

Remorse and Criminal Justice

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Abstract

A defendant's failure to show remorse is one of the most powerful factors in criminal sentencing, including capital sentencing. Yet there is currently no evidence that remorse can be accurately evaluated in a courtroom. Conversely there is evidence that race and other impermissible factors create hurdles to evaluating remorse. There is thus an urgent need for studies about whether and how remorse can be accurately evaluated. Moreover, there is little evidence that remorse is correlated with future law-abiding behavior or other legitimate penal purposes, and, moreover, there is evidence that remorse is often conflated with shame, which is correlated with increased future criminality. More accurate information on the nature and evaluation of remorse can be used to reform the criminal justice system.

Keywords

contrition, criminality, facial expression, remorse

Introduction

The jury in the capital case against Boston Marathon bomber Dzhokhar Tsarnaev heard graphic and heartbreaking testimony from a series of his victims and victims' family members. As is common in capital cases, Tsarnaev chose not to testify, but he was still labeled unremorseful based on his performance at trial. The media closely watched his demeanor and body language as he sat through the victim testimony, describing his "disquietingly casual affect," his "toe-tapping, his beard fiddling" and the way he leaned back in his chair, and concluded that the parade of maimed and grieving witnesses "doesn't seem to bother him much" (Stevenson, 2015). Capital jurors often draw similar conclusions from a nontestifying defendant's demeanor at trial. A defendant does not need to sneer or laugh or fall asleep to be adjudged remorseless—jurors deduce remorselessness from his lack of visible emotion as the prosecution introduces into evidence "horrific depictions of his crimes" (Sundby, 1998, p. 1563). Interviews with capital jurors contain a common refrain: jurors expect defendants to express visible emotion, and interpret its absence as arrogance, nonchalance, and lack of remorse (Sundby, 1998, p. 1564). A defendant's perceived remorse or lack of remorse (based only on in-court observations of the defendant) is one of the most important factors in jurors' decision whether to sentence him to death (Haney, Sontag, & Constanzo, 1994, p. 163).

Evaluations of remorse play a crucial role in a wide range of criminal justice determinations. They influence sentencing hearings; parole, probation, and clemency determinations; forensic evaluations; decisions on whether to try a juvenile as an adult; and even (counterintuitively) determinations of guilt or innocence. In most of these contexts, the decision-maker has access to the individual's own verbal description of his emotions and attitudes. Yet even when a defendant's words are available for scrutiny, his demeanor is regarded as an especially reliable indicator of his level of remorse. As Richard Weisman notes, it is a paradox that demeanor, the "most elusive and least articulated of all criteria," is "perceived as the true window to the person's essence" (Weisman, 2014, p. 32). The U.S. Supreme Court recognized the power of demeanor in this regard when it held that a mentally ill defendant must be permitted to testify without taking psychotropic drugs, because medication may interfere with his ability to show a remorseful demeanor, and therefore with the sentencer's ability to "know the heart and mind of the offender" (Riggins v. Nevada, 1992).

Though judges and jurors often believe they know remorse when they see it, the term itself is rarely defined in legal proceedings (Weisman, 2014, pp. 26–27), and there is no legal consensus about how to identify it. This lack of consensus is not confined to legal decision-makers. Thus far, the affective sciences have done

little investigation of remorse. Currently, there is no good evidence that remorse can be evaluated based on facial expression, body language, or other nonverbal behavior. Conversely, there is evidence that legal decision-makers evaluating remorse do so through their own cultural and emotional lens, and that evaluating remorse via demeanor is particularly problematic across racial and cultural divides and where the defendant is a juvenile, intellectually disabled, mentally ill, or taking psychotropic drugs.

This state of affairs, in which unsupported folk knowledge drives decisions about life and liberty, leads to several pressing questions for the criminal justice system and for emotion researchers. Can a fuller profile of remorse be developed—one that identifies outward indicia that can be identified in a courtroom setting? The answer to this question depends in part on a legal question: what is the relevance of remorse to the criminal justice system? For example, there is evidence that decision-makers value remorse because they believe remorseful offenders will be less likely to offend again. There is little evidence to support this assumption. But equally important, there *is* evidence that certain types of shame are tied to an *increased* likelihood of future criminal activity. Thus if remorse is valued for its relationship to decreased recidivism, it becomes essential to identify a profile for remorse that distinguishes it from shame. Second, the legal system often regards remorse as an indicator of certain more enduring character traits, such as empathy or compassion, or of moral character more broadly. This raises the legal question of whether sentencing should depend on character, but also a question for affective science: can empathy, compassion, or character more broadly be evaluated from demeanor?

Proeve and Tudor propose a working definition of remorse that includes several characteristics: a recognition that one has caused harm; an acceptance of responsibility for causing that harm; an associated internal strife; a desire to atone or make things right; a desire to be forgiven; and perhaps some actions in furtherance of atonement and reparation (Proeve & Tudor, 2010, p. 48). Under this definition, remorse is a complex, unfolding, internal process rather than a discrete emotion. If this is an accurate description of what legal decision-makers are trying to assess when they evaluate remorse, then it is hard to see how it can be accurately assessed based solely on outward indicia like an offender's facial expression and body language in the courtroom.

In short, the pressing question for emotion researchers is whether remorse can be evaluated by external indicia. If so, emotion research can aid the legal system in identifying ways to improve the process of evaluating remorse. Alternatively, researchers may conclude that remorse cannot be reliably evaluated in the courtroom. They may also conclude that illegitimate factors like the race or ethnicity of the defendant are likely to skew the evaluation of remorse, and thus have a detrimental influence on criminal justice outcomes. These conclusions, too, would provide essential knowledge to the legal system.

The Powerful Role of Remorse in the Criminal Justice System

Remorse plays a powerful role in decisions about criminal justice¹ in the United States and other common law systems,

including Canada, the UK, and Australia. Most prominently, evaluations of remorse exert a strong influence on sentencing decisions. In most criminal cases, judges determine the appropriate sentence, and remorse has been shown to be a significant factor in their calculus (Everett & Nienstedt, 1999; Wood & MacMartin, 2007). In capital cases in the US, juries generally determine both culpability and sentence. The Capital Jury Project, a nationwide study of factors influencing capital jurors, found that at the penalty phase of their deliberations, juries place tremendous stock in remorse. In articles based on the data from the California segment of the project, Haney, Sontag, and Constanzo (1994, p. 163) found that jurors identified “whether or not the defendant expressed remorse (based only on in-court observations of the defendant)” as one of the most compelling factors driving their life or death decisions. Sundby (1998, pp. 1560–1562) found that “69% of the jurors who voted for death ... pointed to lack of remorse as a reason for their vote ... many of those jurors cited it as the most compelling reason for their decision.” He found that the defendant's demeanor and behavior at trial was the most powerful factor shaping jurors' evaluation of remorse.

There are various potential sources of information about remorse in the criminal context. Decision-makers may interpret a defendant's actions directly after the crime, such as aiding the victim or fleeing the scene. They may look to whether the defendant acknowledged guilt² (Sundby, 1998, p. 1574) or cooperated with authorities (Everett & Nienstedt, 1999) prior to sentencing. In noncapital cases, judges may evaluate remorse based on the defendant's in-court statement at the sentencing hearing and a presentence report prepared by court personnel, as well as by his demeanor and body language in the courtroom. In capital cases, however, the defendant rarely testifies or gives an in-court statement and there is no presentence report. Jurors often have little more to go on than the defendant's facial demeanor and body language as he sits silently in the courtroom.³

Even where the defendant addresses the court, decision-makers do not necessarily regard any words of apology as expressions of sincere remorse (Ward, 2006). Even when presented with verbal testimony, many judges regard demeanor as a more reliable indicator of remorse (Zhong et al., 2014). All these modes of evaluating remorse demand further study. But there is a particularly pressing need to test the prevalent folk belief that demeanor is a reliable—perhaps the most reliable—indicator of remorse. This unsupported and to some extent demonstrably false belief has consequences affecting life and liberty.

What Is Remorse and How Do Legal Decision-Makers Evaluate It?

Remorse is not a term with a standardized meaning across the sciences, social sciences, and humanities—or even within any particular field. Proeve and Tudor (2010, pp. 31–33) refer to a family of emotions they call the “retractive emotions.” These include guilt, shame, regret, contrition, repentance, and remorse. Their shared core is the sense of withdrawal from one's action, omission or state of being, entailing the feeling of “I wish I had acted otherwise.” Beyond that shared core, there is no consensus

about the particular attributes possessed by this cluster of emotions. The terms are hotly debated and often conflated.

Whether this taxonomical imprecision is problematic depends on the context. In law, it is a serious problem. Despite the lack of legal definitions, decision-makers often believe they know remorse when they see it. Moreover, they are often confident that remorse signals certain other attributes or predictions. Specifically, they view remorse as a sign that the offender regards his offense as not only out of character but also in conflict with his deeply held values. The emotion is thought to signal that he understands the gravity of the harm he has inflicted, wants to atone for it, and will make every effort to avoid such behavior in the future. Thus remorse is viewed as an indicator of good character and a predictor of law-abiding future behavior.

What Do We Know About How Legal Decision-Makers Identify Remorse?

There is substantial evidence that decision-makers have certain expectations for the communication of remorse, and attach legal consequences when these expectations are not met. This is true of judges as well as jurors. Ward (2006, pp. 150–152) found that judges often enhanced the sentences of defendants they felt had shown a lack of remorse in the courtroom—including for courtroom demeanor that “seemed cavalier” or reflected a “lack of concern ... [a] complete lack of remorse.”

When the defendant verbally expresses remorse—for example by offering an apology at sentencing—this hardly settles the matter of his sincerity. Evaluation of direct expression is a complex matter. Because of the high stakes for the defendant and the incentive to appear remorseful, decision-makers often regard such expressions with understandable skepticism. There has been little study of the language of remorse in the courtroom (but see Wood & MacMartin, 2007, examining the discursive practices involved in judges’ construction of remorse), but it is clear that following a verbal formula guarantees nothing. In interviews conducted by Zhong and colleagues (Zhong et al., 2014, p. 43), judges expressed concern that defendants “could lie (or) recite ‘rote remorse’ in the language of [their] attorney.” Judges also discussed in detail the indicia they value or mistrust in verbal expressions of remorse. For example, one judge stated that greater levels of detail were often indicative of greater levels of sincerity, and another claimed that indirect statements (e.g., “I am sorry about what happened”) were less sincere than those made in the active voice (e.g., “I am sorry for what I did”).

Even where offenders speak, judges accord great weight to their demeanor and body language, indicia that are often regarded as less subject to manipulation and therefore more reliable than words (Weisman, 2014, p. 11). Yet judges may be in substantial disagreement about these behavioral indicia as well. For example, Zhong et al. (2014, p. 43) found that “some judges believed that putting one’s head down or hanging one’s head was a sign of respect. Others said it indicated an absence of remorse. Similarly, eye contact could be construed as respectful or disrespectful.”

When decision-makers evaluate capital defendants based solely on their demeanor, they often find them inadequately

remorseful. Jurors tend to view a defendant’s lack of affect during the presentation of disturbing evidence as a strong indicator of his lack of remorse. What is less clear is what behaviors jurors interpret as reflecting an appropriately remorseful demeanor. For example, in Sundby’s (1998) study only 2 of 37 capital defendants were viewed as remorseful, and in each of these two cases jurors based their conclusion on factors other than demeanor at trial. This result is unsurprising, as exhibiting (what is regarded as) appropriate remorse while sitting silently through one’s murder trial poses a challenge. Consider this description of capital defendant Karla Faye Tucker’s attempt to follow her lawyer’s instructions:

[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], the press reported that she had smiled at someone else, and so she never looked out in the courtroom again. (Lowry, 2002, p. 71)

As Weisman (2014, p. 11) observes, the criminal defendant cannot opt out of this evaluation by jurors, spectators, and the public. His performance will be judged regardless of what he does, and lack of affect will generally be judged harshly. What is not clear is what sort of affect would convince a jury of sincere remorse.

Factors such as culture, youth, mental health status, and race also influence assessments of remorse. A cultural gulf may separate the expression norms of the defendant from those of the decision-maker. One U.S. judge acknowledged his own culturally inculcated expectation that sincerely remorseful defendants would look him in the eye and say they are sorry, and his awareness that other cultures or ethnicities may not share this norm, but instead may regard eye contact as disrespectful or see openly displayed remorse as a sign of weakness (Everett & Nienstedt, 1999, pp. 117–118). Duncan (2002, p. 1476) discussed the influential role of perceived remorse on the decision whether to try a juvenile as an adult, recounting a number of instances in which judges interpreted the demeanor of young adolescents as “impassive” and concluded that this impassivity signified remorselessness or amorality. Yet adolescents are often unwilling to show vulnerability in public (Duncan, 2002, pp. 1499–1501). In addition, full comprehension of the gravity of their crime may take place well after trial and sentencing (Duncan, 2002, pp. 1477–1480). Mental disability or use of psychotropic drugs may render a defendant’s facial expression an unreliable indicator of his state of mind, and decision-makers may be unaware of these influences on emotional expressiveness (Stobbs & Kebbell, 2003). Finally, several studies have identified problems with cross-racial identification of remorse. One problem is that people generally decode the emotions of those in their own racial group more carefully. Another, of particular concern to the criminal justice system, is the common and strong subconscious association between blackness and dangerousness or criminality (Antonio, 2006). Bowers, Steiner, and Sandys (2001, pp. 244–252) found that when judging the same black capital defendant’s demeanor, white jurors saw deceptive behavior, coldness, and incorrigibility, while black jurors saw

sincerity and remorse. White jurors, who were less likely to see a defendant as remorseful generally, were especially unlikely to see a black defendant as remorseful.

Can Remorse Be Identified in a Courtroom or Other Legal Proceeding, Even Under the Best of Circumstances?

These findings about how legal decision-makers presently evaluate remorse are troubling, but they beg a more basic question. Even under the best of circumstances, can remorse reliably be identified, distinguished from other retractive emotions, and evaluated in a legal setting? Thus far, there is no evidence that facial expression, body language, or other physiological markers exist that can identify feelings of remorse.

One key aspect of remorse is that it looks forward as well as backward. It requires not only coming to terms with the harm one has caused; but also seeking to repair that harm, and seeking to change one's own future behavior. If remorse is to serve as an indicator of future behavior, this forward-looking aspect is crucial. Yet guilt and shame may be entirely backward-looking, and have no such predictive value. It is thus crucial to distinguish remorse from these other emotions.

Whether remorse is linked to decreased recidivism is very much an open question. Although legal decision-makers believe in this correlation (Bibas & Bierschbach, 2004, p. 95), there is thus far little reliable evidence supporting it (Weisman, 2014, p. 7). There is, however, evidence that feelings of stigmatic shame are associated with *increased* recidivism (Proeve & Tudor, 2010, p. 90).⁴ So if decision-makers are according weight to remorse because they think it predicts law-abiding behavior, it is at the very least crucial to distinguish remorse from stigmatic shame, which is linked to increased criminality.

There is a thriving field in the affective sciences focusing on the interpretation of emotion through facial expression and body language. Although attention has been paid to shame, guilt, and similar emotions, remorse has been little studied (see Proeve & Tudor, 2010, pp. 61–63, summarizing studies that include remorse). Keltner and Buswell (1996) studied guilt, shame, and embarrassment, and found that while shame and embarrassment may have distinct facial displays, there was no evidence that guilt could be facially identified as a discrete emotion. Guilt and remorse share some characteristics, such as a sense that one has violated one's moral standards, but remorse is likely even harder to recognize from outward manifestations, as it describes an unfolding internal process of soul-searching and reevaluation. Proeve conducted the only empirical comparison of remorse, regret,⁵ shame, and guilt,⁶ which “failed to show distinctive features of remorse” (Proeve & Tudor, 2010, pp. 62–63).

Why Is Remorse so Important to Decision-Makers?

We have seen that decision-makers care about remorse, and that they often seek to evaluate it though they have received no

direction about how (or whether) to do so. How problematic this practice is depends, first of all, on what legally relevant information decision-makers are learning (or think they are learning) when they attempt to evaluate remorse. It also depends on whether the evaluation leads decision-makers down the wrong path—for example, toward decisions affected by racial or cultural bias.

The proper role of remorse in sentencing, as an abstract philosophical question, has received much attention from legal scholars (see for example Murphy, 2012), and this is not the place to delve into that debate. To summarize briefly, in the traditional view, remorse is relevant to punishment insofar as it (a) grounds predictions of future dangerousness and (b) reflects on moral culpability.

Sentencing takes into account the defendant's future dangerousness and likelihood of reoffending. A defendant who poses no more threat to society may be incapacitated for a shorter time—or given a life sentence instead of death or life without parole—and may not need to be deterred from future offending. Remorse is relevant in this regard only if it predicts lack of future dangerousness or a decreased likelihood of criminality. It is widely assumed that remorse does predict these things. This may seem intuitively correct, because remorse is forward-looking as well as backward looking. But as discussed above, there is little evidence to support the correlation between remorse and future good behavior (Proeve & Tudor, 2010, pp. 120–121).

More controversially, remorse may be relevant to the retributive aims of sentencing. Considering remorse as part of the retributive calculus is controversial because if retribution is a response to the criminal act, remorse after the fact is beside the point (Duff, 2001, pp. 120–121). The offender's remorse matters only if her character is part of the retributive calculus, and if remorse (or lack thereof) accurately reflects character. It is deeply controversial whether people ought to be punished for their moral character, over and above the bad character reflected in the crime itself. Yet this notion that remorse or lack of remorse allow a window into the defendant's character, and that bad character should be punished, holds tremendous sway in sentencing. What, then, does remorse show about character that is so important to decision-makers? It appears to signal that the criminal act is a deviation from the offender's deeply held values, not a reflection of her true self. Even if remorse does signal this, it must be sincere remorse for the harm caused to the victim, and not sadness about getting caught and facing prison or death. Thus for our purposes, the question is whether that sort of sincere remorse about harm to another can be reliably identified in a courtroom.

Finally, remorse plays a prominent role in less traditional punishment theories and practices, particularly those that are more victim-centered. Restorative justice conferences bring victims and offenders face-to-face. The goals of the conference are both to help the victim heal and to rehabilitate the offender. Victim-offender confrontation has also begun to play a limited role in traditional criminal justice proceedings, for example, via victim impact statements delivered in a courtroom (Bandes, 2009b; Bandes & Salerno, 2014). Restorative justice regimes raise a rich set of questions about victim and offender emotion

and criminal justice that are largely beyond the scope of this essay. But note that in this context too, sincere remorse is essential to the proceeding—it is generally a criterion for participation in restorative justice conferences, and the expression of remorse is a central goal of these conferences (Proeve & Tudor, 2010, p. 179; Rossner, 2013).⁷ One interesting question is whether sincerity can be more reliably identified in this interactive and less formal setting.

Directions for Further Study

Studies of the operation of remorse in the legal system thus far have drawn upon a variety of sources. One major source of information has been the U.S. National Capital Jury Project, which has interviewed over a thousand jurors after their service in capital trials (see e.g., Sundby, 1998). Studies have also relied on post-sentencing interviews with judges and other decision-makers (Zhong et al., 2014), on trial and sentencing transcripts (Ward, 2006), on video footage of hearings (see e.g., Weisman, 2014, p. 103, on the Truth and Reconciliation Commission Hearings in South Africa), and on comparisons of sentencing outcomes (Everett & Nienstedt, 1999). There is ample room to employ other measures of remorse. Proeve and Tudor (2010, pp. 106–107) argue that the most desirable option for evaluating remorse would be structured interviews and testing, but find few if any commonly followed tests, practices, or approaches to the evaluation of remorse. Specific questions that should be addressed include the following:

How does a courtroom setting influence the expression and interpretation of remorse? How does jury deliberation affect individual jurors' assessment of a defendant's remorse?

What are the barriers to evaluating remorse in specific contexts? For example, how do cross-racial evaluations differ from same-race evaluations? What role do implicit cultural rules about the display of emotion play in the expression and interpretation of remorse?

What sorts of interventions would most effectively correct misapprehensions about the evaluation of remorse? For example, would expert witness testimony or jury instructions help guide jurors who are attempting to evaluate remorse from facial expression and body language? Does remorse predict more law-abiding and less dangerous behavior in the future?

How long does it take for remorse to occur, both in adults and in juveniles? If remorse takes time to unfold, this may have implications for evaluating a defendant's trial behavior, for sentencing, and for post-sentence review.

Conclusion

Remorse, if it is to continue to play an influential role in criminal justice, must advance some legally legitimate purpose. It must be capable of being identified with reasonable accuracy. The process of identifying it must not increase the probability that illegitimate factors like race or ethnicity will influence criminal justice outcomes. If these criteria cannot be satisfied, remorse should be banished from the deliberative process.

However, the notion of banishing remorse from the deliberative process has its own problems. I have argued that remorse would be difficult to banish because it is interwoven with other attributes decision-makers value, such as empathy and conscience (Bandes, 2009a, p. 198). But if remorse turns out to be irrelevant to the purposes of punishment, there are ways to limit its influence. Most prominently, the legal system can minimize its explicit use of remorse as a factor. For example, prosecutors can be barred from calling attention to a suspect's lack of remorse, and sentencing guidelines can be revised to remove remorse as a mitigating factor. In addition, juries can be instructed not to consider remorse.

A more achievable set of reforms would consist of educating and guiding decision-makers about how to evaluate remorse. If it is established that remorse cannot be reliably read via facial expression and body language, judges can so instruct juries, and expert witnesses can testify to that effect. For example, experts could testify about what we know—and do not know—about using facial expression to evaluate various emotions. In addition, experts could testify about particular barriers to evaluating remorse, such as race, ethnicity, cultural assumptions, juvenile status, and mental disability. Judges can also be educated by expert witnesses and in judicial conferences.

The study of remorse in the courtroom presents an opportunity to study emotions as they actually unfold in the social world—not in a rarefied lab setting that cannot capture the essential social dimension of emotional expression and interpretation. The other unique reward of studying remorse in the legal system is that the results will have real-world consequences for the reform of the criminal justice system.

The question of whether this complex attitude can be identified through external indicia—and moreover through indicia exhibited during a criminal proceeding—urgently needs to be addressed. Until it is adequately addressed, the criminal justice system will proceed on the unsupported and highly questionable assumption that remorse can be reliably identified through demeanor, and will make decisions about life and liberty in light of that assumption.

Declaration of Conflicting Interests

None declared.

Notes

- 1 Remorse also plays a role in civil cases. In particular, the expression of remorse through apology has been shown to affect juror decisions in medical malpractice cases (see, e.g., Robbenolt, 2003, finding that under certain circumstances, a medical professional's apology for malpractice can increase the likelihood of a settlement).
- 2 These expectations for the acceptance and acknowledgement of responsibility are harmful to those who assert their innocence, as Weisman (2014, p. 77) has documented.
- 3 Weisman (2014) and Proeve and Tudor (2010) contain in-depth discussion of the dynamics of evaluating remorse in a range of legal contexts. Sundby (1998) focuses on the various junctures at which a criminal defendant might express remorse, and the impact of the timing of expression.

- 4 The relationship between shame and recidivism is complex. Recent studies suggest that there is an important distinction between shame as condemnation of one's whole self and shame as condemnation of one's bad behavior. The latter, but not the former, is linked to decreased recidivism (see, e.g., Darby, Henniger, & Harris, 2014).
- 5 In the taxonomy employed for this study, regret and remorse share many characteristics, including an action tendency: a desire to make reparations. However, regret is more concerned with events, mistakes, lost opportunities, and wanting a second chance, whereas remorse is more other-focused and characterized by recurrent thoughts about one's changed existence as a result of the action or inaction (Proeve & Tudor, 2010, p. 66).
- 6 In this study, undergraduates completed a description of one of the four emotions, as either a personal experience or a typical experience of that emotion. The content of emotion experiences was then coded in order to identify commonly occurring elements of the four emotions.
- 7 Rossner (2013, p. 20) reports on a study of juvenile restorative justice conferences in Australia that found reoffending less likely when the offender was remorseful and the victim and offender had reached consensus about the reparative steps the offender would take.

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