the harm they have caused and in turn demonstrates active changes to their behavior–that can lead to sentencing recommendations that maximize the rehabilitation of defendants. Second, remorse was viewed as a "rebalancing power"– in which opportunities for a defendant to take responsibility, seek and receive forgiveness, and apologize and repay victims and communities–that can lead to sentencing recommendations that maximize the reconciliation of defendants with victims and the community.

Berryessa (2023a) drew upon these data to analyze and understand how officers used a defendant's remorse within the focal concerns framework to impact their recommendations for sentencing. Findings suggested that probation officers utilized a defendant's remorse to assess three primary concerns for sentencing. First, expressing remorse indicated that a defendant may have a reduced level of responsibility and intention for the respective crime (level of blameworthiness). Second, a defendant's expressions of remorse suggested to officers that there is a reduced need for their community protection and that they have a high possibility of reform (community protection). Finally, expressing remorse was viewed to have potential practical impacts on correctional resources and their caseload efficiency, so fewer resources and

supervision would be required for defendants who express remorse (Berryessa, 2023a). The first two concerns mentioned here contributed heavily to officers' sentencing recommendations (Berryessa, 2023a).

Finally, Berryessa (2023b) investigated the impact of mental illness and psychiatric diagnoses on their evaluations of defendants' remorse, as well as how this led to recommendations for a diverted sentence. Results suggested that officers considered psychiatric diagnoses within their evaluations of remorse in three central ways. First, they considered whether diagnoses may result in defendants having difficulties expressing remorse, such as struggling to effectively display it in normative ways, and that this led to concerns about how to best assess non-normative expressions of remorse. Second, officers battled with how the symptoms of defendants' diagnoses may interfere with the emotional complexities used to develop feelings of "true" remorse (Berryessa, 2023b). Third, some officers appeared to stigmatize and more critically evaluate remorse displays by defendants with psychiatric illnesses. They believed that psychiatric diagnoses could make defendants more unpredictable and perhaps impulsive, and, thus, there is caution and suspicion around defendants' abilities to feel and demonstrate genuine remorse.

In conclusion, these studies' findings demonstrate that there is much to learn from probation officers and their use of remorse during sentencing. Indeed, remorse and its affective features appear to bear heavily on probation officers' thought processes, evaluations, and decision-making when interacting with their clients and considering their outcomes.

Judges

Our most recent work has assessed state-level judges' perceptions of defendants' expressions of remorse and how such displays impact how judges operationalize their sentencing

goals. We interviewed 61 state court judges from around the United States and asked an array of questions that encouraged them to ponder how they defined remorse, what remorse can look like with regards to expressions from defendants, the times they have witnessed genuine and insincere displays of remorse, and how they evaluate a defendant's remorse. We also learned about their professional experiences before they were a judge, the type of courtroom(s) they oversee, and basic demographic information.

Thematic analysis, originating from content analysis and further developed by Braun & Clarke (2006; 2022), was utilized to identify codes, sub-codes, and general themes throughout the interviews. Though the semi-structured interview protocol guided much of the coding process, open coding was also used to consider themes that emerged outside the prompted questions (Strauss & Corbin, 1994). This methodology allowed us to deeply engage with what judges thought about and spoke about regarding the role of remorse in the courtroom. This thematic analysis also included Charmaz's (2006) ideals of grounded theory, which prioritize the context-dependent constructivist view of how participants shape their reality and inductive, co-constructed perspectives of their responses (Charmaz, 2006). As this research has yet to be published, more information on the study's methodology, as well as findings, are available upon request.

Overall, findings appear to reinforce preexisting concerns about evaluating the affective quality of remorse, such as the uncertainty in detecting genuine remorse (Bandes, 2014), using a "gut feeling" in evaluating remorse (Heumann et al., 2019), and considering the positive and negative motives that may induce remorse (Tudor, 2008). In fact, some judges cited concerns about "crocodile tears" or putting on a show, in which they feared a defendant may fake

emotional displays of remorse to receive a sentencing discount. As a result, many judges

appeared incredibly skeptical of any affective demonstrations of remorse.

At the same time, judges said that defendants' expressions of remorse can help streamline

and inform their decision-making and save resources. As one judge puts it pointedly,

> "I think generally it is very useful. I think it certainly helps and guides the judges
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> because I think; again, most of us are looking for that. We're looking for that
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> expression at least at the time of sentencing. And I think that impacts how much
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> intervention we think we need to put in place…whereas if they already have that
>
> mindset of remorse and they've already started thinking about their actions, I
>
> think we, as a judiciary… perhaps do not need to intervene as strongly."

For judges, remorse also serves a larger, more abstract purpose: humanizing and legitimizing the

justice system. As one judge from Georgia explains here:

> "I think remorse… sets the tone for the criminal justice system. It keeps humanity
>
> in our criminal justice system. I think sometimes we get systemic, we get robotic.
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> We just kind of treat it like it's just everyday society. And I think that remorse
>
> helps bring – humanizes the criminal justice system. And we can't lose our
>
> humanity."

Indeed, while the evaluation of remorse may be inconsistent and controversial, the inclusion and

reliance of remorse in relation to decision-making within criminal-legal proceedings serves a

purpose and is a fundamental aspect of the court. Specifically, it is the grease that keeps the

wheels of the court moving.

Despite these beliefs, judges appeared to believe that remorse does not typically

significantly mitigate a sentence drastically. This may also be related to judges' feelings that they

should not overly punish someone for a lack of remorse and that lack of remorse cannot be used explicitly as an aggravating factor in sentencing in at least some states (Dinkines v State, 2013). Several judges also expressed awareness that the courtroom environment can make it incredibly difficult for individuals to express emotion, emphasizing the concerns of Carline et al. (2024). Some even cited the literal positionality of judges being physically higher than them, and how that makes vulnerability and overall communication difficult. Others mentioned that many defendants do not have much family that comes to support them in court, also insinuating that there may not be much emotional support or familiarity that could make the environment more comfortable.

Judges in our study, similar to prior work related to remorse more generally, also discussed whether feeling remorse is an inherent trait born within us (i.e., nature) or if it is an emotion that must be taught and cultivated by others (i.e., nurture) (Bandes, 2014; Proeve & Tudor, 2010). This debate especially appears to shape perceived levels of blameworthiness, in some cases, mainly related to a defendant's age. For some judges, typically if the defendant was younger and there was information that they grew up in a dysfunctional household and/or lacked education (and lack of parental oversight), there were lower expectations of showing remorse– based on beliefs that it may be more challenging for those defendants to be empathetic towards another person's pain based on learned behaviors and their upbringing. Other judges felt that remorse is an innate human connection, but were still conflicted by the factors that may prevent someone from expressing such remorse. As one judge from Oregon describes it, while facing an internal contradiction:

"… [remorse] is that human connection thing that we all seem to have,

that emotional tie that we all seem to have with each other… there's like this

certain way that people express remorse that almost everybody can relate to. But then I'm very aware that like there's this whole other thing where folks are actually either wanting to express remorse or just don't know how to do it that we might miss."

Finally, judges also explained how remorse served several purposes in the justice system for defendants, victims, and communities. For defendants, judges believed that allowing them to process and express remorse encourages them to be emotionally reflective and heal from the harm they have caused to others and themselves. The notion of the victim-to-offender cycle was prominent in these discussions, which suggested that discerning the victims and perpetrators in a case is not always so black and white. For victims, some judges believed that expressions of remorse by defendants may allow them to feel a sense of closure and inner peace, and become more aware of the intentions and reasoning behind the defendant's harm. By hearing and "feeling" that the defendant is remorseful, it may ease some victims' feelings of fear and anxiety that they will be harmed again. This can also alleviate the potential by-products and PTSD-related symptoms stemming from the harm committed, as well as provide a sense of resolution for all parties. For communities, judges believed that demonstrations of remorse can better indicate to them which defendants may or may not be a risk to society and who may be further along in their processes of reflection and rehabilitation. The more a defendant can emotionally express themselves and their remorse, take responsibility, and acknowledge the harm they have caused–the closer they may be to being a productive member of society and abstaining from future criminal behavior.

Summary of Our Findings

Our research provides new insights into several aspects of emotional perception in the courtroom on behalf of criminal-legal decision-makers, particularly how considering and weighing remorse in criminal-legal processes may act as a double-edged sword. These findings are important given the diverse and often paradoxical goals and expectations these decision-makers must satisfy during the criminal-legal process. Many of these goals are priorities of the system, but are also formally embedded in sentencing principles that some judges *must* consider during sentencing due to legislative mandates. Despite sentencing guidelines and factors being prescribed across sentencing systems, there is little literature on the role of affect and perceptions of remorse in sentencing and court proceedings. Through our findings, we dig into the "black box" of affect and build a working understanding of how judges and probation officers operationalize the various goals of sentencing alongside their considerations of remorse.

Part of this operationalization for probation officers and judges is evaluating what factors will mitigate and aggravate sentencing. Historically, there have been several rationales for including remorse as a mitigating factor for sentences. As argued by Tudor (2008), the inclusion of remorse in sentencing practices may make punishment redundant; yet, offering remorse as a mitigating factor can encourage defendants to express such emotions, which may benefit all parties involved (this was also present in our interviews with judges). Similarly, our data also suggest that demonstrations of remorse usually mean that defendants have reflected upon their actions and have taken responsibility for the harm they have caused (Berryessa, 2022b). Despite this, recognizing and believing that a defendant is remorseful is far more challenging to decode. This may be due to difficulties feeling empathy with or emotions of defendants or biased attributions about the origins of a defendant's bad behavior as stemming from a situation or an inherently criminal personality (Berryessa,2022a). Thus, despite the logical benefits of its use as

a mitigating factor, recognizing genuine remorse may be inconsistent, unreliable, and controversial.

Importantly, even if judges and probation officers could accurately assess a defendant's remorse, roadblocks may prevent defendants from being able to express it authentically. Defendants may be advised against showing remorse by their attorney. We explore this line of thinking by interpreting the 'double-edged sword' of remorse literally: demonstrating remorse might indicate that a defendant is reflective, sympathetic, and taking responsibility, but also could indicate that they are *guilty* and could ruin their chance of appeal or maintain innocence (Proeve, 2023). This problem may cause defense attorneys to suggest that their clients not talk directly to the judge or others, including the victims. However, not expressing remorse may lead to non-mitigated sentences, as a judge cannot consider remorse if it is absent. Regardless of the ability to express remorse, the logistics of criminal-legal proceedings and the complex nature of remorse may often prevent such expression.

Our findings also illuminate the roles of cognitive biases and heuristics in shaping perceptions of affect and remorse in criminal-legal decision-making. Expressions of emotions, particularly remorse, can look vastly different depending on a defendant's background, cultural upbringing, gender, neurodivergence, gender, or personality (Bandes, 2014; Berryessa, 2023b; Weisman, 2016). Yet based on their own characteristics, decision-makers often have expectations for how remorse is communicated and expressed, which most often involves conventional displays such as crying or verbally apologizing (Duncan, 2002). These expectations might close individuals off to other demonstrations of remorse that emerge from other cultures, personality types, and upbringings, and encourage them only to seek out forms of remorse that are 'typical' to them; we consider this to be a form of *remorse bias*. Indeed, it is one thing for an

individual to demonstrate remorse, but another for someone to receive it; even if a defendant feels remorse, they may still not be able to effectively communicate it or have it accurately assessed. This highlights the established relational concerns about expressing remorse (Bibas & Bierschbach, 2004), as well as data to suggest that affect and remorse in criminal-legal proceedings are not easy to implement or consistently evaluate during criminal-legal decision-making. Moving forward, we can build a more extensive understanding of cognitive and subconscious biases that may infiltrate evaluations of remorse (Berryessa, 2022a).

Alongside examining their opinions and stories, probation officers and judges also considered the innate challenges they face in their roles that may make communicating emotions difficult for defendants. Many environmental, relational, and situational factors alter how defendants show remorse and how that remorse, or the lack thereof, is interpreted by officers or judges. For example, Berryessa (2022b) suggests that more research should investigate how probation officers' use of remorse in shaping their sentencing recommendations may be impacted by their respective court environments within their jurisdictions. Doing so may provide better awareness of these environmental factors and strategies to mitigate or alleviate their effects.

Finally, our research indicates that evaluations of remorse in the criminal-legal system have a unique versatility, and perhaps ambiguity, that allow them to serve several purposes for decision-makers. Logistically speaking, both probation officers and judges believed that including remorse in criminal-legal proceedings provides some practical utility. For probation officers and judges, it represents a logistical "shortcut" by increasing case efficiency, simplifying decision-making, and reducing the need for correctional resources (Berryessa, 2022a).

Our results ultimately suggest that removing remorse and affect from consideration in criminal-legal proceedings would likely disregard several goals of sentencing, as well as make the process feel more "robotic" and, overall, "less human." Remorse is significant and important to decision-makers and their beliefs, as it helps to legitimize their jobs and the system as a whole. Nonetheless, there is obvious complexity in weighing remorse and maintaining these goals in the criminal-legal environment–creating a "double-edged sword" for both defendants *and* criminal-legal decision-makers.

Future Research Agenda

In future work, there are several ways to develop further research that may be adaptive to the study of affect theory and emotions in the courtroom. When studying emotional expressions and their reception, it surely takes longer than a 45-minute interview to truly capture and understand how a criminal-legal decision-maker thinks about emotions and how *they* perceive affective demonstrations of others, including defendants. The time constraints and logistics of conducting research will always pose a challenge, as well as the retrospective thinking we ask of our participants. When describing remorse and stories about defendants, the decision-makers may both benefit and suffer from hindsight and rely heavily on their recollection of events. While this information is still incredibly valuable, gaining their thoughts in real time as they assess a defendant's remorse would allow for a contemporary snapshot of their views about and decision-making related to remorse. Further, gaining the defendant's point of view, and their experiences expressing remorse in criminal-legal contexts or how they believed the criminal-legal system may have interfered with their ability to express remorse, would provide a rich and diverse portrait of their experiences with these issues (Berryessa, 2022b).

In addition to time and perspectives, using semi-structured interviews to gain insight into beliefs about affect and its implications for criminal-legal decision-making may still be *too* structured and limiting. Nonetheless, there are still opportunities for natural conversations to arise during interviews that a researcher may not have planned for during the conceptualization of the project; thus, as long as there is room and willingness to develop emergent data–and be open to unexpected findings– qualitative methods are valuable in gaining insights surrounding affect and expressions of emotion in the criminal-legal system.

Several other issues warrant further exploration, both in terms of topics and methodology. As outlined in several of the studies mentioned here, future work should consider how remorse is used to guide sentencing recommendations, better parse out jurisdictions in which remorse may matter most, and assess how various court environments and philosophies could influence more general and therapeutic perceptions of remorse. Studies that aim to understand remorse bias better should also explore other research designs that may be less vulnerable to selection bias, involve methodological triangulation, and provide avenues for stronger generalizability. Doing so may result in a broader understanding of affect in the courts. However, as those goals are typically associated with positivist inquiries, they may not always be well-suited for the emergence and openness that comes with understanding expressions and the utility of affect.

Overall, we have learned much about how probation officers and state-level judges, as criminal-legal decision-makers, consider, evaluate, and utilize remorse in their decision-making and daily duties. Remorse is significant in carrying out the goals of the criminal-legal system, especially sentencing, but continues to be a double-edged sword for all parties involved. For probation officers and judges, remorse is subjective, and their evaluations may be inconsistent or laden with biases–but it still keeps the system "humane." Defendants may be prevented from

expressing remorse due to courtroom procedures, their attorney, and/or their own fears, despite the possible yearning just to say, "I'm sorry." Therefore, if remorse continues to be used in sentencing as a mitigating factor, we must better consider how judicial assessors adjudicate defendants' expressions of remorse. Doing so may allow us to better identify and avoid cognitive biases that form a "tunnel-visioned" sense of remorse and, thus, educate and encourage criminal-legal decision-makers to keep an open mind when identifying affect during sentencing.

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