Sentencing Without Remorse

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I. INTRODUCTION

State court judges in the United States have a great deal of discretion in assessing punishments for criminal defendants. Over time, through either statutory pronouncement or precedent, state courts have considered a distinct group of factors in determining the proper punishment for a convicted criminal defendant. One of these factors is remorse.

Many state courts have found remorse to be an appropriate mitigating factor to consider when assigning criminal punishment.[1] However, many states have found the absence of remorse to be an appropriate aggravating factor when calculating an appropriate criminal punishment.[2] Unfortunately, remorse has proven to be an increasingly ambiguous concept, which state court judges have had a great deal of difficulty applying in any coherent or consistent manner. Rather, reflecting the myriad definitions of remorse, state courts have found a myriad of reasons to find remorse present or absent, many of which are illogical at best.

Remorse presents problems for both prosecutors and defenders. Prosecutors may confront a savvy criminal defendant who is not remorseful, but who claims remorse in order to obtain a reduced sentence and is proficient in saying the right things before a susceptible judge. Defenders face a perceived lack of remorse, which may result in a more lengthy sentence for the defendant who is inarticulate or fails to behave or speak in the manner the judge believes indicates remorse.

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1. Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the* Alford *Plea*, 68 MO. L. REV. 913, 921 n.43 (2003).

2. *Id.* at 922, n.44.

This article will argue that remorse should not be relevant in criminal sentencing because its application is completely subjective. This subjectivity has led to a multitude of different approaches for determining the presence (or absence) of remorse, many of which are illogical and prejudice either the criminal defendant or the prosecution. Also, the application of remorse in criminal sentencing does not serve the prominent theories of punishment.

For those who see punishment as a mechanism intended to remold the defendant into an accepted and productive member of society, the use of remorse for purposes of punishment is unfair and self-defeating. Similarly, for those who view punishment from the retributivist perspective,[3] applying remorse makes little sense because remorse does not assist in determining the severity of the sentence. Retributivist theory is "forward looking" and primarily concerned with assigning punishments that are "in proportion to the severity of the offense."[4] Feelings of remorse do not assist in determining the blameworthiness of a defendant, nor do they repair the harm caused.[5] Thus, remorse is vague and ill defined for sentencing purposes—it is illogically applied and does not necessarily advance any theories of punishment.[6]

As appellate review on a finding of remorse or lack of remorse is nearly always based on objections made by the defendant, [7] this article,

3. *See generally* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION (1976); Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379 (1979).

4. *See, e.g.*, Mirko Bagaric & Kumar Amarasekara, *Feeling Sorry? - Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing*, 40 THE HOWARD JOURNAL 364, 368 (2001).

5. *Id.*

6. The focus of this article is remorse and sentencing in state courts. For a discussion of the manner in which the federal courts deal with remorse, see Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507 (1997). An interesting question, not discussed herein, is the effect that the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005), will have on the role of remorse in federal sentencing. Prior to *Booker*, remorse was rarely considered. *See*, United States v. Fagan, 162 F.3d 1280 (10th Cir. 1998). However, in a post-*Booker* world, courts are no longer required to impose a guidelines-based sentence, but rather are to consider all of the legislatively enumerated factors included in § 3553(a) of the sentencing guidelines. These factors include "the history and characteristics of the offender." Surely, this would open the door to a consideration of the presence or absence of remorse in the defender as a reflection of his or her "characteristics."

7. The ability of the state to appeal sentencing decisions is fixed by statute. Twenty-nine states have no statute affirmatively permitting the state to appeal a sentencing decision by the trial court. Sixteen states authorize such appeals only when the sentence is viewed to be "illegal" or contrary to the mandatory sentencing guidelines in the state. Only five states allow for a broader review of the sentence, including review based on assertions by the state that the sentence is "too lenient." *See* ALASKA STAT. § 12.55.120 (Lexis 2004 & Supp. 2005); MINN. STAT. § 244.11 (2005); NEV. REV. STAT. § 177.015 (2006); PA. R. CRIM. P. 721 (West 2001 & Supp. 2006);

by necessity, focuses on the improper use of remorse which accrues to the detriment of the defendant. However, the theoretical arguments against the use of remorse at sentencing are applicable for both defendants and prosecutors. Part II of this article discusses the difficulties inherent in both defining remorse and in identifying it in the criminal defendant.[8] Part III then explores the historical and contemporary application of remorse as a factor in criminal sentencing and argues that the motivations behind this application are chiefly subjective.[9] Parts IV through VII then look to the specific problems and inconsistencies that the application of remorse as a sentencing element creates.[10] These problems arise from courts' focus on and varying treatment of the object of the criminal's remorse (Part IV),[11] the words used to express that remorse (Part V),[12] the actions that accompany that expression (Part VI),[13] and the defendant's motivations for expressing remorse (Part VII).[14] Part VIII then explores the conflict with defendants' Fifth Amendment right against self-incrimination that arises when courts look to postconviction expressions of remorse as a mitigating factor in sentencing.[15] Finally, Part IX concludes by recommending that remorse no longer be a factor considered in assigning punishment for criminal defendants.[16]

II. WHAT IS REMORSE?

The first obvious difficulty with remorse is our inability to precisely define it for purposes of application at sentencing. The Oxford English Dictionary defines remorse as "a feeling of compunction, or of deep regret and repentance, for a sin or wrong committed."[17] This definition

TENN. CODE ANN. § 40-35-402 (Lexis 2003 & Supp. 2005).

8. *See infra* Part II (discussing various definitions of remorse as well as several factors which make it difficult to assess the presence or absence of remorse).

9. *See infra* Part III (discussing remorse from a historical perspective as well as exploring several justifications for the consideration of remorse in punishment).

10. *See infra* Parts IV–VII (discussing the presence or absence of objective indicators of remorse, specific statements made by defendants to express remorse, tears and other nonverbal expressions of remorse, and the defendant's motivation for expressing remorse).

11. *See infra* Part IV (discussing objective indicators of remorse).

12. *See infra* Part V (discussing specific statements made by defendants to express remorse).

13. *See infra* Part VI (discussing nonverbal expressions of remorse).

14. *See infra* Part VII (discussing a defendant's varying motivations for expressing remorse).

15. *See infra* Part VIII (discussing court attempts to reconcile the consideration of remorse with a defendant's Fifth Amendment right to remain silent or to continue to proclaim innocence at sentencing).

16. *See infra* Part IX (concluding that remorse should not be considered when assigning punishment for criminal defendants).

17. OXFORD ENGLISH DICTIONARY Vol. XIII, at 598 (2d. ed. 1989).

seems to place remorse within the individual as a "feeling" arising after the commission of some wrong. Other definitions emphasize that remorse can be identified through behavior. Michael A. Simons observes:

> Remorse begins—but does not end—with a felt sense of guilt. In an ideal community, the wrongdoer will identify with the victim, and the pain inflicted on the victim will, in the wrongdoer, become self-directed anger that is guilt. Remorse takes guilt one step further. Where guilt is passive and self-centered, remorse is active and other-centered. The remorseful (as opposed to the merely guilty) wrongdoer will seek to atone for his wrong.[18]

Yet other definitions go so far as to look for external symptoms of that internal regret. Richard Weisman notes that "remorse is iconic where apology is discursive . . . . The apology may refer to the anguish and pain that the offender feels as a result of transgressing the norms of the community, but, in remorse, the offender shows or expresses this pain by making the suffering visible."[19]

The significance to be found in these different definitions is the varying expectations that could be applied to individual criminal defendants. If remorse is an inwardly possessed feeling, as implied by the dictionary definition, one might not expect any outward manifestations of it from the criminal defendant. If Simons is correct, remorse is only found when the defendant is actively attempting to atone for his wrongdoing by putting the victim right.[20] If Weisman is right, the remorseful defendant would be expected to exhibit outward signs of suffering.[21] Thus, each implies a different standard for a sentencing judge with varying results based upon the definition chosen by a given judge.

The issue becomes even more complicated, irrespective of the definition chosen, due to several factors which inherently make it more difficult to assess the presence or absence of remorse: subjectivity, deception, cultural values, developmental limitations, and psychological problems.

18. Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 35 (2003).

19. Richard Weisman, *Detecting Remorse and Its Absence in the Criminal Justice System*, 19 STUD. LAW POL. & SOC'Y 121, 124 (1999).

20. Simons, *supra* note 18 at 33–34.

21. Weisman, *supra* note 19, at 127. Weisman goes further to imply that the more serious the crime, the more significant the outward suffering should be. He notes that his observations of court conduct indicate that "[t]here is at least some evidence here of moral economism in which the more serious the offense, the more dramatic must be the offender's suffering in order for it to be validated." *Id.*

The first factor is that determining the presence or absence of remorse is a subjective endeavor. As Alan Tieger has observed:

> Remorse presents a particularly compelling demand for clarity because of its subjective nature. . . . Remorse . . . resides within the perpetrator and can only be identified through circumstantial evidence or reliance on the declaration of the accused. This subjectivity further complicates a sentencing court's effort to ensure that the basis for its decision is understood.[22]

The second factor is the concern which plagues most prosecutors—the deceptive defendant. Clearly, intelligent (and often repeat) offenders understand the significance of demonstrating remorse at sentencing.[23] Even the unintelligent or uninitiated will be informed of this fact by competent counsel.[24] How then can the court tell if the defendant is "truly" remorseful?[25] Sentencing judges are certainly cognizant of this problem as well. As one judge noted:

> If you give too much consideration to it [remorse] then you are a sitting duck, I suppose, for sham protestations of remorse and breast-beating, and buckets of tears and appeals of sympathy. And you have got to watch out for that and part of the sentencing process is invariably making a value judgment on the genuineness of the appeals you receive, both from the defendant, expressions of contrition or remorse, and from the people who write in for him. And I have no doubt that some are more genuine than others, but you have got to do the best you can to evaluate those. To the extent that I feel I am able to distinguish between genuinely repentant and the defiant defendant, I will give it some consideration.[26]

Though findings of fact are always difficult to make, by judge or jury, this particular "fact" is perhaps even more intractable insofar as, at least based on some definitions, remorse is an entirely internal phenomenon which may not be amenable to refutation by countervail-

22. Alan Tieger, *Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT'L L. 777, 778 (2003).

23. *See, e.g.*, ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 143 (3d ed. 2000).

24. "[D]efense counsels know well that pleas for mitigation need to begin with acknowledgment of wrongdoing and the expression of 'deep remorse'. The fact that most of the actors realize that much of the time no remorse is felt does not detract from its importance in allowing the sentencing procedure to continue as if it were true." David Indermaur, Offender Psychology and Sentencing, 31 Australian Psychologist 15, 18 (1996).

25. One commentator offered the following less-than-persuasive means of testing the veracity of an ostensibly repentant person, "the affect of those who express remorse provides a clue: those who fake it sound empty, rehearsed, and unconvincing, while those who are truly sorry seem humbled." REPENTANCE: A COMPARATIVE PERSPECTIVE 10 (Amitai Entzioni & David E. Carry eds., 1977).

26. STANTON WHEELER ET. AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 117 (1988).

ing external evidence. If remorse is a feeling, how can one prove that a defendant is not feeling the way he says he is?

Additionally, attempts to establish the presence or absence of remorse clash with cultural, developmental, and psychological factors which may make the effort fruitless. For example, commentators have noted that applying remorse as a sentencing factor for juveniles is inappropriate given the developmental limitations inherent in such offenders.[27] Also, as Everett and Nienstedt have noted, "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."[28] Everett and Nienstedt discuss a judge from an area with a large Hispanic population who "commented on Hispanic males' difficulty in openly and publicly admitting guilt, 'to look you in the eye and say they're sorry.'"[29]

Finally, psychological problems may limit a defendant's ability to express remorse at sentencing. As one commentator has noted:

> Some criminal offenders simply don't understand what they've done. If they did, they wouldn't have done it in the first place, or having done it, would now feel remorse. The problem with these offenders is not so much a lack of *cognitive* knowledge as it is *affective* understanding. The offender knows he did wrong at the cognitive level, but due to a lack of empathetic imagination, that cognitive knowledge never really sinks in; it never reaches the level of affective understanding.[30]

For each of these types of defendants, considering remorse as a factor in calculating a criminal sentence may be unfair because his ability to outwardly express remorse is inhibited by traits not commonly found among the population as a whole. Therefore, even if every criminal judge could agree on a consistent definition of remorse to apply at sentencing, that definition would be necessarily insufficient because it would still fail to identify remorse in many defendants who are truly remorseful to the fullest extent of their capability.

27. *See* Martha Grace Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1526 (2002) (concluding that our legal system should "anticipate a certain amount of resistance to [remorse], especially in children and adolescents, who . . . are more likely to use denial, to exhibit a short sadness span, to follow the code of the street, and to engage in egotistical and non-empathic behavior").

28. Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You're Sorry Enough?*, 16 JUST. Q. 99, 117–18 (1999).

29. *Id.*

30. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1847 (1999) (emphasis in original).

III. IS THE PRESENCE OF REMORSE RELEVANT TO ANYTHING?

Determining the relevance of remorse to sentencing is crucial in analyzing its use. One way of making that determination is to assess why remorse has been historically applied as a sentencing factor. Its use can be traced back through colonial times. Colonists in New England viewed remorse and repentance as key factors in securing the spiritual well-being of the accused and expected such expressions by defendants.[31] Confession was an important part of the process because the sentence of the defendant, particularly a death sentence, was used as a means of impressing upon the general public the need to avoid sin and crime. Minor sins were commonly punished, however, "severity was not the point of punishing minor sins. The point was repentance and a good swift lesson."[32]

Remorse and repentance played a particular role for those defendants sentenced to death for whom pardon or mitigation was not possible.

> In the Puritan colonies, the practice developed of delivering a sermon either before the executions or at the gallows. These took the form of a recital of the confession of the condemned, usually a brief autobiography that showed how small sins had progressed inevitably to enormous crimes. The minister wove the appropriate scriptural text and comment into the sermon.[33]

To achieve the appropriate effect, some form of confession, remorse, and repentance was necessary. Thus, even though the presence of remorse had no mitigating effect for the defendant, its presence was expected for religious reasons and for reasons of general public order.

The moral aspect of remorse continued to play a role into the twentieth century. Sentencing judges routinely asked the defendant at sentencing if he was remorseful.[34] However, the role for remorse at sentencing seemed to shift as the overall theory of punishment shifted in the early twentieth century. The revolution in criminal jurisprudence in the early twentieth century can be viewed as "a revolt against natural

31. *See generally* DANIEL E. WILLIAMS, PILLARS OF SALT: AN ANTHOLOGY OF EARLY AMERICAN CRIMINAL NARRATIVES (1993) (exploring a collection of thirty-two crime narratives from the seventeenth and eighteenth centuries in the context of the public ritual of capital punishment in colonial times). For a discussion of the concept's relevance to Colonial Virginia, see ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 123–24 (1930) (giving several accounts of eighteenth century executions from the Virginia Gazette and stating, "Particularly penitent sinners might be allowed a few extra days in which to make their peace with God").

32. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 37 (1993).

33. Bradley Chapin, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660 55 (1983) (citing WILLIAMS, *supra* note 31, for examples of execution sermons).

34. FRIEDMAN, *supra* note 32, at 409.

law or objective concepts of right and wrong."[35] Commencing in 1870, at a meeting of National Conference on Penitentiary and Reformatory Discipline, legislatures and courts began to view the purpose of punishment to be reforming the offender rather than merely locking them away.[36] Indeterminate sentencing became a tool used by reformers to affect this revolution in criminal jurisprudence. Indeterminate sentencing was a regime

> in which the judge, within very wide margins and with little guidance, established a set of maximum and minimum terms of imprisonment. Parole boards controlled ultimate release dates. The theory of sentencing was utilitarian in concern for deterrence and incapacitation, and was animated by what might be termed the rehabilitative ideal.[37]

Courts became concerned with remorse insofar as it assisted the judge in determining what to do with a criminal defendant in an indeterminate sentencing system. As one commentator observed, "What he [the judge] was really looking for were clues to middle class respectability. These proceedings were little morality dramas. . . . The judge, after all, was going to recommend to the prison authority how to handle prisoner X . . . ."[38]

As rehabilitation became the predominant objective of punishment, judges sought indications that defendants were amenable to rehabilitation, and one of the preferred indicators was remorse. Judges concluded that the presence of remorse in a defendant meant he was more likely to respond to attempts at rehabilitation, and the absence of remorse marked a defendant as one unlikely to succeed in any rehabilitation effort.[39] The difficulty in using rehabilitation as the basis for legitimizing the consideration of remorse at sentencing, however, is that it is only appro-

35. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 2 (2003).

36. *Id.* at 2–4.

37. Robert P. Mosteller, *New Dimensions in Sentencing Reform in the Twenty-First Century*, 82 OR. L. REV. 1, 15 (2003).

38. FRIEDMAN, *supra* note 32, at 409–10.

39. *See, e.g.*, People v. Barger, 624 N.E.2d 405, 468 (Ill. App. Ct. 1993); People v. Sprawls, 562 N.E.2d 1065, 1069 (Ill. App. Ct. 1990); State v. Bragg, 388 N.W.2d 187, 192 (Iowa Ct. App. 1986); State v. Constantine, 588 A.2d 294, 296 (Me. 1991); Jennings v. State, 664 A.2d 903, 908 (Md. 1995); People v. Steele, 434 N.W.2d 175, 177 (Mich. Ct. App. 1988); State v. Hickman, 666 N.W.2d 729, 732 (Minn. Ct. App. 2003); State v. Blake, 908 P.2d 676, 677 (Mont. 1995); State v. Daniel, 354 S.E.2d 216, 219 (N.C. 1987); State v. Mollicone, 746 A.2d 135, 137–38 (R.I. 2000); State v. Purkey, No. E2000-00308-CCA-R3-CD, 2001 WL 120728 at *6 (Tenn. Crim. App. July 20, 2001); State v. Sims, 608 A.2d 1149, 1158 (Vt. 1991); State v. Wickstrom, 348 N.W.2d 183, 192 (Wisc. Ct. App. 1984). *See also* Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 209–11 (1956) ("Judges feel that such a confession of wrongdoing evinces a repentant attitude, and thus an important step toward rehabilitation of the accused").

priate if rehabilitation is the primary objective of punishment. Rehabilitation, though, seems hardly the current predominant theory of criminal justice in the United States, given sentencing guidelines, mandatory minimum sentences, and "life means life" sentencing. One must suspect that, in terms of its justification, the utility of remorse as a sentencing factor is not certain.

Commentators have offered other justifications for the consideration of remorse. Stephanos Bibas contends that judges look to expressions of remorse because "they indicate that an offender is not 'lost,' that he has some self-transformative capacity that justifies (or requires) a lesser punishment . . . . [T]he judges' point is that the remorseful offender is in some way changed, or likely to change."[40] Significantly, unlike rehabilitation, this self-transformative capacity is actuated by the defendant himself and is not dependent upon state efforts to effect his change.[41] Others claim expressions of remorse are important as part of the overall process of dealing with victims and crime. As Pipes and Alessi claim, "[I]t is a common belief that remorse is an integral part of asking for forgiveness and that it is effective in reducing the anger others may have about an injustice."[42] Other commentators view remorse from the perspective of self-punishment[43] or general criminal punishment theory.[44] In each case, however, one gets the sense that scholars are grasping for a theoretical justification for a popular sentencing factor that has become ingrained throughout the history of the criminal sentencing process. Austin Sarat claims that remorse retains its vitality in the twenty-first century simply because "popular culture . . . still gives a central role to accepting responsibility and expressing remorse in representations of crime and punishment."[45] As

40. Stephanos Bibas, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 87, 94–95 (2004).

41. *See id.* (discussing an "individual badness model [that] dominates the criminal law's current stance toward expressions of apology and remorse").

42. Randolph B. Pipes & Marci Alessi, *Remorse and a Previously Punished Offense in Assignment of Punishment and Estimated Likelihood of a Repeated Offense*, 85 PSYCHOL. REP. 246, 247 (1999).

43. Alan Tieger, *Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT'L. L. 777, 779 (2003) (noting that in many societies, "there is almost an intuitive link between misconduct, punishment, and remorse," and discussing remorse's role in the socialization of the young in a society); NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA, 129 (1980) (observing that remorse may be important because the remorseful defendant may have already punished himself enough).

44. *See* Simons, *supra* note 18, at 38–40 (discussing how traditional punishment theories may provide explanation for remorse's use as a mitigating factor in sentencing).

45. Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture, in* THE PASSIONS OF LAW 170–71 (Susan A. Bandes ed., 1999).

Simons notes, "Regardless of the theoretical justifications for viewing remorse as mitigation, the idea has undeniable popular resonance."[46]

Sentencing courts have gone even further in attempting to justify considerations of remorse at sentencing. A Washington trial court stated that assessing the defendant's remorse was necessary because remorseful defendants "speed up the healing and closure process for their victims."[47] An Oklahoma court held that remorse was "pertinent to a finding that the defendant is a continuing threat to society."[48] Other courts have found that the absence of remorse is indicative of "wanton cruelty,"[49] a propensity to act in a similar fashion "if confronted with the situation in the future,"[50] or the need for a prison sentence to deter the defendant from similar conduct in the future.[51] Finally, Louisiana courts have held that an absence of remorse is relevant to the "character and propensities" of the defendant.[52]

All of these justifications for the relevance of remorse at sentencing are assumptions based on subjective conclusions reached by judges due, in large part, to anecdotal information or suppositions. Courts routinely fail to provide any substantive evidence that remorse or its absence can be affirmatively correlated with any type of future conduct by the defendant. Similarly, the presence or absence of remorse may or may not be directly related to the "character" of the defendant in any identifiable way. In essence, courts rely on remorse simply because, historically, courts always have.

IV. IS THERE AN APPROPRIATE OBJECT OF REMORSE?

If one decides, as United States courts consistently have, that it is appropriate to consider remorse in criminal sentencing, a key question is whether there must be an object of the expression of remorse. Must the defendant express remorse to the victim? The victim's family? The court? Or maybe his own family and loved ones? One could argue that "true remorse" exists if the defendant expresses regret to any of those

46. Simons, *supra* note 18, at 40.

47. State v. Jones, Nos. 48152-5-I, 51738-4-I, 2003 WL 22230128, at *7 (Wash. Ct. App. Sept. 29, 2003).

48. Pickens v. State, 850 P.2d 328, 337 (Okla. Crim. App. 1993). An Ohio court of appeals came to a similar conclusion in State v. Ramos, No. 21286, 2003 WL 21186032, at *3 (Ohio Ct. App. May 21, 2003).

49. People v. Gandy, 591 N.E.2d 45, 63 (Ill. App. Ct. 1992).

50. Linger v. State, 508 N.E.2d 56, 64 (Ind. Ct. App. 1987).

51. State v. Rivers, 599 A.2d 558, 564 (N.J. Super. Ct. App. Div. 1991).

52. State v. Summit, 454 So. 2d 1100, 1108 (La. 1984); State v. Hamiliton, 681 So. 2d 1217, 1225 (La. 1996).

mentioned. As one commentator has observed, "[T]he view of the philosophical *literati* is that remorse is ongoing, relentless self-reproach, an unsuccessful or slow-going attempt at seeking forgiveness, from God, one's self, or some significant other . . . ."[53] One could just as easily argue, however, that there need be no object of the expression of remorse—remorse could be seen as a personal state for which no active object is necessary.

Sentencing courts, however, take a dim view of defendants who appear sorry only for how the situation affected them or their loved ones.[54] This reaction seems contradictory to some theoretical notions of remorse. If remorse is present when the defendant is only sorry about how the crime affected him, this type of remorse is indicative of a defendant who is suffering because of what he has done.[55] If one takes a broad view of punishment, even the defendant who only regrets his actions because of the impact they have had on him or his family is being "punished" simply through his recognition of the likely consequences of his actions.

Such punishment, however, is not deemed sufficient by some courts. Rather, they expect a remorseful defendant to regret how he has affected the victim and the victim's family. Concern about oneself or one's own family garners the defendant little sympathy or mitigation of sentence, as exemplified in *People v. McDade*.[56] There, the Illinois Appellate Court examined the sentence of a defendant who stated at the time of his sentencing, "I would like to say due to the seriousness of the charges, it's forced me to look at myself, and I regret getting in the situation that I got in, which all I want to do is just get through this and return back to my family."[57] The sentencing court was singularly dissatisfied with the defendant's expression of remorse, noting, "I have heard some expressions of remorse this morning, although frankly I believe he was somewhat ambivalent. When the defendant says that he was sorry, he's sorry that he allowed himself to be in a position where this could happen, that sounds almost as if he is simply sorry that he got

53. James E. Dublin, *Remorse as Mental Dyspepsia*, 5 THE PSYCHOTHERAPY PATIENT 161, 166 (1989).

54. People v. McDade, 579 N.E.2d 1173, 1183 (Ill. App. Ct. 1991); People v. Buckner, 561 N.E.2d 335, 343 (Ill. App. Ct. 1990); State v. Purkey, No. E2000-00308-CCA-R3-CD, 2001 WL 120728, at *4 (Tenn. Crim. App. Feb. 13, 2001); State v. Dillard, No. 03C01-9903-CR-00100, 1999 WL 1191518, at *2 (Tenn. Crim. App. Dec. 16, 1999).

55. As Nigel Walker has observed, it might be appropriate to give a lesser sentence to one who has expressed remorse because "the remorseful offender is already punishing himself to some extent." NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA 129 (1980).

56. *McDade*, 579 N.E.2d at 1183.

57. *Id*.

in the car with the young lady as opposed to being sorry for committing the offenses that a jury has concluded beyond a reasonable doubt that he committed."[58] The appellate court, focusing on the question of to whom one should be sorry, observed, "Defendant's statement indicated he was not sorry for what he had done to the victim, but rather he was sorry for what he had done to himself . . . ."[59] It was this distinction which permitted the sentencing court to impose a more severe sentence than it would have had he expressed his remorse to the victims.[60] It is this focus on the victim that seems to dominate the notion of to whom one must express remorse.[61]

The requirement by some courts that genuine remorse can only be exhibited by a public expression of remorse to the victim or the victim's family illustrates the inherent arbitrary nature of the concept of remorse. Whether one can be remorseful and not outwardly manifest it is debatable; likewise, it is arguable whether an outward expression of remorse by a defendant towards his or her own family and friends is indicative of remorse. Courts, however, seem to equate remorse with an apology to the victim and/or the victim's family. Such a requirement is fraught with danger—the court would need to evaluate the sincerity of every apology or engage in an elaborate charade in which a defendant makes an apology (which may or may not be sincere) and the court then determines whether to factor it into the sentencing process. By equating remorse with apology, courts are, in effect, penalizing defendants who are not sophisticated enough to understand that when assessing remorse, the court really wants an apology. The sophisticated (and perhaps deceptive) criminal defendant will likely figure this out, while the unsophisticated will be denied mitigation (or suffer aggravation) even when he may be remorseful—but in a way not recognized by the court.

V. ARE THERE MAGIC WORDS?

The arbitrary manner in which remorse is considered at the time of sentencing is further demonstrated when trial courts engage in an

58. *Id*.

59. *Id*. at 1184.

60. *Id.*

61. The Tennessee Court of Criminal Appeals in *State v. Purkey*, focused on the significance of the victim when it observed, "The trial court found that the appellant demonstrated a lack of remorse, specifically stating that the appellant exhibited no remorse to the victim or his family following the accident." State v. Purkey, No. E200 00308-CCA-R3-CD, 2001 WL 12078, at *4 (Tenn. Crim. App. Feb. 13, 2001). In *People v. Buckner*, the court observed, "The defendant did make an apology to family and friends at his sentencing hearing, but this hardly qualifies as 'substantial remorse.'" People v. Buckner, 561 N.E.2d 335, 343 (Ill. App. Ct. 1990).

excessively strict examination of the words used by defendants to express their remorse. This is unfortunate because typical criminal defendants are poorly educated,[62] and as such they often prove to be inarticulate in daily conversation. This tendency is exacerbated by the stress of the moment, especially when attorneys advise the defendants that what they say to the judge can greatly affect the sentence that they receive. Despite this, many courts engage in a detailed "parsing" of language when deciding whether the defendant's statements reflect true remorse.

One manner of expressing remorse seems almost always doomed to failure—that of simply saying that one is sorry. Courts often view this statement as per se inadequate and take offense to the notion that saying "sorry" is enough.[63] As a trial court judge in Alaska observed, "I'm not going to let him [the defendant] get away with just saying I'm sorry, that's definite because I don't think people can just say, I'm sorry, and just walk away and think that, well, that's it."[64]

Other courts have elaborated on this position by drawing a distinction between remorse and sorrow. By concluding that sorrow isn't the same thing as remorse, trial judges can easily avoid finding remorse when the defendant was only "sorry." This analysis is best illustrated by a Florida Supreme Court decision in which the court concluded that were a sentencing court to give credence to expressions of sorrow, "defendants at sentencing could . . . enhance their position by 'gratuitously expressing sorrow for the victim.'"[65] Such a conclusion exhibits a profound disregard for the limited abilities of criminal defendants to express themselves in a way deemed acceptable by the court. It is unlikely that many criminal defendants (or citizens in general for that matter) would understand that "expressing sorrow for the victim" was not demonstrative of remorse for the crime committed.

Courts also seem to evaluate statements made by criminal defendants in an excessively exacting way. The results are often exasperating examples of hypertextualism, with courts frequently finding distinctions

62. *See*, Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 360–61 (1968).

63. In fact, this perception is not unique to American courts. In the United Kingdom, Lord Woolf, the Lord Chief Justice, when commenting on proposed revisions to British law which would provide for shorter jail terms for those who admitted guilt, noted that it "was very easy for someone to say sorry" but that this would not be enough to obtain the shorter sentence proposed. Robert Verkaik, *Criminals Offered Shorter Sentences in Return for Guilty Plea*, THE INDEPENDENT (LONDON), Sept. 21, 2004, at 16.

64. Christian v. State, 513 P.2d 664, 669–70 n.5 (Alaska 1973).

65. Beasley v. State, 774 So. 2d 649, 672 (Fla. 2000).

without substantive differences. Thus, an Ohio appellate court concluded that "[t]he defendant's expressions of remorse at the sentencing hearing seemed superficial—more related to a recognition that his conduct was wrong rather than to deep feelings of shame and regret." If asked what remorse meant, it is likely that most criminal defendants would answer that it meant "a recognition that his conduct was wrong."[66]

A trial court in Indiana concluded that the statement by the defendant that "he knew how it felt to lose a loved one, because his own mother died of natural causes, and that he was 'very sorry about what happened'" was "equivocal at best and 'well short of a full acceptance of responsibility.'"[67] A Tennessee trial court concluded that the apologies the defendant made to the victim and to the court could be discounted as "hollow."[68] Similarly, a trial court in North Carolina heard the following statement from the defendant:

> I just want to apologize for my wrongdoing and whatever. I understand how you feel and I know your mom will never be back with you and I kind of feel the same way, that I will never be with my one[-] year-old son again because of the actions that I took part in[,] and I just wanted—just wanted to let you know that I am sorry for the part that I took in it and I hope that you will forgive me.[69]

The court proceeded to parse the language and concluded that "[w]hile Defendant in this case was remorseful at the sentencing hearing and apologized for the 'part' that he had played in the crimes committed . . . his statement does not lead to the sole inference that he accepted he was answerable for the result of his criminal conduct."[70] One wonders how an inarticulate criminal defendant could ever articulate his remorse in a manner that would be acceptable to this sentencing court.

Finally, and lamentably, some courts seem to take offense to the expressions of remorse made by criminal defendants and appear almost vindictive in the manner in which they dismiss the claim. The Rhode Island Supreme Court discounted the "alleged" remorse of a criminal defendant by noting, "The trial justice apparently detected no salt in

66. State v. Millet, No. 80527, 2002 WL 31195405, at *3 (Ohio Ct. App. Oct. 3, 2002).

67. Price v. State, 765 N.E.2d 1245, 1253 (Ind. 2002).

68. State v. Oviedo, No. W2000-01003-CCA-R3-CD, 2001 WL 846052, at *6 (Tenn. Crim. App. July 20, 2001).

69. State v. Norman, 564 S.E.2d 630, 632 (N.C. Ct. App. 2002).

70. *Id.* at 634. *See also* Payne v. State, 838 N.E.2d 503, 509 (Ind. Ct. App. 2005), where the court concluded that statements made by the defendant that "I know I did wrong and messed up. A lot of drinking led to a lot of silliness" and that what happened was a "mistake" did not demonstrate a full acceptance of responsibility.

[defendant's] tears, nor do we . . . ."[71] Even harsher was the judgment of an Arizona trial court judge. In *State v. Schackart*, the defendant raped and then murdered an acquaintance by strangulation.[72] Apparently, the defendant wrote to the trial court, stating, "[T]he knowledge that Charlie is forever gone from this plane of existence is made especially painful by the fact that her life literally passed through my hands."[73] While it is true that this quotation does not fully express remorse for the crimes committed, the court's reaction *to the words used* was extreme:

> You may think that to have been a clever turn of phrase; I find that it is a snide word game describing a foul murder perpetrated by you. It speaks volumes not of remorse or of respect for Ms. Regan, but of a mind so supercilious and full of self that it believes it is permissible to be cute about this crime. It says that you committed these crimes with a depraved mind and malignant heart.[74]

The court's hostile reaction to the words used by the defendant in *Schackart* illustrates the fundamental problem—courts may interpret and misinterpret the intentions of a defendant based on word choice and sentence structure. This is inherently arbitrary, particularly when those attempting to articulate their feelings about an extremely traumatic event are, in most cases, poorly educated and thus inarticulate. Determining the presence or absence of a state of mind by the manner in which the person in question expresses it renders the entire process suspect to misinterpretation and misunderstanding. Courts appear to be suspicious of remorse in the first place and thus make the task of expressing "true remorse" that much more difficult for the criminal defendant. Any ambiguity or inappropriate "turn of a phrase" seems to result in the trial court reacting against the defendant.

VI. IT'S NOT WHAT YOU SAY BUT WHAT YOU DO (AND WHEN YOU DO IT)

We have assumed so far that expressions of remorse by criminal defendants are made verbally—the defendant telling the court or others that he is sorry or regrets his conduct. However, courts often attempt to assess the sincerity of the words by examining their accompanying actions. *How* a defendant expresses remorse is important for trial court judges. Tears or other expressions of emotion may validate the

71. State v. Thorton, 800 A.2d 1016, 1045 (R.I. 2002).
72. State v. Schackart, 947 P.2d 315, 325 (Ariz. 1997).
73. *Id.* at 330.
74. *Id.*

remorseful words spoken by a defendant just as laughter or sarcasm may refute them.[75] The sincerity of one's expressions of remorse is evaluated not just in terms of how one says he is sorry, but also in the light of how one behaved prior to the crime, immediately after the crime, during the trial, and even after conviction.

This approach is particularly troubling given that the conduct in question is often completely unrelated in time or location to any professions of remorse and appears to be irrelevant to an assessment of the current mental state of a criminal defendant. This approach further disregards the theoretical argument that remorse is a state of mind reached by a defendant after a period of soul searching and reflection.[76] It is illogical to contend that remorse that comes only after reflection and self-examination is any less legitimate than remorse that is felt immediately after the commission of an offense. As the North Carolina Supreme Court noted:

> For the state to prove lack of remorse as an aggravating circumstance, it is not enough to show merely that there was no remorse at the very time the crime was being committed. Rarely does a defendant have remorse for a crime he is presently committing. Almost always remorse occurs, if at all, sometime after the commission when the defendant has had an opportunity to reflect on his criminal deed. If after such time for reflection remorse does not come, and there is

75. *See, e.g.*, State v. Brank, No. C2-01-242, 2001 WL 710590, at *1 (Minn. Ct. App. June 26, 2001) in which the court, evaluating a defendant's apology, noted, "He appeared to be remorseful. The record can show that he was crying as he made it, and for what my evaluation of this is worth, it appeared to me to be genuine . . . ." See also State v. Krouch, No. C8-90-2225, 1991 WL 15398, at *2 (Minn. Ct. App. Feb. 12, 1991) in which the trial court inferred remorse on the part of a Buddhist defendant who had shaved his head, noting that a shaved head demonstrates remorse in the Buddhist religion.

76. The Scottish High Court of Justiciary noted the evolutionary nature of remorse in a discussion of its potential relevance *postsentencing* as a factor to determine release date, etc. The court observed:

> Expressions of remorse and acceptance of guilt are, of course, factors that will be taken into account by the trial judge when he is considering the issue of punishment. But it would be wrong to assume that the book is closed on the day when the prisoner is sentenced.
>
> The short time that has elapsed between the date of the murder and the date of the sentence . . . and the tension which results from the trial process left little time for reflection and remorse to be encouraged and displayed before they were sentenced. The time for full reflection and genuine appreciation of what has happened comes afterwards. The encouragement of this process, and its reflection in the assessment of what is needed for the purposes of punishment, is an important part of the management of the sentence . . . . Flynn et al. v. Her Majesty's Advocate, 2004 S.L.T. 863, 873 (2004).

> evidence of this fact, then lack of remorse properly may be found by the sentencing judge . . . [as an aggravating circumstance].[77]

Regrettably, many trial courts do not see it this way, and often the trial court takes the position that if one fails to express remorse immediately after committing the crime, then later expressions of remorse are merely a dodge to avoid a harsher sentence. Such assumptions are, however, insupportable by the very nature of remorse. Remorse without time for reflection is unlikely, yet courts still may punish more severely those who have come to regret their offenses after the necessary lapse of time.

A. Conduct Prior to the Crime

Some courts conclude that remorse is impossible for any defendant with a checkered past. (One almost wonders if a recidivist could ever be found to be remorseful under this logic.) But it is not only prior criminal activity that courts consider sufficient to bar present remorse. In New Mexico, a trial court concluded that a defendant lacked remorse because he had exhibited a pattern over several years of "not taking responsibility for his own actions and showing little remorse for the effect of his actions on others."[78] Similarly, in Minnesota, a trial court concluded that remorse was questionable when a defendant had a history of blaming others for problems in his life, had lied, had not followed the directions of doctors, missed therapy meetings, stopped taking medication and "generally displayed what's known as avoidance and denial . . ."[79] It is difficult to rationalize this approach. How can one make any conclusions about a person's attitude toward a given event based on perceptions of his or her attitudes prior to the event's occurrence? If we believe that remorse is an epiphany in which the defendant finally comes to grips with the reality of what he has done, how can we focus on conduct that occurred prior to this life-changing event?

Prior criminal conduct is even more likely to result in present expressions of remorse being questioned. Courts have discounted present expressions of remorse when the prior criminal conduct is similar in nature to the current crime.[80] Courts have also concluded that the gravity of a prior offense and the consequences of that offense may make expressions of remorse for new criminal conduct suspect; as the

77. State v. Parker, 337 S.E.2d 497, 502 (N.C. 1985).

78. State v. Wilson, 868 P.2d 656, 665 (N.M. Ct. App. 1993).

79. *Brank*, 2001 WL 710590, at *1.

80. *See, e.g.*, Gray v. State, 790 N.E.2d 174, 177 (Ind. Ct. App. 2003).

Utah Supreme Court observed, "A prisoner serving a sentence for a first degree felony has already been convicted of a serious crime and has usually been given a long prison sentence. . . . [O]ne might presume that such prisoner's willingness to engage in further violent activity while incarcerated indicates a lack of remorse . . . ."[81]

Courts are willing to allow the connection between past conduct and current remorse to be even more attenuated than this. For example, a trial court in Arizona concluded that a defendant charged with a drug offense lacked remorse in part because he had been convicted fifteen years earlier for a drug-related offense.[82] In these cases of prior conduct, both criminal and noncriminal, the courts assume that past performance guarantees future conduct. Though such conduct may speak to dangerousness and susceptibility to rehabilitation, there is no evidence linking such previous conduct to whether a defendant is currently truly remorseful.

B. Conduct Immediately Following the Crime

Courts have also expanded the universe of "relevant" actions to include how a defendant acts immediately after committing the offense in question, hoping that this will also give insight into whether the defendant is truly remorseful. An Ohio trial court questioned the sincerity of a defendant's expression of remorse at sentencing in part because he failed to surrender to the police until he was surrounded by them.[83] A trial court in Missouri found that a lack of remorse existed when the defendant made efforts to destroy the evidence of his crime and escape the scene.[84] A Washington trial court focused much attention on how a defendant behaved after the commission of the crime as an indicator of lack of remorse by the defendant at the time of sentencing. The court observed:

> [T]he first part of lack of remorse is simply the fact that you sat on this information for such a long period of time. Not only did you hide the body a few days later but you just let it stay there in the woods leaving all these things to happen that the family has talked about. I don't see any reason why if you did feel some remorse, some guilt, why you wouldn't have made a phone call . . . .[85]

81. State v. Gardner, 947 P.2d 630, 641–42 (Utah 1997).

82. State v. Calderon, 827 P.2d 473, 474–75 (Ariz. Ct. App. 1991).

83. State v. Campbell, 765 N.E.2d 334, 343 (Ohio 2002).

84. State v. Rodden, 728 S.W.2d 212, 222 (Mo. 1987).

85. State v. Stalkfleet, No. 99-1-00137-9, 2001 WL 629397, at *4 (Wash. Ct. App. June 7, 2001).

The North Carolina Supreme Court upheld a trial court which questioned the remorse of a criminal defendant who claimed that his remorse following his crime was evidenced by the fact that he rendered aid to his victim and immediately took her to an urgent care center.[86] The court concluded that the motivation for the defendant's actions could be interpreted as "selfish" and based on a "concern for his own self-interest" because the defendant testified:

> [O]nce I realized I hurt her that bad, I thought she was going to die and I was scared for myself just as much as for her because, like I say, I'm on probation, and I feel like she was going to die and I wouldn't be able to tell what my story was against her story . . . .[87]

The North Carolina Supreme Court concluded, "The defendant's testimony in this case unequivocally shows that remorse played little role in his decision to aid [the victim] . . . and that his concern was for his own self-interest."[88] Thus, even apparent instantaneous remorse may be suspect in the eyes of some state courts.

Additional examples of postoffense conduct drawing into question a defendant's claim of remorse include a trial court in Alabama which discounted the defendant's remorse because "he was seen running from the scene of [the] murder 'clapping his hands with a big smile on his face' . . . ."[89] In Illinois, a trial court rejected a defendant's claim of remorse for the killing of his wife based on the fact that when arrested, the defendant remained calm and showed no emotion.[90] Courts have even focused on the most trivial conduct as an indicator of the defendant's remorsefulness. For instance, a trial court in Illinois concluded that the fact that the defendant was drinking beer after a criminal shooting demonstrated a lack of remorse at the time of sentencing.[91]

Perhaps the most egregious expansion of the universe of relevant conduct in determining the sincerity of a profession of remorse is found in a Tennessee court decision. There, the trial court found that the defendant lacked remorse because, at the time of her arrest for drunk driving, the defendant refused to submit to a blood or breath test for alcohol and "became loud and profane, screaming that the officers were 'f——— up' her life by arresting her."[92] Not only was the defendant

86. State v. Spears, 333 S.E.2d 242, 245 (N.C. 1985).
87. *Id.*
88. *Id.*
89. *Ex parte* Harrell, 470 So. 2d 1309, 1318 (Ala. 1985).
90. People v. Buckner, 561 N.E.2d 335, 343 (Ill. App. Ct. 1990).
91. People v. Thomas, 577 N.E.2d 831, 836 (Ill. App. Ct. 1991).
92. State v. Hagan, No. 01C01-9304-CC-00122, 1994 WL 65151, at *1, *3 (Tenn. Crim. App.

here obviously impaired, as evidenced by the charge against her, which draws into question the relevance of anything she said, but what she said does nothing to undermine the conclusion that she was remorseful, *perhaps even* at the time of her arrest.

In each of these instances, the trial courts have so confused the notion of remorse and its indicators as to render the concept useless. It defies logic to insist that the presence or absence of remorse by a criminal defendant at the time of his sentencing can be deduced by his or her conduct weeks if not months earlier. One cannot reasonably expect any criminal defendant to exhibit grave remorse in the immediate moments after the commission of a crime. If remorse can only be felt after thought and reflection on the gravity of the actions a defendant has taken, one could never expect remorse to occur so rapidly. The actions of the defendants described above were the natural results, in many cases, of committing crime and trying to avoid detection. If we assume that trying to avoid detection is evidence that defeats any latter profession of remorse by a defendant, the mere fact that the crime was committed would also indicate a lack of remorse, thereby rendering the entire notion of remorse after reflection absurd.

C. Conduct During Trial

Another group of factors that courts have considered in criminal sentencing is the defendant's behavior during his or her trial.[93] These courts seem to believe that conduct during trial gives some sort of insight into the sincerity of a defendant's claim of remorse. Yet the conduct in question is generally irrelevant to the issue of remorse because the conduct occurred days, if not weeks, prior to the defendant's expression of remorse at sentencing.

One type of trial behavior that courts frequently focus on is disrespectful or arrogant conduct by a defendant. A trial court in Illinois enhanced a defendant's sentence for lack of remorse by observing that he always had a smirk or a smile on his face that only left when he was confronted with a capital sentence.[94] A Florida trial court found a defendant to be not truly remorseful because he "appeared

March 3, 1994).

93. *See* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2104 (2003) (noting that in addition to the trial behavior of the defendant, in federal courts, research has indicated that overly zealous conduct on the part of defense counsel is viewed as being indicative of a lack of remorse on the part of the defendant.)

94. People v. Johnson, 594 N.E.2d 253, 269–70 (Ill. 1992).

cavalier" throughout the proceedings.[95] In Connecticut, a trial court noted the absence of remorse at sentencing, stating, "I've had a lot of opportunity to observe Mr. Anderson in this courtroom, his demeanor, his actions and if there's one thing that strikes me that's been especially impressed upon me is his complete lack of concern, his complete lack of remorse for what transpired in this particular incident."[96] In Indiana, a trial court found a lack of remorse based on the demeanor of the defendant and his "state of disdain for the whole system."[97] A trial court in Louisiana found a lack of remorse in the defendant based on the fact that he "ma[de] faces and talk[ed] under his breath" while the victims were testifying.[98] In North Carolina, a trial court found a defendant unremorseful because he laughed at statements read to the court by the prosecutor which were contradictory to his version of events.[99]

In each of these cases, the attitude and behavior of the defendant at trial somehow indicated to the courts the defendants' lack of remorse at sentencing. Logically, behavior and remorse are not necessarily linked. Who can say why a defendant seemed to smirk, or made disparaging comments about the prosecutor? As the appellate court in *State v. Parker* noted:

> [W]hy [defendant] laughed is entirely speculative as far as the evidence shows. Some of the many possibilities are that he laughed out of mere nervousness or meanness, or because he was an immature adolescent in the toils of the law for the first time, or because he had no remorse for his crime. One thing is not speculative, though, but is known to everyone that has spent time in court is that defendants and other witnesses often laugh or smile at being contradicted."[100]

Whatever the reason for the conduct, one cannot definitively say that prior courtroom behavior means that the defendant has no remorse for the crime that he or she committed.

Courts unfortunately have taken a defendant's trial conduct one step further and have imputed lack of remorse to defendants who have pursued trial tactics of which the court disapproves. In one case the trial court felt that "the rendition of a fanciful story of duress, indicated a

95. Stephens v. State, 787 So. 2d 747, 761 (Fla. 2001).

96. State v. Anderson, 561 A.2d 897, 905 (Conn. 1989).

97. Deane v. State, 759 N.E.2d 201, 205 (Ind. 2001) (observing a lack of remorse based on the defendant's disrespect for the proceedings—specifically his reference to the prosecutor as a "prick" in open court and his statement that he had been "persecuted" by the trial court.)

98. State v. Stamper, 615 So. 2d 1359, 1365 (La. Ct. App. 1993).

99. State v. Parker, 373 S.E.2d 558, 559 (N.C. Ct. App. 1988).

100. *Id.*

complete lack of remorse . . . ."[101] Another state trial court noted, "[A]ppellant had his attorney ask questions which were designed to embarrass the witnesses and which were irrelevant insofar as whether or not a crime was committed."[102] This court held that the defendant was without remorse because he pursued a trial strategy of aggressive cross-examination of witnesses.[103] An Illinois court accepted the remarks of a sentencing judge who stated that the defendant should be "taken out and beaten" because he and his counsel had portrayed the defendant as a victim[104]—the appellate court felt that it was "appropriate for the trial court to consider both counsel's comments and defendant's own attitude in focusing on the impact the offense had on him"[105] when concluding that such a tactic in trial was offensive and an indication of lack of remorse. In addition, a state trial court went so far as to conclude that a defendant was lacking remorse because he refused to testify against his accomplice.[106]

In each of these instances, the court stretched the already tenuous link between the conduct in question and the ultimate determination of the presence or absence of remorse. What is particularly troubling is the distinct possibility that criminal defendants are being punished for the trial tactics they (and their attorneys) employ. It is certainly true that criminal defendants often pay a price for an ill-chosen trial strategy and that price is properly paid in the guilt or innocence phase of the proceeding. What has been described above are examples of defendants paying the price of ill-advised trial tactics at sentencing—a result which discourages legitimate as well as illegitimate trial tactics out of the fear of suffering adverse sentencing repercussions.

D. Conduct After Trial

Courts will occasionally look at postconviction behavior as relevant conduct when assessing the sincerity of remorse at time of sentencing. Though this conduct is certainly more proximate in time to the actual sentencing process, and thus conceptually more relevant, courts often fail to make the necessary logical connection between the post-conviction conduct in question and the issue of the presence or absence of remorse. For example, the fact that a defendant commented to a probation officer that "the trial court 'had it in for her' and 'probably

101. State v. Corrieri, 654 A.2d 419, 423 (Me. 1995).
102. State v. Schneider, 715 P.2d 297, 305 (Ariz. Ct. App. 1985).
103. *Id.*
104. People v. Borash, 820 N.E.2d 74, 84 (Ill. App. Ct. 2004).
105. *Id.* at 83.
106. Hogan v. State, 761 P.2d 908, 910 (Okla. Crim. App. 1988).

everybody else,'" may be revealing as to the defendant's attitude toward the court system, but it will tell us very little about how remorseful the defendant was for the criminal conduct in question.[107] Nevertheless, these very comments were construed by a Louisiana appellate court as evidence of a lack of remorse.[108] Similarly, it is hard to justify an Ohio trial court's conclusion that the refusal of a defendant to submit to a pre-sentence investigation was indicative of a lack of remorse for the underlying criminal offense.[109] In each instance, the trial court made assumptions about a defendant's state of mind at the time of sentencing based on postconviction conduct that had no rational relationship to the presence or absence of remorse.

Courts also challenge expressions of remorse made by criminal defendants who have spent time in jail prior to their final sentencing. In an astounding conceptual reversal, the North Carolina Supreme Court in *State v. Butler*[110] confronted a defendant who attempted to bolster his claim of remorse with testimony by a pastor who had visited the defendant in jail twice a month until his trial.[111] Despite its reasoning in *State v. Parker*,[112] the North Carolina Supreme Court concluded that such evidence of remorse was not persuasive, noting that "the fact that the defendant showed remorse while in jail carries little weight with this Court. It is relatively easy for one facing life behind bars to be remorseful."[113] It would appear, then, that the sort of reflection spoken of favorably in *Parker* cannot occur in jail. This apparent inconsistency illustrates the inability of courts to set forth coherent standards for assessing remorse and further demonstrates their inability to address logically the concept of remorse as a cumulative process rather than a factor which is present or absent at a particular time or place.

The cynical belief that expressions of remorse at sentencing are only motivated by the desire to avoid punishment is the predominant theory when assessing expressions of remorse that occur after a finding of guilt. As an Illinois trial court observed, "Express[ing] remorse after someone has been found guilty [is] not quite the same."[114] These

107. State v. Coutee, 545 So. 2d 571, 580 (La. Ct. App. 1989).

108. *Id.*

109. State v. Carnicom, No. 2003-CA-4, 2003 WL 22060583, at *2 (Ohio Ct. App. Sept. 5, 2003).

110. State v. Butler, 462 S.E.2d 485, 489 (N.C. 1995).

111. *Id.*

112. State v. Parker, 337 S.E.2d 497 (N.C. 1985).

113. *Butler*, 462 S.E.2d at 489.

114. People v. Thurmond, 741 N.E.2d 291, 300 (Ill. App. Ct. 2000) (quoting the Illinois trial court).

sentiments were echoed by the Supreme Court of New Jersey, which observed that the defendant "expressed remorse for the crime, albeit belatedly. Waiting until allocution to express remorse when facing the prospect of a death sentence diminishes the value of that remorse."[115] Other trial courts in Illinois and New York also adopted the position that expressing remorse at the time of sentencing was too late to be considered sincere.[116] Similarly, a Kansas trial court refused to consider the presence of remorse as a mitigating factor for a defendant who had pled guilty pursuant to a plea agreement under the belief that expressing remorse in this situation was "something that commonly happens, it's not exceptional. It's not unusual."[117] An Indiana trial court observed, "I really don't consider remorse . . . a mitigating circumstance. I mean, quite frankly, everyone when they get to this point is going to be sorry. You are sorry for all sorts of reasons, you know, most of all, probably, what's going to happen to you, and that's only natural."[118]

Remorse thus loses its meaning. No longer is it a state of mind present or absent at the time of inquiry. Now, if not present at any select time in the prosecution process, remorse cannot credibly exist at the time of sentencing. Some courts believe remorse must be present at the time of the commission of the offense, no matter how illogical that may be. Others expect remorse at some undefined time prior to sentencing, and if it is absent then, it can never exist thereafter.

Ultimately, courts consistently fail to accept the possibility that defendants acquire remorse over time; by definition, then, it may not be present at many "key points" during the prosecution. Trial courts fail when they attempt to draw connections between pre-offense conduct and legitimate remorse for the crime in question. Similarly, trial courts have not been able to provide any causal link between conduct during the offense, during trial, or even after conviction and the presence or absence of remorse.

VII. BUT WHY ARE YOU SORRY?

Many courts attempt to evaluate the presence or absence of remorse in criminal defendants by looking into the defendant's motivations.

115. State v. Papasavvas, 790 A.2d 798, 810 (N.J. 2002).

116. *See, e.g.*, People v. Washington, 587 N.E.2d 40, 43 (Ill. App. Ct. 1992) (holding that a letter of apology written by defendant before sentencing was not sincere because it was the first time he expressed any remorse); People v. Wilson, 511 N.Y.S.2d 746, 746 (App. Div. 1987) (holding that defendant's expression of remorse at time of sentencing was not sincere).

117. State v. Spain, 953 P.2d 1004, 1015 (Kan. 1998) (quoting Kansas trial court).

118. Wilkie v. State, 813 N.E.2d 794, 800 (Ind. Ct. App. 2004) (quoting Indiana trial court).

Courts often ask why a defendant is, or is not, demonstrating remorse for the crime committed. As most would agree, this is an impossible task in that the presence or absence of remorse is truly only to be found within the mind and heart of the defendant. Why a defendant feels the way he does is perhaps just as unknowable as whether he is remorseful or not.

Unfortunately for many criminal defendants, courts seeking answers to this question often have preconceived notions about expressions of remorse. Many judges believe expressions of remorse are disingenuous because they assume a defendant will say whatever is necessary to lessen his or her sentence. It seems pointless to even attempt a showing of remorse to a judge with that mind-set.

These skeptical judges take the position that defendants only claim to be remorseful as a scam to get a lighter sentence. A North Carolina appellate court genteelly expresses this concern by noting, "Defendant's apologetic statement, which he made after the return of the jury's verdict, is not so persuasive that Defendant's acceptance of responsibility for his conduct is the only reasonable inference that can be drawn from the statement."[119] A clearer expression of this judicial attitude is found in an Indiana trial court's conclusion that a defendant's remorse was not legitimate because it "was an attempt to avoid consequences rather than a true expression."[120] That remorse is used as a scam to affect sentencing was accepted by a trial court in Minnesota which commented to a defendant, on the record, "You profess remorse now and at the time of your plea, but I think that's simply to affect your sentence . . . . Only now when he is worrying about his sentence does he profess any concern regarding the victims of the crime."[121] A court in Montana found that the remorse professed by the defendant was "that of a man who had been caught."[122]

Some courts go further and articulate a standard rule when it comes to defendants and remorse. As a Tennessee criminal appellate court observed, "[M]ost people facing a lengthy prison sentence feel or express remorse for their actions."[123] Other courts express their

119. State v. Godley, 535 S.E.2d 566, 576 (N.C. Ct. App. 2000).

120. Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) (referencing the Indiana trial court's holding).

121. State v. Wilmoth, No. C3-01-1884, 2002 WL 1325613, at *3 (Minn. Ct. App. June 18, 2002) (quoting Minnesota trial court).

122. State v. Blake, 908 P.2d 676, 677–78 (Mont. 1995) (referencing the district court's holding).

123. State v. Garrison, No. 0LC0L-9407-CC-00236, 1995 WL 555067, at *4 (Tenn. Crim. App. Sept. 20, 1995).

skepticism in a manner similar to a taunt. As a Tennessee trial court observed, "I think you have remorse . . . that you're here. That this report states that you report feeling guilty, hopeless and helpless. I think it's probably brought on by the sentence that you face . . . ."[124] An Arizona trial court expressed its skepticism by jokingly declining to find remorse in the case of a defendant who had served several years in prison on another charge prior to being sentenced for murder, noting, "I'd get a little remorseful too, after spending a few years in prison."[125] These ingrained attitudes render expressions of remorse meaningless.

Oddly enough, however, just as courts are more than willing to interpret the motivation of a defendant who is expressing remorse, they are less open to trying to understand why a particular defendant is not expressing remorse or is expressing it in an unusual way. In *State v. Campbell* the defendant was diagnosed as having antisocial personality disorder.[126] The doctor in question claimed that such a disorder precluded remorse and sufferers were incapable of "the kind of deep feelings for someone else implied by the word remorse."[127] Based on this evidence, the court concluded that the defendant lacked remorse despite the same physician's belief that the defendant's remorse was genuine for a person suffering such a disorder.[128] An Indiana trial court found the defendant's lack of remorse to be a valid aggravating factor in sentencing despite the fact that the jury had found the defendant to be mentally ill.[129] The Indiana Supreme Court concluded that because the defendant's illness was not severe enough to excuse him from committing a crime, it was also not severe enough to excuse his lack of

124. State v. Dillard, No. 03C01-9903-CR-00100, 1999 WL 1191518, at *2 (Tenn. Crim. App. Dec. 16, 1999) (quoting the Tennessee trial court).

125. State v. Smith, 687 P.2d 1265, 1267 (Ariz. 1984) (quoting the Arizona trial court).

126. State v. Campbell, 765 N.E.2d 334, 343 (Ohio 2002).

127. *Id.* (quoting the doctor who diagnosed the defendant as having antisocial personality disorder).

128. *Id.* See also State v. Schweitzer, No. 2-05-03, 2005 WL 2709548, at *5 (Ohio Ct. App. Oct. 24, 2005), where the court upheld a trial court's finding of lack of remorse for a defendant who was borderline psychotic and taking medication which made him appear "less remorseful." The appellate court held that the expert:

> testified that as a result of Schweitzer's illness, he was less likely to experience remorse for his actions. Although that factor, which favors incarceration, may be the result of circumstances beyond Schweitzer's control, it is, nevertheless, pertinent to the determination of Schweitzer's likelihood of recidivism. The statute, for better or worse, does not differentiate the weight to be given to recidivism factors that are organically, or psychologically, inherent. *Id.*

129. Barnes v. State, 634 N.E.2d 46, 49–50 (Ind. 1994).

remorse.[130] Such a ruling reveals a view of remorse so cynical as to render the entire concept meaningless.

Clearly, attempting to assess the motivation underlying an expression of remorse is fraught with difficulties. There are a variety of motivations that may explain a defendant's conduct with respect to the issue of remorse. As one federal court observed, "[A] colorable argument can be made that a glib willingness to admit guilt in order to 'secure something in return' may indicate quite the opposite of repentance, and that a reluctance to admit guilt may in fact reflect repentance."[131] The subjectivity of this process illustrates the overriding problem with respect to all remorse determinations—the inability of a court to correctly determine the state of mind of the criminal defendant and the myriad indicators which courts rely upon in making this determination. If a court is likely to disregard all expressions of remorse based on its underlying belief that the motivation for such professions is simply an attempt to get a lighter sentence, then why consider these professions at all?

VIII. THOSE WHO CLAIM INNOCENCE OR REMAIN SILENT

The problems with state court conceptions of remorse are most starkly illustrated by the manner in which courts attempt to reconcile their views of remorse with the conduct of those defendants who exercise their constitutional right to remain silent or continue to proclaim their innocence at sentencing. Frequently, a criminal defendant chooses to exercise his Fifth Amendment right against self-incrimination not only at trial, but also at sentencing by either remaining silent or continuing to profess innocence. The reasoning is clear: in order to maintain a viable appeal, a defendant must not render his claims moot by acknowledging guilt and expressing remorse at the sentencing hearing.[132] Such conduct provides no evidence that the defendant feels any personal remorse for the crime, but is constitutionally protected nevertheless.

The United States Supreme Court confronted this dichotomy in *Mitchell v. United States.*[133] The Supreme Court addressed the argument that a finding of guilt (either via a plea of guilty or a finding of guilt by a jury or court) extinguishes the Fifth Amendment privilege

130. *Id.*

131. Scott v. United States, 419 F.2d 264, 271 n.33 (D.C. Cir. 1969).

132. *See* AM. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-8.1 (1986) (discussing how a defendant's admission of guilt could affect his appeal).

133. Mitchell v. United States, 526 U.S. 314 (1999).

against self-incrimination.[134] The Court held that even though criminality had been established, the privilege was not extinguished.[135] The Court further held that a sentencing court could not draw negative factual inferences from a defendant's decision to remain silent at sentencing.[136]

The problem arises when state courts interpret silence or a profession of innocence as a "lack of remorse" and aggravate the defendant's sentence or refuse to mitigate the sentence based on this finding. Some courts, when confronted with this obvious constitutional catch-22 have held that considerations of remorse or "lack of remorse" are inappropriate given the context.[137] As an Arizona appellate court noted in *State v. Hardwick*, "As contrition or remorse necessarily imply guilt, it would be irrational or disingenuous to expect or require one who maintains his innocence to express contrition or remorse."[138] In *People v. Leckrone*, an Illinois appellate court addressed the interplay between a continued assertion of innocence, the sentencing factor of remorse, and the appellate rights of a criminal defendant, concluding that "[a] convicted criminal defendant remains a litigant in an adversarial proceeding. That he shows no remorse should be of no concern to the

134. *Id.* at 325–26.

135. *Id*.

136. *Id.* at 327–30.

137. *See, e.g.*, State v. Hardwick, 905 P.2d 1384, 1391 (Ariz. Ct. App. 1995) (holding that the sentencing court's reliance on defendant's lack of guilt violated defendant's Fifth Amendment privilege); People v. Young, 987 P.2d 889, 894 (Colo. Ct. App. 1999) (holding that the trial court's reliance on defendant's lack of remorse was improper); Jackson v. State, 643 A.2d 1360, 1380 (Del. 1994) (holding that the defendant's failure to testify does not indicate a lack of remorse); State v. Kamanao, 82 P.3d 401, 410 (Haw. 2003) (holding that sentencing based on defendant's refusal to admit his guilt was unconstitutional); People v. Leckrone, 481 N.E.2d 343, 347 (Ill. App. Ct. 1985) (indicating that court would show dismay toward defendant's "sermon of innocence"); Ridenour v. State, 787 A.2d 815, 824 (Md. Ct. Spec. App. 2001) (holding that court should not consider defendant's silence as a sentencing factor); State v. Shreves, 60 P.3d 991, 996 (Mont. 2002) (holding that defendant's refusal to admit guilt should not be used as a sentencing factor); Bushnell v. State, 637 P.2d 529, 531 (Nev. 1981) (holding the trial court's consideration of defendant's lack of remorse in sentencing was a violation of defendant's privilege); Brown v. State, 934 P.2d 235, 245 (Nev. 1997) (holding that the trial court violated Fifth Amendment privilege by telling defendant to admit his guilt or he would receive a harsh sentence); Brake v. State, 939 P.2d 1029, 1033 (Nev. 1997) (holding that harsher sentence given to defendant because he would not incriminate himself was improper); State v. Williams, 389 S.E.2d 830, 834 (N.C. Ct. App. 1990) (holding that the court should not use defendant's plea of not guilty to impose a harsher sentence); State v. Ramires, 37 P.3d 343, 352 (Wash. Ct. App. 2002) (holding that the trial court's consideration of defendant's lack of remorse was improper in giving defendant harsh sentence).

138. *Hardwick*, 905 P.2d at 1391.

court, since in theory defendant persists in his position until his right to appeal has been exhausted."[139]

Perhaps the best exposition of the interplay between the constitutional issues, sentencing considerations, and common sense is found in the Nevada Supreme Court's ruling in *Brown v. State*.[140] There, the court confronted a situation in which the defendant, Troy Brown, had persistently declared his innocence, not only at trial, but also at sentencing after the trial jury found him guilty of the offense.[141] The sentencing judge concluded that the defendant was guilty and found his professions of innocence to be evidence of a lack of remorse and, accordingly, sentenced the defendant to the statutory maximum.[142] The Nevada Supreme Court overturned the sentence based on its belief that the sentencing factor of remorse was utilized inappropriately. The court noted:

> The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." The district court violated Troy's Fifth Amendment rights by considering his "lack of remorse" when he still had a constitutional right to maintain his innocence and by threatening to impose a harsher sentence if Troy refused to admit his guilt. Troy was unable to express remorse sufficient to satisfy the judge without foregoing his right to not incriminate himself, and the fact that he took the stand at trial does not change this analysis because Troy maintained his innocence. As such, requiring Troy to either express remorse or receive a harsher sentence violated Troy's Fifth Amendment rights and constituted an abuse of discretion.[143]

Despite this compelling reasoning, courts in many states contend that lack of remorse may be used as an aggravating factor (or as a reason not to mitigate a sentence) even when the evidence of this "lack of remorse" is either silence at sentencing or a consistent pattern of maintaining innocence.[144] Some courts, in considering "lack of remorse" in these

139. *Leckrone*, 481 N.E.2d at 347.

140. *Brown*, 934 P.2d at 245.

141. *Id.*

142. *Id.*

143. *Id.* at 245–46.

144. *See, e.g.*, People v. Leung, 7 Cal. Rptr. 2d 290 (Cal. Ct. App. 1992); State v. Barnes, 637 A.2d 398 (Conn. App. Ct. 1994); Dupont v. State, 418 S.E.2d 803 (Ga. Ct. App. 1992); People v. Ward, 499 N.E.2d 422 (Ill. 1986); Bacher v. State, 686 N.E.2d 791 (Ind. 1997); State v. Discher, 597 A.2d 1336 (Me. 1991); People v. Wesley, 411 N.W.2d 159 (Mich. 1987); State v. Moore, 458 N.W.2d 232 (Neb. 1990); State v. Jackson, No. CA2002-01-013, 2002 WL 31155122 (Ohio Ct. App. Sept. 30, 2002); Commonwealth v. Begley, 780 A.2d 605 (Pa. 2001); State v. Clegg, 635 N.W.2d 578 (S.D. 2001); State v. Muscari, 807 A.2d 407 (Vt. 2002); State v. Fuerst, 512 N.W.2d 243 (Wis. Ct. App. 1994).

types of cases, simply fail to recognize any sort of constitutional dilemma. They take the view that the Hobson's choice posed by these situations is simply a risk defendants must take when remaining silent or continuing to profess their innocence.[145] A Georgia appellate court in *Dupont v. State* held that, "entry of a harsher sentence . . . reflects not unconstitutional vindictiveness but rather the risk inherent in electing to go to trial instead of plea bargaining."[146] Similarly, an Ohio appellate court, in a case decided after *Mitchell*, observed that a finding of a "lack of remorse" on the part of a defendant who chose to remain silent at sentencing was, in essence, the defendant's fault. As the court noted, "In choosing not to make a statement, appellant made a tactical decision and must be expected to accept the consequences of that decision."[147] This line of reasoning is contrary to a line of decisions which hold that a defendant should never be put in the position of having to sacrifice a constitutional right as a means of obtaining a lesser sentence.[148]

Another line of cases disputes the propriety of claiming innocence at sentencing after a finding of guilt. Though not directly arguing against the principles of *Mitchell* and the continuance of a defendant's Fifth Amendment rights past trial through sentencing, they somehow try to factually distinguish certain cases where the defendant's claims of innocence at sentencing are not credible.[149] In California, aggravating a defendant's sentence based on lack of remorse as evidenced by a continued denial of guilt is appropriate unless the evidence of guilt at trial was "conflicting."[150] In *People v. Leung*, a California appellate

145. Bizarrely, in Smith v. Commonwealth, 499 S.E.2d 11, 14 (Va. Ct. App. 1998), a Virginia court of appeals attempted to finesse this "Hobson's choice" by arguing that it is not impossible to claim innocence and also exhibit remorse, noting, "[A]n expression of remorse does not presuppose acceptance of criminal responsibility." One finds this hardly convincing. An Indiana court in Mathews v. State, 824 N.E.2d 713, 733 (Ind. Ct. App. 2005), finessed the issue by simply denying that there was an issue—denial of guilt and lack of remorse were found to be simply different, and a defendant who denied his guilt could have his sentence aggravated if the trial court just didn't mention denial of guilt and only mentioned lack of remorse.

146. *Dupont*, 418 S.E.2d at 806.

147. *Jackson*, 2002 WL 31155122, at *7.

148. *See* United States v. Stockwell, 472 F.2d 1186 (9th Cir. 1973), *cert. denied*, 411 U.S. 948 (1973) (regarding exercise of right to jury trial); North Carolina v. Pearce, 395 U.S. 711 (1969) (regarding vindictive sentencing following a successful appeal and new trial).

149. One subtle attempt at distinguishing *Mitchell* is found in Colorado v. Lopez, No. 03CA0049, 2005 WL 1773911, at *5–6 (Colo. App. Jul. 28, 2005). The court in *Lopez* claimed that the protections afforded those proclaiming innocence at sentencing only applied to those who expressed their innocence by remaining silent. Once a defendant testified and made statements at the sentencing, his credibility could be questioned and a finding of lack of remorse was appropriate.

150. People v. Holguin, 262 Cal. Rptr. 331, 337 (Cal. Ct. App. 1989).

court found a lack of remorse based on a claim of innocence because the evidence of guilt at trial was "overwhelming."[151] This kind of reasoning implies that the Fifth Amendment protections against self-incrimination are only available to those whose guilt is not clear-cut, as determined by the sentencing judge—a far cry from the universal application clearly intended by the Constitution.

Other states take the view that, after a finding of guilt by a jury, a defendant who still asserts his innocence does not deserve the protections afforded by the Fifth Amendment; these decisions reflect a belief in the nearly infallible judgment of the jury and thus fail to see the need for a protection against self-incrimination at that stage of the process. The Nebraska Supreme Court, in *State v. Moore*, found no fault in the remarks of the sentencing court which seemed to link the defendant's assertions of innocence with a "lack of remorse" by noting that the remarks "were not a criticism of the defendant's maintaining her innocence throughout the trial, but an observation that the defendant failed to express any remorse for her actions even after having been found guilty beyond a reasonable doubt."[152]

The South Dakota Supreme Court also attempted to draw a distinction between the assertion of Fifth Amendment rights during trial and afterwards. It acknowledged in *State v. Clegg*, another post-*Mitchell* case, that it was not proper to draw an inference of a "lack of remorse" based only on a plea of not guilty.[153] However, the court observed that "after exercising the right to trial, a defendant's continued refusal to take accountability may be considered as a sign of lack of remorse."[154] Thus, for these courts, the Fifth Amendment right against self-incrimination is a pro forma right which is accepted prior to trial, but is mere formalism after a finding of guilt.

A more sophisticated attempt to deal with the Fifth Amendment post-trial is found in the Vermont Supreme Court's decision in *State v. Muscari*.[155] In this case, the court attempted to distinguish the mandates of the *Mitchell* decision by arguing that *Mitchell* only precluded drawing adverse *factual* inferences from a defendant's silence at sentencing.[156] It was, however, permissible to draw adverse conclu-

151. People v. Leung, 7 Cal. Rptr. 2d 290, 305 (Cal. Ct. App. 1992).

152. State v. Moore, 458 N.W.2d 232, 236 (Neb. 1990).

153. State v. Clegg, 635 N.W.2d 578, 580 (S.D. 2001).

154. *Id.*

155. State v. Muscari, 807 A.2d 407 (Vt. 2002).

156. *Id*. at 416; *see also* State v. Spencer, 70 P.3d 1226, 1228–29 (Kan. Ct. App. 2003) (asserting that *Mitchell* precluded drawing "an adverse inference from a defendant's silence" in determining facts relating to the circumstances and details of the crime).

sions from the defendant's silence when assessing whether he had accepted responsibility for the offense and expressed remorse for his conduct.[157] This conclusion is troubling because it implicitly assumes that the presence or absence of remorse is somehow not a factual determination. If it is not based on facts, what is it based upon? Hunches by sentencing judges? Conclusions unsupported by facts? If Vermont is correct on this issue, one can think of no more damning indictment of the use of remorse in the sentencing process than that it is based on nonfactual conclusions and surmises.

A third line of cases attempts to justify the imputation of "lack of remorse" by inserting a step in the analysis as a means of screening off the constitutional problems. Specifically, these courts claim that the inference of "lack of remorse" is only used to inform the judge as to the rehabilitative potential of the defendant and not as a reason to increase his sentence—in so doing, these courts attempt to finesse the constitutional issue.

A Connecticut appellate court claimed in *State v. Barnes*[158] that "the sentencing judge properly related the defendant's refusal to admit responsibility and claims of innocence to the likelihood of his rehabilitation, rather than imposing a harsher punishment for his recalcitrant nature."[159] Similar reasoning is found in decisions by the Michigan Supreme Court and a Wisconsin appellate court.[160]

Ridenour v. State illustrates how courts attempt to skirt the Fifth Amendment.[161] There the defendant's attorney counseled him not to say anything about the case to anyone. The sentencing judge, though, reprimanded him for not approaching the victim of the theft case and apologizing prior to sentencing:

> Your explanations for the delay in coming clean are accepted as such but they reveal to me a certain lack of compassion and understanding that I don't follow. It's one thing while you're on drugs but it's another when you come clean. There is nothing in the world that would have prevented you from sending a letter to the State's Attorney's office saying, "I don't know how to do this without violating my bond but please Mr. State's Attorney or Deputy Baker or whoever, would you please give this letter to the Harrisons telling

157. *Muscari*, 807 A.2d at 416.

158. State v. Barnes, 637 A.2d 398 (Conn. App. Ct. 1994).

159. *Id.* at 403.

160. *See* People v. Wesley, 411 N.W.2d 159, 162 (Mich. 1987) (asserting that a defendant's lack of remorse may be considered by a court in imposing a sentence as it bears upon defendant's potential for rehabilitation); State v. Fuerst, 512 N.W.2d 243, 247 (Wis. Ct. App. 1994).

161. Ridenour v. State, 787 A.2d 815 (Md. Ct. Spec. App. 2001).

> them how genuinely sorry I am . . . . If a lawyer had told me, "You mean it's illegal for me to apologize to somebody? It may be illegal but you ain't my lawyer any more."[162]

When defendant's counsel objected to this statement by noting that the defendant was only exercising his Fifth Amendment rights, the court stated:

> The right thing to do is not always the legal thing to do. You can advise him whatever you want and he can take your advice but there are consequences to it, many times. And a person who doesn't show remorse at the right time for the right reason should be a factor considered at sentencing . . . . And if the Court of Appeals wants to say on the record that Judges should not say that people should apologize to victims then I want to be the first one in line at the polls the next time one of those Court of Appeal's [sic] Judges comes up. And I want to give a Lay day sermon in churches on that. That's when we ought to hang up the law if it's wrong, illegal or immoral to apologize to a victim for the wrong you've done them.[163]

Fortunately for the defendant, the court of appeals in the *Ridenour* case took up the sentencing judge's challenge and overturned the sentence.

Another justification for increasing the sentence of a defendant who has been found to lack remorse due to his silence or professions of innocence can be found in *Commonwealth v. Begley*.[164] In *Begley*, a post-*Mitchell* case, the Pennsylvania Supreme Court claimed that the defendant's "lack of contrition" and "lack of cooperation," actions consistent with a defendant's choice to exercise his Fifth Amendment rights and maintain his innocence, were indicative of his "social conscience."[165] The court went on to find that consideration of this factor was appropriate in aggravating his sentence because it was an aspect of the defendant's "character."[166] Thus, the Pennsylvania Supreme Court also fell into the trap of ignoring the constitutional implications of an enhanced sentence for a defendant due to the exercise of a constitutional right by simply inserting a step into the process and claiming that the enhanced sentence is based on concerns about "character" rather than an imputed lack of remorse.

The problem with this reasoning in these cases is that they proclaim a distinction without a difference. Whether a defendant's sentence is

162. *Id.* at 820–21.
163. *Id.* at 821.
164. Commonwealth v. Begley, 780 A.2d 605, 644 (Pa. 2001).
165. *Id.*
166. *Id.*

enhanced because of lack of remorse for remaining silent or professing innocence, or his sentence is enhanced because such conduct reflects a poor potential for rehabilitation, the result is the same—his sentence is increased and the underlying reason is because he has insisted on exercising his Fifth Amendment rights. The courts' reasoning in this line of cases is similar to a situation in which a court gives a defendant the maximum sentence after trial, not because he had insisted on a jury trial, but because his insistence on a jury trial reflected disrespect for the judicial system which indicated a poor potential for rehabilitation. Surely no reviewing court would permit such an obvious subterfuge—yet in the case of remorse, they do.

IX. CONCLUSIONS

Criminal defendants are not the only ones aggrieved and dissatisfied with the manner in which remorse is treated at time of sentencing. Prosecutors also have reason to be dissatisfied with how remorse may be used by crafty criminal defendants to obtain unwarranted sentencing reductions. Structurally, however, there is very little case law evidencing this dissatisfaction. This is due to two factors. First, many states do not permit prosecutors to automatically appeal a criminal sentence that they feel is too low.[167] Second, even when an appeal may be possible, a prosecutor must look long and hard at the cost associated with such an appeal.

In such situations, it is likely that prosecutors will accept sentences that are lower than expected merely to promote efficiency.

Additionally, many trial judges are uncomfortable with remorse as a sentencing factor. They feel challenged in attempting to sort out the truly remorseful defendant from the unrepentant but savvy defendant.[168] The challenge may be all the more difficult when victim participation in criminal sentencing is factored in[169]—one can imagine the dilemma posed to a judge who must address the issue of remorse in the presence of a victim or victim's family who are crying for "justice" and are offended by the claims of remorse expressed by the defendant. Does the judge discount the self-professed remorse of the defendant and thus

167. *See supra* note 7 (discussing the fact that sixteen states allow a prosecutor to appeal a sentence only when the sentence is "illegal" or contrary to the state's mandatory sentencing guidelines, and only five states allow for a broader review of the sentence).

168. *See supra* text accompanying notes 23–26.

169. All fifty states have enacted some variant of a Victims' Bill of Rights, which often includes the right to attend criminal proceedings and often the right to actively participate at time of sentencing. *See* Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5TH 343 (2001).

spare the victim of one last outrage, or does he credit the claim of remorse, reduce the sentence accordingly, and face the wrath of the victim or victim's family? Judges would likely prefer to avoid the problem altogether.

Nor should one conclude that judge-based sentencing is the source of the problem. Judges do struggle to adequately assess the presence or absence of remorse and create sometimes bizarre tests for determining its presence or absence. Nevertheless, it is hard to believe that a jury-based sentencing system would be any more effective in addressing the problem. One judge, addressing the efficacy of jury sentencing in a jurisdiction that still retains it, noted:

> Judges, if there's anything in the world judges learn, is that you cannot judge by appearances. The appearance of the defendant—his facial features, his expression, his mannerisms, his personal merits—have more to do with jury sentencing than does anything else. And that is just a totally unreliable basis for sentencing. A jury cannot help but consider these things because really that's all they know—they just judge everybody by appearances.[170]

A different judge from the same jurisdiction, however, criticized jury sentencing for being too lenient and too susceptible to influence based on evidence of contrition by the defendant.[171] Such concerns about excessive leniency reflect the fears of many prosecutors with respect to judicial sentencing. Some statistical studies, though, indicate that jury-based sentencing tends to be harsher than judicial sentencing and also tends to be more variable.[172] Thus, it is fair to conclude that jury sentencing is probably not the answer.

Whether undertaken by judges or juries, sentencing should be a process in which facts are assessed by the sentencer for purposes of reaching an appropriate punishment. Whether an indeterminate-sentencing system or a guidelines-based system, the common denominator is that facts must be weighed. As the United States Supreme Court observed in *Williams v. New York*,[173] a seminal case addressing sentencing in indeterminate systems, one of the advantages of having presentencing reports compiled by probation officers was to assist "conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate

170. Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 23 (1994).

171. *Id.* (stating that a sentence was "based entirely on emotion, appearances, and lawyer ingenuity").

172. Weninger, *supra* note 170 *passim*.

173. Williams v. New York, 337 U.S. 241 (1949).

information."[174] Information implies facts—not suppositions. By its very nature, remorse cannot depend on a factual determination, but rather relies upon guesswork and supposition.

The natural consequence of a process dependent to some degree on guesswork is uncertainty. Uncertainty exists for the defendant and the prosecution in terms of the actual sentence a defendant will receive for a particular offense. Uncertainty is also anathema to the judicial system in general and to criminal justice in particular.[175] Some uncertainty is, however, unavoidable. As one commentator noted, "What is called the uncertainty of the law is, perhaps, most commonly the uncertainty of facts, uncertainty of human testimony, uncertainty of memories."[176] Uncertainty can also result from the manner in which a judge (or jury) applies the law.[177] To the extent that we wish to minimize uncertainty, one effective strategy is to eliminate those points at which the court (or jury) could deviate from the known statutes and case precedents, and, instead, resort to the unknowable—namely hunches, guesses, and suppositions.[178] Eliminating the consideration of remorse at the time of criminal sentencing would be one step along this path.

Courts have ultimately failed to fairly and accurately consider the concept of remorse during criminal sentencing—the attempt to effectively and uniformly utilize this concept at sentencing has failed. Often, remorse has been used as a justification for enhancing or reducing a sentence based on the "gut instincts" of a judge, and nothing more. Though the expertise that judges acquire over time should not be minimized, this "skill" should not exclude other, more factually based, methods of sentencing.

174. *Id.* at 249.

175. *See* Werner Z. Hirsch, *Reducing Law's Uncertainty and Complexity*, 21 UCLA L. REV. 1233 (1974); Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002). *But see* Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2003).

176. Austin Abbott, *Delay and Uncertainty in the Administration of Justice*, 44 AM. L. REG. 349, 355 (1896).

177. This type of uncertainty can be further broken down into uncertainty created by the language of the statute or the precedent or that created simply by the human element of a judge or jury being involved in the process.

178. Jerome Frank and other legal realists would likely believe such an effort impossible. Frank contends that we must accept that judges reach decisions by following their hunches and that "[i]f the law consists of the decisions of the judges and if those decisions are based on the judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches make the law." JEROME FRANK, LAW AND THE MODERN MIND 112 (Anchor Books ed. 1963).

The failure of remorse is simply the failure of men to be able to read the innermost thoughts and feelings of other men—an age-old problem which plagues many of mankind's interpersonal relationships. No one really knows what remorse is—and courts certainly don't seem to know it when they see it. Anything that is so intrinsically unknowable cannot fairly be the basis for extended (or reduced) periods of incarceration in any system of justice.