Missouri Law Review

Volume 83 | Issue 2 Article 6

Spring 2018

Remorse Bias

M. Eve Hanan

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M. Eve Hanan[*]

TABLE OF CONTENTS

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[*]Associate Professor, University of Nevada, Las Vegas, Boyd School of Law; J.D., Michigan Law School. The author thanks Jane Murphy, Ann McGinley, Robert Rubinson, Frank Rudy Cooper, Keith Findley, Susan Bandes, Tiffany Sizemore-Thompson, Vida Johnson, Gillian Chadwick, and the many helpful comments offered by colleagues at the Clinical Writer's Workshop at New York University School of Law and the Rocky Mountain Junior Scholars Forum. A special thanks to my research assistant, Anna Clark.

I. INTRODUCTION

"Because Mr. Turner came before us today and said he was genuinely sorry for all the pain that he has caused to [Jane] and her family. And I think that is a genuine feeling of remorse."[1]

When a California judge sentenced Brock Turner, the Stanford student convicted of sexually assaulting an unconscious woman, to serve six months in prison followed by a probationary term, his decision was met with public outcry over the perceived leniency of the sentence. Within weeks, an online petition to remove the judge from the bench garnered over one million names.[2] Debate has continued for more than a year regarding whether the sentence was based on a fair assessment of the relevant sentencing factors[3] or whether, instead, it was infected by either sanguinity toward sexual assault or bias in favor of a privileged, white defendant.[4]

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1. Excerpt of the judge's decision in the sentencing hearing of Brock Turner. Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge's Controversial Decision*, GUARDIAN (June 14, 2016, 6:00 PM) (alteration in original), https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky.

2. Tyler Kingkade, *Judge Who Sentenced Brock Turner Believed He Was Sorry*, HUFFINGTON POST (June 14, 2016, 10:41 PM), https://www.huffingtonpost.com/entry/judge-persky-brock-turner-transcript_us_5760a069e4b05e4be8602a6f (indicating that sentencing judge stated Turner was "remorseful" and "genuinely sorry"); Veronica Rocha & Richard Winton, *Stanford Rape Sentence Unusually Light, Legal Experts Say*, L.A. TIMES (June 7, 2016, 12:12 PM), http://www.latimes.com/local/lanow/la-me-ln-judge-stanford-rape-20160607-snap-story.html.

3. The California Commission on Judicial Performance concluded that Judge Persky acted within his discretion when sentencing Turner and that there was no clear and convincing evidence of bias, abuse of authority, or other basis to concluded that Judge Persky engaged in judicial misconduct warranting discipline. Press Release, Comm'n on Judicial Performance, Comm'n on Judicial Performance Closes Investigation of Judge Aaron Persky 12 (Dec. 19, 2016), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf. Ninety-one California law professors published a statement condemning the recall effort as a threat to "fundamental principles of judicial independence and fairness." RICHARD L. ABEL ET AL., LAW PROFESSORS' STATEMENT FOR THE INDEPENDENCE OF THE JUDICIARY AND AGAINST THE RECALL OF SANTA CLARA COUNTY SUPERIOR COURT JUDGE AARON PERSKY (Aug. 17, 2017), https://www.paloaltoonline.com/news/reports/1503112952.pdf. Nevertheless, the judicial recall effort gained momentum, resulting in a vote to remove Judge Persky from the bench on June 5, 2018. Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault,* N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html.

4. *See* Rocha & Winton, *supra* note 2. Support for the theory that Turner's light sentence was the product of implicit bias favoring white, college-educated defendants came in later articles documenting the same judge sentencing non-white defendants to longer sentences for forcible rape. Harry Cockburn, *Judge Who Sentenced Stanford*

Lost in the noise of debate about the judge's decision is the role of remorse.[5] Over ten percent of the judge's in-court explanation of the sentence was devoted to crediting Turner's expression of remorse,[6] captured in a statement that Turner read during his sentencing hearing.[7] It mattered to the judge that Turner expressed remorse. In the eyes of the court, Turner was a young man who was not defined by his crime but by his regret and shame about the crime.

This is not an article about the Brock Turner case. It is an article that addresses how implicit cognitive biases may affect judges when they decide whether to credit defendants' displays of remorse and how we can lessen the effects of that bias.

This article focuses exclusively on the relationship between racial bias against African Americans[8] – primarily men – and remorse assessment. Much

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Rape Case's Brock Turner to Six Months Gives Latino Man Three Years for Similar Crime, INDEPENDENT (June 30, 2016, 12:22 PM), http://www.independent.co.uk/news/world/americas/stanford-rape-case-judge-aaron-persky-brock-turner-latino-man-sentence-a7110586.html.

5. *See* Veronica Rocha & Richard Winton, *Juror Slams Judge in Stanford Rape Case, Calls Sentence 'a Mockery' Amid Recall Push*, L.A. TIMES (June 14, 2016, 9:15 AM), http://www.latimes.com/local/lanow/la-me-ln-brock-turner-judge-20160614-snap-story.html.

6. The sentencing court spent 385 words, out of a total of 3281 words, discussing Turner's expression of remorse as a factor weighing in favor of leniency under the multi-factor test. Levin, *supra* note 1.

7. Victor Xu, *Brock Turner's Statement in Trial and at His Sentencing Hearing*, STANFORD DAILY (June 10, 2016), http://www.stanforddaily.com/2016/06/10/brock-turners-statement-in-trial-and-at-his-sentencing-hearing/ (quoting Turner's statement in full).

8. This article uses the adjectives "black" and "African American" interchangeably, although "black" is arguably a broader category because it encompasses people who are not U.S. citizens or legal permanent residents. Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being "out of Place" from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1120 n.28 (2017). When used as an adjective to describe a person, I do not capitalize the "B" in "black" or the "W" in "white." I am mindful of the perspective that "black" should begin with "an upper-case 'B' to reflect [the] view that Blacks, like *A*sians, *L*atinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catherine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982) (explaining that "Black" should not be viewed "as merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions")); *see also* Lori L. Tharps, Opinion, *The Case for Black with a Capital B*, N.Y. TIMES (Nov. 18, 2014), http://www.nytimes.com/2014/11/19/opinion/the-case-for-black-with-a-capital-b.html. Because this article addresses implicit biases triggered by the *perception* of the

more can and should be said about how implicit biases relating to gender, class, and other social groupings might affect judges when they assess defendant remorse.[9] Gender, for example, probably plays a significant role in how remorse is expressed by defendants and interpreted by judges.[10] While taking a multidimensional approach to the intersections of race, gender, class, and other variables yields important insights,[11] this article focuses on bias against African American men for two reasons. First, sentencing disparity is clearest between black male and white male defendants.[12] Second, the implicit – and sometimes explicit – association of African Americans with criminality may directly cause judges to discredit remorse displays.

A remorse display, broadly defined, can include any verbal or nonverbal expression of regret for committing a crime.[13] Although this definition captures a wide range of behaviors, all remorse displays must convey "a distressing emotion that arises from acceptance of personal responsibility for an act of harm against another person."[14] Remorse thus stands in contrast to apologies, which are verbal constructs that can be offered without an emotional display

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defendant as either a black or white – rather than the cultural or personal identity of the defendant as black or white – I employ the lowercase.

9. Intersectionality theory is the practice of taking into account multiple variables, such as gender, race, class, nationality, sexual orientation and identity, and other socially constructed groupings. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

10. A male defendant's face, for example, might show no remorse because his view of masculinity requires him to refrain from emotional displays. Nancy E. Dowd et al., *Feminist Legal Theory Meets Masculinities Theory*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 25, 31 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

11. Multidimensionality theory, which builds upon intersectionality theory, posits that "(1) identities are co-constituted and (2) identities are context-dependent." Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another*, *in* MASCULINITIES AND THE LAW, *supra* note 10, at 1, 6; *see also* Athena D. Mutua, *The Multidimensional Turn: Revisiting Progressive Black Masculinities*, *in* MASCULINITIES AND THE LAW, *supra* note 10, at 78, 81–82 (introducing multidimensionality theory).

12. *E.g.*, U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 20 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

13. Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 745 (2012) (independent variable of "true remorse" defined as "a sincere expression of contrition for the commission of the offense").

14. Rocksheng Zhong, *Judging Remorse*, 39 N.Y.U. REV. L. & SOC. CHANGE 133, 146 (2015) (citing MICHAEL PROEVE & STEVEN TUDOR, REMORSE: PSYCHOLOGICAL AND JURISPRUDENTIAL PERSPECTIVES 29–70 (2010)).

of regret or contrition.[15] While remorse can be communicated in the context of an apology, a remorse display can be completely nonverbal, conveyed through facial expressions, gestures, and postures.[16]

While legal scholars have long debated whether remorse affects punishment decisions,[17] whether remorse should affect punishment decisions,[18] and whether judges can accurately assess remorse,[19] little attention has been given to how implicit biases may cause judicial remorse assessments to deviate in systematically racist ways.[20] This article lays out a side-by-side analysis of

15. M. CATHERINE GRUBER, "I'M SORRY FOR WHAT I'VE DONE": THE LANGUAGE OF COURTROOM APOLOGIES 14 (2014). The distinction between apology and remorse only matters when an apology seems insincere due to a lack of remorse. *See, e.g.*, Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 144–45 (2006) (discussing cases in which judges reject the significance of defendant apologies because they detect "no salt in . . . tears" (quoting State v. Thornton, 800 A.2d 1016, 1045 (R.I. 2002))).

16. Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 15 (2016) (discussing how jurors and the general public assess defendant remorse based on nonverbal behavior even when the defendant does not testify).

17. Quantitative and qualitative studies have attempted to ascertain whether remorse affects punishment decisions. *See, e.g.,* GRUBER, *supra* note 15, at 3 (presenting qualitative study of defendant allocutions in fifty-two federal sentencing hearings); Zhong, *supra* note 14, at 135 (presenting qualitative study of interviews with sitting judges about impact of defendant remorse on their sentencing decisions); Robinson et al., *supra* note 13, at 742 (presenting quantitative survey study of the effects of eighteen extra-legal factors on punishment decisions).

18. *See, e.g.*, Stephen J. Morse, *Commentary: Reflections on Remorse*, 42 J. AM. ACAD. PSYCHIATRY & L. 49, 50–52 (2014) (discussing remorse in light of four punishment justifications); Steven Keith Tudor, *Why Should Remorse Be a Mitigating Factor in Sentencing?*, 2 CRIM. L. & PHIL. 241, 242 (2008). Sitting judges also disagree about the degree to which remorse should affect sentencing. *See, e.g.*, Zhong, *supra* note 14, at 145, 148–49 (presenting qualitative study of twenty-three judges expressing diverse opinions about legal relevance of remorse).

19. *See, e.g.*, Zhong, *supra* note 14, at 151–60 (noting wide variation among judges in how they assess verbal and nonverbal expressions of remorse); *see also* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 98 (2004) (noting that "the context of the sentencing allocution inhibits rather than facilitates meaningful remorse and apology" – the "quasi-public settings" of courtrooms and other variables that cause apologies to sound "stilted, forced, or not enough" (internal quotations omitted)); Morse, *supra* note 18, at 54 (noting the potential effects of inaccurate remorse assessments on discretionary sentencing decisions).

20. Professor Susan Bandes calls for more research on whether it is possible to objectively measure remorse, noting that emotion researchers "may . . . conclude that illegitimate factors like the race or ethnicity of the defendant are likely to skew the evaluation of remorse, and thus have a detrimental influence on criminal justice outcomes." Bandes, *supra* note 16, at 15. She suggests that stereotypes equating African Americans with crime may be particularly biasing in remorse assessments. *Id.* at 16. Professor Martha Grace Duncan noted the problem of miscommunication across cul-

remorse scholarship and implicit bias research to demonstrate what can be called "remorse bias." Because the decision whether to believe a defendant's expression of remorse is profoundly subjective, it is a fertile area in which implicit bias can flourish and lead to sentencing disparity.

The article concludes that two currently favored remedies for reducing sentencing disparity – cabining discretion through sentencing guidelines and sanitizing racial content – will not reduce remorse bias. As discussed below, cabining sentencing discretion has not cured racially disparate sentencing. Nor has approaching sentencing with the intent to be race-neutral, or color-blind, cured racially disparate sentencing. A more promising remedy for remorse bias may lie in "making race salient" by explicitly raising the issue of racism to trigger conscious awareness of unconscious bias so that it can be observed and controlled.[21] This would require more than implicit bias training for judges. It would require judges to sentence defendants within an environment that repeatedly prompts them to consider the effects of implicit racism during every punishment decision, coupled with a system of oversight and feedback.

Despite data showing patterns of racial disparity in sentencing,[22] it is difficult to isolate judicial bias as a contributing factor in individual cases.[23] In its 2012 to 2016 analysis of federal sentencing practices, the U.S. Sentencing Commission found that black male offenders continued to receive longer sentences than similarly situated white male offenders.[24] The Commission attributed the difference to variations and departures from the Federal Sentencing

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ture and class in her article examining why children who commit murder may not behave in ways that seem callous. Martha Grace Duncan, "*So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1505 (2002) (discussing how callous affect in children who murder may be product of "street code" rather than true lack of feeling).

21. Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1562–63 (2013).

22. *See, e.g.*, Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & SOC'Y REV. 733, 761 (2001) (Maryland study finding significant racial disparity in incarceration and sentencing rates in judges using sentencing guidelines); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296 (2001) (finding African Americans are incarcerated at higher rates and receive longer sentences in study of federal sentencing practices controlled for income, education, and criminal history); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 POLICIES, PROCESSES, & DECISIONS CRIM. JUST. SYS. 427, 427–28 (2000) (review of forty studies demonstrates consensus that racial disparity exists in exercise of judicial discretion whether to incarcerate, but studies varied as to whether evidence confirmed racial disparity in sentence length).

23. *See generally* David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 367 (2012) (discussing decades of statistical analyses aimed at establishing direct link between judicial sentencing decisions that create racial disparity and judicial bias).

24. U.S. SENTENCING COMM'N, *supra* note 12, at 2.

Guidelines.[25] In other words, the Commission found racial disparity in sentence length that seemed to derive specifically from the exercise of judicial discretion.

Moreover, studies show that Afrocentric features are correlated with harsher sentences, suggesting that Afrocentric features trigger implicit bias even if the fact of a racial designation, standing alone, does not result in a harsher sentence.[26] A judge, then, may be careful not to sentence black defendants more harshly than white defendants while, at the same time, unconsciously allowing variables like "darker skin tone, wider noses, coarser hair, darker eyes, and fuller lips [to] influence the length of a criminal sentence."[27] In their comprehensive review of studies examining the relationship between sentencing practices, skin tone, and Afrocentric features, the Honorable Mark W. Bennett and Professor Victoria Plaut note that most of the studies demonstrate that darker skin tone and Afrocentric features correlate with higher rates of incarceration and longer sentences.[28]

When we look to individual cases that seem to be exemplars of sentencing disparity, however, they perplex because we cannot know with certainty whether implicit racial bias played a role in their outcome. In the Turner case, for example, the judge considered permissible factors under the relevant court rule, yet the result gave rise to concerns that the court exercised leniency because Turner was a white male.[29] Even when judges consider only permissible factors, unconscious biases may alter how they resolve an ambiguity in assigning value to a factor like remorse. We are thus left with a conundrum described by Professor Michelle Alexander in *The New Jim Crow*. Overwhelmed with data on patterns of discrimination, we cannot show exactly how "a formally color-blind criminal justice system achieve[s] such racially discriminatory results" in individual cases.[30]

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25. *Id.* at 7.

26. *See generally* Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice,* 122 AM. J. SOC. 90, 95–117 (2016) (finding positive correlation between longer sentences, dark skin tone, and Afrocentric features); William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 352 (2005).

27. Mark W. Bennett, *The Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J.F. 391, 403 (2017).

28. *See generally* Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 773–84 (2018) (discussing seven studies analyzing state sentencing data and one laboratory study).

29. *See* Shaun King, *Brock Turner, Cory Batey, Two College Athletes Who Raped Unconscious Women, Show How Race Affects Sentencing*, N.Y. DAILY NEWS (June 7, 2016, 5:42 PM), http://www.nydailynews.com/news/national/king-brock-turner-cory-batey-show-race-affects-sentencing-article-1.2664945.

30. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 15, 103 (2010).

All is not lost, however. While criminal courts have largely eschewed responsibility for racial disparity in sentencing through their unwillingness to apply statistical evidence of sentencing trends to individual cases,[31] social scientists continue to examine the phenomenon and develop ways to test how unconscious biases skew decisions. In the laboratory setting, social scientists employ implicit association tests ("IATs") to measure participants' levels of implicit bias and then test the effect of implicit bias in mock criminal justice scenarios.[32] By isolating the variable of race, researchers can measure the impact of racial bias on punishment decisions. Other social scientists have conducted field studies, such as Nicole Gonzalez Van Cleve's analysis of more than one thousand hours of courtroom behavior data to determine how, through the process of "colorblind racism," courtroom actors turn "central sites of due process into central sites of racialized punishment."[33] Qualitative and quantitative social science research that sheds light on judicial bias is thus available to shape future sentencing practices and policy.

In order to understand how judges, who intend to make fair, race-neutral sentencing decisions, may unconsciously contribute to racially disparate sentencing, we must identify the specific points of judicial decision-making most vulnerable to implicit racial bias. Remorse bias is a useful touchstone for examining unconscious bias in sentencing for three reasons. As discussed *infra*, Part II, remorse plays a significant role in punishment decisions in which the judge has a broad statutory range of sentencing options or in the informal context of parole release decisions in which parole authorities assess the defendant's potential for rehabilitation.[34]

Second, assessing remorse is a subjective process that provides fertile ground for cognitive bias. In assessing remorse, the judge must accurately read the defendant's countenance, demeanor, tone of voice, and style of speech and do so free from cultural assumptions. Even under circumstances unlikely to trigger implicit biases (where age, race, gender, and class differences between the judge and the defendant are minimal) the judge will unconsciously filter remorse displays through a lens of assumptions about how someone should act after committing a crime.[35]

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31. *See* discussion *infra* Part IV.

32. *See* discussion *infra* Part III.A.

33. NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT xii (2016). Van Cleve characterizes her study as directly responding to Alexander's quandary of how to pinpoint the mechanisms of discrimination within a "color-blind" system. *Id.*

34. *See* discussion *infra* Part II. For a discussion of the defendant's expression of remorse in the context of parole release decisions, see Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

35. Duncan, *supra* note 20, at 1497–99 (decision to try child in adult court due to defendant's lack of remorse as evidenced by "impassive" countenance, coupled with a forensic psychiatrist's opinion that the defendant felt no remorse).

Third, because remorse functions as a "proxy for overall character,"[36] it is easy for the remorse assessment to degrade into a mutually reinforcing circle of cognitive errors based on the well-established unconscious bias associating African Americans with criminality.[37] Rather than crediting a remorse display, as the court did in Turner's case, the implicit bias association of black-criminality works to discount African American displays of remorse.

More than thirty years ago, a wave of statutory and judicial sentencing reforms was implemented to reduce disparity in punishment by limiting discretion in sentencing and release decisions.[38] Now, the pendulum appears to be swinging away from mandatory sentences and rigid sentencing guidelines toward increased judicial discretion and the re-invigoration of parole systems that afford early release. The greater the discretion of the judge or parole commissioner, the more likely she will be influenced by extra-legal, ineffable factors like her subjective impression of the defendant's remorse and general character.[39] Given the vagaries of our perception of the sincerity of others, this is likely to produce discriminatory results unless we find a way to identify, document, and control the effects of bias. The debate regarding how to identify and reduce bias in the exercise of discretion that animated the advocates for uniformity in sentencing is thus poised to re-ignite.[40]

Part II of this article establishes the salience of remorse to punishment decisions and then demonstrates the ambiguity involved in assessing the sincerity of remorse. Part III examines existing research on implicit biases associating African Americans with criminality to consider whether judges are likely to view African American defendants' expressions of remorse as insincere and, thus, unworthy of leniency. Part IV critiques and rejects two strategies for addressing implicit bias in punishment decisions – cabining discretion and sanitizing racial content from consideration. Part V offers recommendations to reduce the impact of racial bias on remorse assessments in punishment decisions.

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36. Zhong, *supra* note 14, at 164 (lack of remorse viewed as character flaw warranting greater punishment); *see also* Bibas & Bierschbach, *supra* note 19, at 92–95 (reviewing the manner in which courts use apology and remorse to gauge character of defendant).

37. *See* discussion *infra* Part III.

38. *See* discussion *infra* Part IV.

39. *See* discussion *infra* Part IV.

40. The call for uniformity in sentencing is based on the general fairness principle that judges treat like cases alike. *See* Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249, 249 (2005).

II. JUDGING REMORSE

"'Explain to the courtroom what went through your mind' . . . 'I felt the power of death over life. I orphaned his children, I widowed his wife. I beg for forgiveness, I wish I was dead.' I hung my head. I hung my head."[41]

This Part addresses seriatim the importance of remorse in sentencing hearings, the cultural significance of remorse displays, their required specificity in verbal content and demeanor, and the ambiguity in assessing their sincerity and import.

A. The Debated Relevance of Remorse

Deeply rooted beliefs grounded in Western religion, literature, and psychology make remorse seem relevant to punishment because remorse indicates both amenability to rehabilitation and, on a more basic level, fundamental goodness of character.[42] The significance of remorse to rehabilitation has deep roots within the Judeo-Christian tradition.[43] The believer's confession and atonement signal awareness of right from wrong and function as a prerequisite to spiritual alignment with God and fellow believers.[44] Restorative justice practices, for example, import the Judeo-Christian model of apology and forgiveness into criminal law on the theory that expressing remorse and experiencing forgiveness have rehabilitative effects on the defendant.[45]

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41. STING, *I Hung My Head*, *on* MERCURY FALLING (A&M Records 1996).

42. The four justifications for punishment are retribution, deterrence, incapacitation, and rehabilitation. Tapia v. United States, 564 U.S. 319, 325 (2011). Some scholars advocating a purely retributive regime reject the relevance of remorse to retributive punishment. *See* Bibas & Bierschbach, *supra* note 19, at 144; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445 (2004) (retribution concerns "past wrongdoing" rather than offender's later conduct or perspective on the offense).

43. Remorse is a component of the confessional model of forgiveness in Christianity, exemplified in SAINT AUGUSTINE, CONFESSIONS, which I discuss *infra* Part II.C.4. See Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677 (2000), for a discussion of the role of repentance and forgiveness in the Jewish concept of teshuva and its influence on American jurisprudence.

44. Within the parole process, Professor Daniel Medwed notes that the "reliance on remorse and responsibility . . . mirrors the classic Christian tenets of the Sacrament of Penance: 'contrition, confession, the act of penance, and absolution.'" Medwed, *supra* note 34, at 533 (quoting John Celichowski, *Bringing Penance Back to the Penitentiary: Using the Sacrament of Reconciliation as a Model for Restoring Rehabilitation as a Priority in the Criminal Justice System*, 40 CATH. LAW. 239, 249 (2001)).

45. M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 147–48 (2016) (discussing restorative justice's goals of offender rehabilitation through acceptance of responsibility, shame, apology, and restitution).

Popular views of human psychology have long held that remorse is relevant to rehabilitative potential.[46] Alcoholics Anonymous, for example, requires the addict to admit to addiction, make a list of people he has harmed, and make amends to them based on the theory that recovery is impossible without admission, acceptance of responsibility, and apology.[47] The recovery formula is based on a more general belief that we cannot turn to the task of ridding ourselves of damaging aspects of our character or behavior unless we fully appreciate their gravity and impact. As long as we are "in denial," we cannot change.[48]

Professional psychology also refers to remorse as an indicator of rehabilitation or capacity to change. Risk assessment instruments that measure dynamic (changeable) factors often include lack of remorse as an indicator of "antisociality" that may be correlated with a heightened risk of recidivism.[49] A psychopathic person is characterized, in part, as someone who does not feel "[r]emorse, shame, empathy, or guilt" for his misdeeds.[50] In psychoanalytic diagnosis, remorse may be an indicator of amenability to treatment because it shows that the patient is troubled by his own actions.[51] In diagnosing person-

46. Medwed, *supra* note 34, at 514 ("[P]arole boards view sincere admissions of guilt at a hearing as evidence of that inmate's cooperation in his own rehabilitation and, thus, indicia of having been cured. Mea culpa meets medical restoration, so to speak.").

47. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1395 (2003). Professor Stephanos Bibas made the parallel between recovery in Alcoholics Anonymous and confession to a crime, noting that, in Alcoholics Anonymous, "admitting that one has a problem is an essential step to recovery." *Id.*

48. Medwed discusses the progression of psychoanalytic theory from Sigmund Freud's ideas about "disavowal and repression" to the modern concept of denial. Medwed, *supra* note 34, at 533. He notes modern mental health professionals working in the criminal justice setting embrace the prerequisite of admission of past mistakes to rehabilitation. *Id.* at 533–34 (citing Gad Czudner & Ruth Mueller, *The Role of Guilt and Its Implication in the Treatment of Criminals*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 71 (1987); W.L. Marshall, *Treatment Effects on Denial and Minimization in Incarcerated Sex Offenders*, 32 BEHAV. RES. THERAPY 559, 559 (1994)). The correlation between antisocial attitudes and recidivism risk, however, does not emerge uniformly across studies. *See* Michael S. Caudy et al., *How Well Do Dynamic Needs Predict Recidivism? Implications for Risk Assessment and Risk Reduction*, 41 J. CRIM. JUST. 458, 463–64 (2013).

49. *See* Kevin S. Douglas & Jennifer L. Skeem, *Violence Risk Assessment: Getting Specific About Being Dynamic*, 11 PSYCHOL. PUB. POL'Y & L. 347, 353–54 (2005) (citing Vernon L. Quinsey et al., *Proximal Antecedents of Eloping and Reoffending Among Supervised Mentally Disordered Offenders*, 12 J. INTERPERSONAL VIOLENCE 794 (1997)) (discussing a study measuring the relationship between dynamic risk factors and recidivism that found "dynamic antisociality (procriminal sentiments, lack of remorse)" to be the only dynamic factor predictive of increased risks of recidivism).

50. RICHARD WEISMAN, SHOWING REMORSE: LAW AND THE SOCIAL CONTROL OF EMOTION 60 (2014).

51. *See id.* at 24.

ality disorders, defined by the permanence of the patient's maladaptive characterological traits, the psychoanalyst determines whether the patient's symptoms are "ego-syntonic" or "ego-dystonic."[52] Maladaptive behaviors and character traits that are ego-syntonic function as a part of the patient's personality and are thus much less likely to be amenable to change.[53] Only behaviors and traits that are ego-dystonic – that disturb the patient's view of himself – may be amenable to change.[54]

The punishment decision in criminal law usually involves a similar inquiry into whether the defendant is capable of reform. Within the forward-looking view of rehabilitation and, inversely, the need to incapacitate those who are deemed beyond rehabilitation, remorse is a barometer of amenability to reform.[55] More precisely, expressions of remorse signal that the defendant has undergone an internally driven "moral reform."[56] Someone who expresses deep regret for his actions seems unlikely to commit the same crime again.[57] Condemning one's own actions is akin to "splitting of the self into a blameworthy part and a part that stands back and sympathizes with the blame giving."[58] In condemning his own bad behavior, he signals his good character.[59]

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52. NANCY MCWILLIAMS, PSYCHOANALYTIC DIAGNOSIS: UNDERSTANDING PERSONALITY STRUCTURE IN THE CLINICAL PROCESS 28–29 (2011) (discussing the widely-held belief among psychoanalysts that symptoms that the patient experienced as "ego alien" or "ego dystonic" are more treatable).

53. *Id.*

54. *Id.* at 45–46 (discussing diagnosis and treatment based on identifying and highlighting for the patient ego-syntonic symptoms).

55. *See, e.g.*, State v. Fonseca, 76 N.E.3d 509, 517 (Ohio Ct. App. 2016) (sentencing court properly considered past criminal record and current lack of remorse in determining likelihood that defendant would commit future crimes); *see also* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 310 (1999) (discussing relevance of remorse in juvenile court to adult court transfer decisions). Social scientists, however, have not proven a correlation between remorse and rehabilitation. Bibas & Bierschbach, *supra* note 19, at 106. Some scholars have challenged the "validity of remorse as a predictor of future character." Duncan, *supra* note 20, at 1469.

56. Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 400 (2015) (recognizing moral reform as one of three distinct rehabilitative frameworks in Supreme Court jurisprudence, and the only one that seems to assume that punishment may "induce in the offender feelings of remorse and repentance").

57. *See, e.g.*, OHIO REV. CODE ANN. § 2929.12(D)(5) (West 2018) (noting that an offender who does not express remorse is more likely to commit future crimes).

58. Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture*, *in* THE PASSIONS OF LAW 168, 170 (Susan A. Bandes ed., 1999) (quoting ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER 113 (1971)).

59. Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 295–96 (2007) (discussing the phenomenon that we assign less blame to the apologetic person because the apology suggests the misdeed was not intentional); Jeffrey J. Rachlinski et al., *Contrition in the Courtroom: Do Apologies Affect*

The remorseful defendant shows his good character by joining the law-abiders in condemning himself.

While other factors influence character assessment, such as the defendant's criminal record, work history, and family ties, remorse sheds light on the significance of the crime to the defendant and thus illuminates the relationship between the crime and his character.[60] Remorse measures the degree to which the defendant understands the impact of his actions and finds his own behavior abhorrent and, thus, regrettable.[61] If a defendant expresses credible remorse, the implicit or explicit assumption is that the defendant experienced the crime as an offensive anomaly that does not reflect his character.[62] If the defendant fails to express remorse, we assume that the crime was a product of his character, meaning that he is likely to offend again.[63]

Given the deep roots of remorse in Western culture, even judges and parole commissioners who disavow reliance on remorse in punishment decisions are likely influenced by it on an unconscious level.[64] Whether intentional or not, the judge considers unquantifiable aspects of the defendant standing before the court.[65] Because we use remorse to assess character and capacity to change in so many of our cultural narratives about wrongdoing, a defendant who does not display remorse may seem fundamentally bad or, at the very least, unintelligible to the observer.

B. How Remorse Affects Sentencing

Given the cultural salience of remorse, it is not surprising that the defendant's remorse display plays a prominent role in the overall assessment of intangible, extra-legal factors that sway punishment decisions. Research suggests

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Adjudication?, 98 CORNELL L. REV. 1189, 1195 (2013) (discussing apologies as "intended to convince the recipient that the transgressor's actions reflect a less malevolent mental state or that the transgressor's long-term proclivities are not as destructive as his or her exhibited behavior would suggest").

60. The defendant either has or is developing "internal checks" that keep people from committing crimes even when external checks are absent or insignificant. United States v. Beserra, 967 F.2d 254, 256 (7th Cir. 1992) (Posner, J.).

61. Etienne & Robbennolt, *supra* note 59, at 296 (discussing how "apologies and expressions of remorse influence beliefs about the general character of the wrongdoer and the entrenchment of the wrongful behavior").

62. *See* WEISMAN, *supra* note 50, at 11.

63. *See id.*

64. Sitting judges may vary widely in their views about "remorse, its assessment, [and] its relevance to the judicial process." Rocksheng Zhong et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY & L. 39, 45 (2014).

65. In general, the personal characteristics of the defendant such as his social and economic background, or mental and emotional condition, are not quantified in sentencing guidelines. Michele H. Kalstein et al., *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.–C.L. L. REV. 575, 604 (1992).

that people in the position to punish others expect remorse and punish the remorseless more severely.[66] One study tested whether and how much lay people would adjust punishment based on "extralegal punishment factors" not directly related to individual "blameworthiness and deserved punishment."[67] The study found that, out of eighteen extra-legal factors, participants reduced punishment most often and most consistently based on four factors related to the defendant's reaction to the offense: (1) True Remorse, (2) Acknowledgment of Guilt, (3) Apology Immediately After the Offense, and (4) Apology.[68] Ranked highest in overall popularity and magnitude were punishment reductions for True Remorse, Acknowledgment of Guilt, and Apology Immediately after the Offense.[69] The salience of remorse on mock jurors accords with the pervasive public attention given to criminal defendants' expressions of remorse.[70]

While some courts have looked skeptically on whether remorse should be a factor in determining duration of sentence,[71] anecdotal evidence of the impact of remorse in the courtroom abounds. Failure to show remorse is commonly seen as a factor weighing against lenity in serious crimes of violence.[72] Professor Susan Bandes notes that jurors will conclude that a defendant facing the death penalty is remorseless if he fails to show emotion during the presentation of "horrific depictions of his crimes."[73] Failure to show remorse can affect

66. *See, e.g.*, Alayna Jehle et al., *The Influence of Accounts and Remorse on Mock Jurors' Judgments of Offenders*, 33 L. & HUM. BEHAV. 393, 397–99 (2009).

67. Robinson et al., *supra* note 13, at 741, 774–78.

68. *Id.* at 815–17.

69. *Id.* at 782. Support for adjusting punishment based on these factors decreased the more serious the offense. *Id.* at 785–86.

70. *See, e.g.*, Sarat, *supra* note 58, at 172–84; *see also* Bibas & Bierschbach, *supra* note 19, at 92 ("Newspapers routinely report stories of victims who demand apologies, criminal defense attorneys who note their clients' deep remorse, and judges who cite defendants' lack of remorse when imposing harsh sentences.").

71. *See, e.g.*, State v. Solberg, 882 N.W.2d 618, 624–25 (Minn. 2016) (remorse relevant to dispositional departures but not relevant to a downward durational departure unless the remorse somehow diminishes the seriousness of the offense).

72. *See, e.g.*, Bun v. State, 769 S.E.2d 381, 384 n.5 (Ga. 2015) (life without parole sentence did not violate state constitution where sentencing judge properly considered offense, defendant's criminal record, and lack of remorse); State v. Brooks, 139 So.3d 571, 575–76 (La. Ct. App. 2014) (juvenile defendant properly sentenced to life without parole where defendant lacked remorse and murder both lacked explanation and endangered others); United States v. Maldonado, No. 09 Cr. 339–02, 2012 WL 5878673, at *10 (S.D.N.Y. Nov. 21, 2012) (life sentence for juvenile defendant who committed murder for hire, showed no remorse, and did not demonstrate rehabilitative potential); State v. Lane, No. 2013–G–3144, 2014 WL 1900459, at *16 (Ohio Ct. App. May 12, 2014) (affirming the trial court's decision to sentence the juvenile defendant to life without parole where the defendant demonstrated contempt for his three victims' families rather than remorse).

73. Bandes, *supra* note 16, at 14 (quoting Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1563 (1998)).

outcomes in misdemeanor cases as well.[74] In some jurisdictions, sentencing judges are explicitly permitted to consider the defendant's lack of remorse,[75] and, in the rare case, it may be an abuse of discretion to fail to consider remorse.[76] Many capital sentencing statutes implicitly or explicitly authorize jurors to consider remorse.[77] In Justice Kennedy's words, "remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies."[78] Jurors report weighing the defendant's demeanor to determine whether it is remorseful[79] and that the defendant's remorse, or lack thereof, influenced their decision whether to vote for the death penalty.[80]

In federal court, the Federal Sentencing Guidelines permit judges to adjust sentences downward if the defendant accepts responsibility for the crime.[81] The Guidelines do not clarify the manner in which a defendant should accept responsibility and may contemplate a plea of guilty rather than an emotionally laden expression of remorse or an apology.[82] That notwithstanding, acceptance

74. *See, e.g.*, Stephenson v. State, 53 N.E.3d 557, 561–62 (Ind. Ct. App. 2016) (sentencing court did not abuse discretion by sentencing defendant to maximum 180 days for misdemeanor assault, taking into consideration defendant's criminal history and lack of remorse).

75. An "egregious lack of remorse" is an aggravating factor under the sentencing guidelines in Washington. WASH. REV. CODE ANN. § 9.94A.535(3)(q) (West 2018). At the same time, Florida courts, concerned that defendants who maintain their innocence may be penalized for failing to show remorse, have held that the sentencing court may not consider lack of remorse unless the defendant raises the issue of her amenability to rehabilitation. *See* Rankin v. State, 174 So.3d 1092, 1096–97 (Fla. Dist. Ct. App. 2015).

76. Crawford v. State, 770 N.E.2d 775, 783 (Ind. 2002) (trial court erred in imposing maximum sentence without adequately considering defendant's mental health and expression of remorse for the crime).

77. *See, e.g.*, Bunch v. Commonwealth, 304 S.E.2d 271, 281 (Va. 1983) (Remorse relevant in capital sentencing to determine (1) whether defendants "would commit criminal acts of violence which would constitute a continuing threat to society, or (2) vileness."); *see generally* Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1604–07 (1998) (surveying state statutory schemes).

78. Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring).

79. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 40 (1987). The jurors may be expressly invited to consider remorse as a mitigating factor, or it may be an explicit aspect of a mitigating factor. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1560–61 (1998) (remorse only outweighed by prior and future dangerousness, and more salient than the nature of the crime).

80. Sundby, *supra* note 73, at 1560.

81. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2010). The Guidelines Manual also refers to remorse in relation to disclosures of undiscovered crimes. *Id.* § 5K2.16.

82. The comments to §3E1.1 state that the Acceptance of Responsibility adjustment should not "apply to a defendant who puts the government to its burden of proof."

of responsibility often occurs within the context of the defendant's allocution, in which he "present[s] any information to mitigate the sentence."[83] In her qualitative study of defendants' Rule 32 allocutions, M. Catherine Gruber found that federal judges reacted favorably to expressions of remorse they found credible and negatively to expressions of remorse they found insincere.[84]

Remorse affects parole release decisions even though it is usually not a factor listed for consideration in parole statutes or regulations.[85] Anecdotal evidence from parole applicants and their attorneys suggests that parole boards look for "intuitive signs of rehabilitation as repentance, willingness to accept responsibility, and self-understanding."[86] Inmates who do not accept responsibility, admit guilt, or express remorse have an exceedingly difficult time securing release on parole.[87]

C. Assessing Remorse and Extrapolating Character

Before applying implicit bias theory to remorse assessments in the next Part, it is helpful to discuss in greater detail what makes accurately assessing remorsefulness so challenging. Even without the influence of implicit bias, it may be impossible to objectively determine whether someone is remorseful.[88]

Assessing someone else's feeling of remorse suffers from the same infirmities as all other assessments of credibility and character. We are habitually

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Id. § 3E1.1 cmt.2. The provision is used mostly to award downward departures to defendants who cooperate with the prosecution, in part because cooperation is highly valued by the prosecution and in part because of the difficulty in gauging 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, 1510–12, 1560–65 (1997); *see also* Sarat, *supra* note 58, at 168–69 (discussing the "Acceptance of Responsibility" provision of the Federal Sentencing Guidelines in light of popular and scholarly trends regarding the relevance of remorse to punishment decisions). Moreover, because the Guidelines recommend departures in only extraordinary circumstances, many judges will only factor in Acceptance of Responsibility if the defendant confessed, pleaded guilty, *and* assisted the government in investigating or prosecuting the case. *See, e.g.*, United States v. Stewart, 154 F. Supp. 2d 1336, 1342 (E.D. Tenn. 2001) (Acceptance of Responsibility adjustment may be appropriate where defendant's cooperation with the prosecution "rises to a level beyond what one ordinarily sees in a standard case.").

83. FED. R. CRIM. P. 32(i)(4)(a)(2).

84. *See* GRUBER, *supra* note 15, at 15.

85. *See* Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1076 (2014) (citing Silmon v. Travis, 741 N.E.2d 501 (N.Y. 2000); Phillips v. Dennison, 834 N.Y.S.2d 121 (N.Y. App. Div. 2007); Bibas & Bierschbach, *supra* note 19).

86. Medwed, *supra* note 34, at 513 (quoting PAUL F. CROMWELL, JR., ET AL., PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 200 (2d. ed. 1985)).

87. *Id.* at 514–15.

88. Bandes, supra note 16, at 15 ("[T]he pressing question for emotion researchers is whether remorse can be evaluated by external indicia.").

overconfident in our ability to read the mental states of others and believe that we can tell whether they are lying.[89] Our confidence in our assessments of other people's mental states and credibility is not related to accuracy.[90] We cannot fact-check whether another person's display of remorse is sincere. Despite data showing that we are accurate about whether another person is lying about fifty percent of the time,[91] the legal system adopts the fiction that judges and juries can assess credibility accurately when observing a witness in vivo.[92] As such, a judge's decision whether the defendant's remorse is credible is a decision entitled to great deference and is virtually immune from judicial review.[93]

Highlighted below are a few factors that make it more difficult to accurately assess remorsefulness in court. They include ambiguities caused by (1) the context of punishment; (2) the challenge of authenticity in the courtroom; (3) the challenge of interpreting variances in nonverbal behavior; and (4) deviations from what we expect a remorseful defendant to say to the court.

1. Remorse in the Face of Punishment

Courtroom assessments of remorse may be distorted by the belief that defendants have a strong motive to feign remorse to obtain leniency. The judge or parole commissioner will likely ascribe a purely self-interested motive to the defendant and doubt whether he would apologize if he did not have such a high stake in the outcome of the sentencing hearing.[94] The judge will attempt

89. Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 810 (2002) (citing studies).

90. *Id.*

91. *See generally* Paul Ekman, *Why Don't We Catch Liars?*, 63 SOC. RES. 801 (1996); Paul Ekman & Maureen O'Sullivan*, Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 913 (1991) (study participants, including law enforcement officers, detect lying at a rate rarely better than chance).

92. Faith in the juror's ability to assess credibility is predicated on the presumption that they are "fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." United States v. Scheffer, 523 U.S. 303, 313 (1998) (quoting Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891)) (holding no Sixth Amendment violation in excluding polygraph evidence). Appellate deference to the factual findings of the trial court is due in part to the belief that the trial judge or jury can better assess witness credibility by observing demeanor. Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) (demeanor evidence one justification for appellate deference).

93. *See, e.g.*, Gibson v. State, 51 N.E.3d 204, 215 (Ind. 2016) (declining to disturb sentencing court's determination that remorse was insincere, stating "credibility, including credibility of professed remorse, is a discretionary judgment for the trial court"), *cert. denied*, 137 S. Ct. 1082 (2017); State v. Soto, 855 N.W.2d 303, 311 (Minn. 2014) (noting that trial court is in best position to determine how much weight to give an apology or expression of remorse).

94. GRUBER, *supra* note 15, at 22 (defendant's stake in the outcome "handicaps" the defendant in his efforts to express sincere remorse); *see also* Ward, *supra* note 15, at 131 (identifying prosecutors' concern that some defendants are simply "proficient in

to discern "true remorse,"[95] but even a defendant who expresses remorse in a heartfelt manner may be judged to be "merely forensically resourceful."[96] The same can be said for the less formal settings of parole hearings or interviews with governors' aids in the commutation or clemency context, where expressions of remorse are both expected and likely to be discounted as self-serving.[97] The court may view feigned remorse as offensive and punish the defendant more harshly.[98]

2. Authenticity in the Courtroom

While the defendant has few constraints on what he says in the courtroom and how he says it,[99] the formality of the courtroom may make any genuine expression of feelings profoundly difficult. Remorse is native to the interpersonal rather than the institutional context. People usually express remorse privately in conversations or correspondence between the person injured and the person who caused the injury.[100] In contrast, it is difficult to behave naturally in institutional settings, to apologize to a judge who does not respond, or to express regret during a ten- to fifteen- minute interview with a parole commissioner who thumbs through a file and takes obscure notes.[101]

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saying the right things before a susceptible judge"); Richard Weisman, *Being and Doing: The Judicial Use of Remorse to Construct Character and Community*, 18 SOC. & LEGAL STUD. 47, 51 (2009) (discussing concern that defendants may make "strategic" and "calculated" "expressions of self-condemnation").

95. Robinson et al., *supra* note 13, at 746 (noting that judges scrutinize apologies to find expression of "true remorse").

96. RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 237 (2001); Rachlinski et al., *supra* note 59, at 1192 n.15 (citing United States v. Fonner, 920 F.2d 1330, 1335 (7th Cir. 1990) (Judge Easterbrook describing defendant's courtroom apology as "a deceitful little show")); *see also id.* at 1233 (hypothesizing that judges become "jaded" based on their constant exposure to defendants at sentencing).

97. In contrast, spontaneous expressions of remorse before arrest are less likely to be feigned. Robinson et al., *supra* note 13, at 744 & n.17; Duncan, *supra* note 20, at 1491–92 (legal professionals and lay people extrapolate vile character and callousness from defendant's lighthearted comments made in the hours after crime).

98. *See* GRUBER, *supra* note 15, at 155 (providing an example of mistake in defendant allocution leading to an increased sentence).

99. *See id.* at 148.

100. The restorative justice dialogues like victim-offender mediation permit direct apology to the victim. *See* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1275–76 (1994). They may, however, be equally susceptible to disparate outcomes due to implicit bias. *See, e.g.*, *id.* at 1282–86; Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 774 (2000).

101. Cohen, *supra* note 85, at 1061–62 (describing parole applicant waiting "a quarter-century for his chance to address the board [for] between five and ten minutes" during which the parole applicant contends with a "barrage of accusatory questions

A case vignette illustrates the inhibition that defendants may experience in court when called upon to express their feelings about the crime.[102]

Bobby Jones was a fifteen-year-old African American boy when a jury convicted him of murdering another teenager. At sentencing, Bobby could hardly speak. He seemed devoid of emotion. He would not look up and kept his eyes fixed on the table. When the judge invited him to speak on his own behalf, he said that he "was sorry all of this has happened" but said nothing concrete about the loss of life or its impact on the victim's family.

Bobby, now in his late thirties, reflected on why he had not expressed any of the deep regret and remorse that he felt during his sentencing hearing at age fifteen. He recalled how his mother brought him clothes to wear for sentencing that did not fit and did not look like something he would wear. He remembered sitting in court in the ill-fitting clothes, aware that everyone in the audience – the judge, the lawyers, the court reporter, and the court officers – was looking at him. When the judge invited him to speak, he wished he could just disappear. "I just wanted it to be over," he told us. He did not like speaking in public and had no idea how to express his feelings about the crime, so he said nothing, although he was full of remorse, shame, regret, and despair. To the judge, he appeared stone-faced, hardened – a "super-predator" capable of anything.[103]

Bobby's case offers insight into the deep and paralyzing discomfort that defendants may feel during their public sentencing hearings. The formality of the courtroom makes genuine, unaffected expressions of emotion exceptionally difficult. In addition to his profound discomfort, Bobby may have been trying to conform to the courtroom environment, which seemed to demand formality and stoicism. Perhaps he would have been able to show remorse if he had been in a less formal setting speaking directly to his victim's family member. Because we usually convey our contrition directly to people we have harmed, apologizing to a judge rather than to the victim creates structural limits on the effectiveness of the apology.[104]

[that] would intimidate and subdue even the most articulate and release-ready inmates").

102. This vignette is based on a client we represented through the Juvenile Justice Project at the University of Baltimore School of Law. All names and identifying details have been changed.

103. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD (Nov. 27, 1995, 12:00 AM), http://www.weeklystandard.com/the-coming-of-the-super-predators/article/8160.

104. Bibas & Bierschbach, *supra* note 19, at 98 (noting that "the context of the sentencing allocution inhibits rather than facilitates meaningful remorse and apology" and that the "quasi-public settings" of courtrooms and other variables cause apologies to sound "stilted, forced, or not enough" (internal quotations omitted)); GRUBER, *supra* note 15, at 23 (noting the oddity of apologizing to a judge rather than to the victim harmed by the criminal act).

The informal settings of parole hearings may appear to provide more natural settings in which the defendant can speak face-to-face with a person empowered to award early release from prison. It may be easier to express emotion, answer questions, and give a complete account to a person sitting across the table than it is to speak in open court to a judge who likely is not even looking at the defendant. But this assumption ignores that the informal conversation is actually a high-stakes interview for freedom in which the defendant is still under incredible pressure to perform.[105]

As Bobby's case demonstrates, evaluating the authenticity of remorse in the courtroom is extremely difficult. Because they assume the defendant will feign remorse to obtain mercy, many judges set a high bar for determining whether remorse appears sincere. Yet the defendant is unlikely to be able to clearly communicate his feelings of remorse in the formal setting of the courtroom.

3. Variances in Nonverbal Behavior

Nonverbal behavior, particularly the expression of emotion, is closely related to the above point about authenticity in the courtroom. We rely on nonverbal behavior to determine whether the defendant is being truthful and authentic.

Some evidence suggests that sentencing authorities rely more heavily on nonverbal expression than speech in assessing remorse.[106] Judges and juries may test apologetic words against paralanguage (tone of voice) and demeanor evidence.[107] When verbal expressions of remorse are not matched with contrite demeanors, for example, mock jurors will rely solely on demeanor evidence and discount the verbal apology.[108] Thus, if the defendant offers an apology without nonverbally conveying true remorse, the apology is likely to be ineffective and may even be harmful.[109]

Further support for the importance of nonverbal communication in remorse assessments comes from studies of judicial impressions of written apologies. One study found that sitting judges, many of whom reported being influenced by apologies in their sentencing decisions, did not alter hypothetical punishment decisions after reading a fictional case in which they read that the

105. One need only note the advice available to people applying for parole to treat the interview like a job interview. *See, e.g.*, Beth Schwartzapfel, *The Secret Hints for Winning Parole*, MARSHALL PROJECT (Jan. 25, 2016, 7:15 AM), https://www.themarshallproject.org/2016/01/25/the-secret-hints-for-winning-parole#.IEgyOMZss.

106. GRUBER, *supra* note 15, at 19 (discussing judicial assessments of defendant demeanor during sentencing).

107. *See* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1131 (2002) (noting difficulty "captur[ing] in words" the "phenomenon" of an apology).

108. Emily P. Corwin et al., *Defendant Remorse, Need for Affect, and Juror Sentencing Decisions*, 40 J. AM. ACAD. PSYCHIATRY & L. 41, 47 (2012).

109. Rachlinski et al., *supra* note 59, at 1196.

defendant apologized.[110] The researchers suggested that a written confirmation that an apology occurred is less effective than an in vivo apology in which the judges "could examine facial expressions and other nonverbal cues that they might feel allow them to assess the sincerity of the apologies more accurately."[111]

Accurately assessing nonverbal behavior, however, is difficult. We erroneously assume that certain expressions, postures, and gestures have universal meaning.[112] As a result, we are unduly confident in our ability to draw conclusions about how other people are feeling. Although Charles Darwin and others have documented potentially universal expressions of emotions,[113] biological universals are overlaid with cultural training and environmental constraints. The more divergent the cultural or ethnic background of the viewer and speaker, the less likely the viewer is to accurately read the emotional content of the speaker's communication.[114] Because people experience mixed emotions and express them in divergent ways, we cannot accurately identify the internal state of other people based on observing their nonverbal behavior, particularly people we do not know well.[115]

There is "little or no evidence that remorse can be accurately evaluated based on demeanor or body language."[116] And it is easy to see how, given the constraints of a courtroom, a defendant's facial expression or body posture could be misunderstood. The classic example of misread countenance is the stone-faced defendant who expresses no emotion during trial and sentencing. One explanation for an impassive countenance is that the defendant feels nothing, a troubling conclusion given the role of regret and remorse in conveying good moral character. We expect the morally-intact defendant to exhibit "submission, obedience, invisibility, silence, and the tacit acceptance of blame," to appear more misguided than dangerous, and to seem more in need of guidance than incapacitation.[117]

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110. *Id.* at 1223–24, 1229–30.

111. *Id.* at 1229–30 ("[T]he circumstances and the articulation of the apology have to be much more compelling to have an effect on a judge than lawyers and defendants might suppose.").

112. Nick Morgan, *7 Surprising Truths About Body Language*, FORBES (Oct. 25, 2012, 3:35 PM), https://www.forbes.com/sites/nickmorgan/2012/10/25/7-surprising-truths-about-body-language/#1a85da1c509f.

113. CHARLES DARWIN, THE EXPRESSION OF EMOTION IN MAN AND ANIMALS (Univ. of Chi. Press 1965) (1872); *see also* EXPLORING AFFECT: THE SELECTED WRITINGS OF SILVAN S. TOMKINS (E. Virginia Demos ed., 1995).

114. *See* Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) (discussing the relationship between race and courtroom demeanor assessment).

115. *See* GRUBER, *supra* note 15, at 19.

116. Susan A. Bandes, *Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition*, *in* THE INTEGRITY OF CRIMINAL PROCESS: FROM THEORY INTO PRACTICE 309, 313 (Jill Hunter et al. eds., 2016).

117. VAN CLEVE, *supra* note 33, at 65.

An impassive countenance, however, can be a protective mask over intense feelings of all kinds.[118] In discussing seemingly callous behavior of children in serious crime cases, Professor Martha Grace Duncan notes the particular difficulty children have sustaining sadness[119] and the adolescent's fear that crying will signify a regression into childhood.[120] Thus, a young defendant may appear impassive in an effort to seem more like an adult.

An impassive countenance can signal awareness that the courtroom, as discussed above, is a formal setting in which informal and passionate displays of emotion are tempered in favor of decorous and reasoned speech.[121] The defendant may be aware that the expression of too little or too much emotion could lead the judge to conclude that he is either unmoved or insincere. He is left with the often impossible task of expressing deep feelings in an emotionally austere and formal context.[122]

An impassive countenance may also reflect stoicism and an attempt at bravery in the face of tragedy. The desire to communicate these attributes may supersede the desire to communicate regret or obtain leniency. In the classic novel *A Lesson Before Dying* a young black man in a mid-twentieth century southern town was sentenced to death for taking part in a robbery that resulted in the murder of a shopkeeper.[123] During sentencing, his white attorney argued that he should not be put to death any more than one should put a "hog" to death.[124] This dehumanizing argument in favor of mercy so debased the defendant that he could not speak for weeks.[125] His loved ones rallied around him with one goal: to help him walk to his own execution like a man, with his head held high, conveying strength and dignity.[126] One can imagine how a man walking with his head held high to his execution might seem stone-faced, callous, and lacking remorse, yet the story offers a radically different reason for his demeanor, a protest demeanor necessary to assert his humanity. Similarly, defendants today may express their disagreement with an overly harsh or biased system of prosecution and incarceration by refusing to show the expected emotions of "submission, obedience, invisibility, silence, and the tacit acceptance of blame."[127]

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118. Duncan, *supra* note 20, at 1500 (citing John Bowlby, *Forty-four Juvenile Thieves: Their Characteristics and Home-Life (II)*, 25 INT'L J. PSYCHOANALYSIS 107, 124 (1944)).

119. *Id.* at 1478.

120. *Id.* at 1483.

121. *See* GRUBER, *supra* note 15, at 69 (describing the courtroom as a setting in which emotions are constrained).

122. *Id.* at 125 ("Defendants need to come across as maximally authentic and maximally sincere in spite of the handicaps that they face in producing a good courtroom apology.").

123. ERNEST J. GAINES, A LESSON BEFORE DYING 7–9 (1993).

124. *Id.* at 8.

125. *Id.* at 14–15.

126. *See generally id.*

127. VAN CLEVE, *supra* note 33, at 65.

At the same time, the sentencing authority may discount even emotionally laden displays of remorse depending on how she views the defendant. A crying defendant, for example, may feel remorseful for the crime, or he may simply feel sad that he will go to prison.[128] Van Cleve notes similar instances in which courtroom professionals in Cook County, Illinois, engaged in "comments, sighs, and rolling of the eyes" when defendants expressed humility and remorse during their sentencing hearings.[129]

We are left with a conundrum. The nonverbal aspects of remorse displays may be the most important factor in determining whether the defendant is sincerely remorseful and thus deserving of leniency. Yet defendants are likely to fail to express their remorse due to the constraints of the courtroom, differences in communication styles, and competing needs to appear dignified and strong. Moreover, when defendants express remorse through tears and a dejected countenance, their emotional displays may be misread as self-pity rather than remorse. The difficulty in assessing nonverbal displays of remorse creates ambiguity that, as Part IV explores, is likely to be a site of implicit racial bias.

4. Required Content: What We Expect the Remorseful Defendant to Say

The invitation to allocute at sentencing is a trap. Although the court invites the defendant to speak freely, it may penalize those defendants who fail to express remorse in the expected manner.[130] Federal Rule of Criminal Procedure 32(a)(1), for example, gives defendants the right to "present any information to mitigate the sentence," which seems to invite the defendant to offer any information that might lead to leniency or to simply ask for mercy.[131] Gruber's study, however, found that judges expect defendants to use their Rule 32(b) allocution to offer detailed apologies "with halting eloquence,"[132] unaccompanied by an explanation of mitigating context or dispute as to the facts of the case.[133]

An early and influential template for reflecting on one's sins can be found in *The Confessions of St. Augustine*, originally published in 400 AD.[134] Augustine confesses to the reader that, as a youth, he and a group of friends stole pears from a pear tree just to destroy them.[135] Three elements of Augustine's account of the pear theft resonate with expectations for modern defendants who

128. *See* GRUBER, *supra* note 15, at 136.

129. VAN CLEVE, *supra* note 33, at 86–87.

130. *Id.*

131. FED. R. CRIM. P. 32(i)(4)(A)(ii); *see also Allocution, Generally*, 21 AM. JUR. 2D *Criminal Law* § 723 (2018).

132. GRUBER, *supra* note 15, at 39 (quoting Green v. United States, 365 U.S. 301, 304 (1961) (holding that pre-sentence allocution rule requires that defendant be permitted to speak for himself rather than through counsel)).

133. *See id.* at 14.

134. SAINT AUGUSTINE, CONFESSIONS (Henry Chadwick trans., Oxford Univ. Press 1991).

135. *Id.* at 29.

allocute at sentencing, (1) admission of guilt, (2) "soul searching," and (3) self-condemnation.[136] After giving details about stealing the pears, he looks inward and tries to understand what he was thinking at the time of the crime. It was a minor crime, to be sure, but he categorically condemns his actions as "driven by no kind of need other than my inner lack of any sense of, or feeling for, justice" and the "excitement of thieving and the doing of what was wrong."[137]

Soul-searching, Augustine queries his own state of mind, citing the Book of Job for the quote, "Who understands his sins?"[138] He throws up his analytical hands and exclaims, "Who can untie this extremely twisted and tangled knot?"[139] This bewilderment over his own actions, combined with self-condemnation, distances him from the crime and aligns him with law-abiding people who would be perplexed and disturbed by his actions. We still expect these confessional elements from people convicted of crimes and judge an apology devoid of soul-searching and self-condemnation as insufficient and, thus, false.[140]

Yet, as remorseful as Augustine appears for stealing the pears, his confessional also contains contextual explanations for his actions, which modern judges might reject. Augustine explains that he was adrift because his parents were inattentive and impoverished and because he was under the sway of his adolescent peer group.[141] He complains that his parents lacked funds to pay for his schooling and that they failed to guard his virtue, leaving "[t]he reins . . . relaxed to allow me to amuse myself. There was no strict discipline to keep me in check, which led to an unbridled dissoluteness in many different directions."[142] He denies that he would have stolen the pears if he had been alone[143] and describes the theft as arising from the collective decision of a "gang of naughty adolescents."[144]

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136. *Id.* at 29–34.

137. *Id.* at 29. Despite the minor nature of the offense, he condemns himself for his utter lack of motive, such as hunger or poverty, comparing himself to a murderer who kills for no reason other than the pleasure of killing. *Id.* at 30–31.

138. *Id.* at 33.

139. *Id.* at 34.

140. Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 498 (2003) (reporting that, in civil context, people perceived defendants as less likely to be careful in the future if the defendants offered only partial apologies that did not include acceptance of responsibility).

141. AUGUSTINE, *supra* note 134, at 24–26.

142. *Id.* at 28.

143. *Id.* at 33.

144. *Id.* at 29. Speaking for adults everywhere reflecting on their adolescent transgressions in the company of their peers, Augustine states, "Friendship can be a dangerous enemy . . . . As soon as the words are spoken, 'Let us go and do it,' one is ashamed not to be shameless." *Id.* at 34.

Were Augustine to offer the above explanation in a sentencing hearing, we would say that he were making a mitigating argument for himself, describing his crime as the result of inadequate resources and adult supervision.[145] This is a "rotten social background" argument that may indeed explain a crime and mitigate punishment.[146] At a sentencing hearing, however, there is a risk that the judge will view the defendant's effort to describe his "rotten social background" as a failure to take responsibility for his actions, a *Gee Officer Krupke!* effort to avoid punishment.[147] Mitigating evidence is generally more effective when it is presented by someone other than the defendant.[148] If the defendant's lawyer or family member tells the court about a "rotten social background," the court may well exercise leniency.

When the defendant verbalizes a mitigating argument, however, it may call into question the authenticity of his remorse to the extent that the defendant seems to be shirking complete acceptance of responsibility.[149] In her study of federal sentencing hearings, Gruber concluded that "most mitigations subject the defendant to character-damaging implications."[150] Defendants' direct requests for leniency were also perceived as efforts to minimize the gravity of the offenses or the defendants' personal responsibility.[151] Even emphasizing

145. Some judges have argued compellingly that the background and circumstances of the defendant matter in sentencing if the punishment inflicted by the state is to have "moral force," but others give family and social context minimal attention. *See, e.g.*, David L. Bazelon, *Foreword – The Morality of Criminal Law: Rights of the Accused*, 72 J. CRIM. L. & CRIMINOLOGY 1143, 1144–47 (1981) (arguing that disadvantaged environments create contexts that curtail free will and thus reduce individual culpability).

146. Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation*, 3 L. & INEQ. 9, 11 n.11, 27 (1985).

147. The delinquent youth in *West Side Story* sing, "Dear kindly Sergeant Krupke/You gotta understand/It's just our bringin' up-ke/That gets us out of hand/Our mothers all are junkies/Our fathers all are drunks/Golly Moses, natcherly we're punks!" LEONARD BERNSTEIN, *Gee, Officer Krupke, on* WEST SIDE STORY (MGM 1961); *see also* Kevin M. Doyle, *Lethal Crapshoot: The Fatal Unreliability of the Penalty Phase*, 11 U. PA. J.L. & SOC. CHANGE 275 n.130 (2007–2008) (noting that "[m]itigation more readily comprehended by the lay person has also long suffered jaded ridicule from some quarters," and citing to *Gee, Officer Krupke*); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 96 n.18 (2009) (citing *Gee, Officer Krupke* in arguing that juveniles are treated alternatively as incompetent children and calculating adults).

148. *See* Janet Hinton, *Developing Mitigation Evidence*, FED. PUB. DEFENDER, EASTERN DISTRICT MO., https://moe.fd.org/Dev_Mitigation.php (last visited May 18, 2018).

149. GRUBER, *supra* note 15, at 86.

150. *Id.* at 103. Examples of "mitigations" include attempts to minimize the crime by showing that it was less serious than it appeared or that it could have been worse (no one was hurt; the gun was unloaded; and so forth). *See id.* at 98–99.

151. *Id.* at 114.

family ties and obligations seemed to be met with judicial skepticism and impatience.[152]

Gruber further found that defendants were expected to describe the crime and refrain from contradicting details in the government's statement of facts.[153] An apology without details about the offense and its consequences seemed to give the court the impression that the defendant was sorry that he was caught, rather than that he was sorry for his wrongdoing and its consequences.[154] Moreover, Gruber found that the court seemed to view contradicting or disagreeing with the government's statement of the facts as a failure to take responsibility for crime.[155] If, on the other hand, defendants adopt the government's version of events and condemn themselves wholeheartedly, they "lay claim to membership in the larger law-abiding community."[156]

Oddly, then, in an allocution designed to allow the defendant to request leniency, the defendant fairs best when he condemns himself and aligns himself with the prosecution by agreeing that he deserves whatever punishment the court metes out.[157] Judge Richard Posner has noted the same paradox with regard to the Acceptance of Responsibility criterion in the Federal Sentencing Guidelines.[158] The defendant who does not explain the circumstances of his crime offers the court no mitigation evidence to support a reduced sentence, but the defendant who explains his circumstances earns the ire of the court for making excuses for his bad behavior.[159]

These observations about the required content of remorse displays apply to all defendants but are relevant to a discussion of implicit bias. Any time a defendant deviates from the expected content of a remorse display, he creates ambiguity about the sincerity of his remorse. The decision-maker may unconsciously employ a cognitive bias in deciding whether to credit an ambiguous display of remorse. Turner's remorse display, for example, was ambiguous. In his statement to the court, he echoed Augustinian soul-searching and self-condemnation. Of his self-condemnation, he wrote, inter alia, "I can never forgive myself for imposing trauma and pain on [redacted]," and "I am completely consumed by my poor judgement [sic] and ill thought actions."[160] Speaking of the emotional toll of his remorse, he wrote, "I go to sleep every night having been crippled by these thoughts to the point of exhaustion. I wake up having dreamt of these horrific events that I have caused."[161] But Turner

152. *Id.* at 100.

153. *See id.* at 50–51.

154. *See id.*

155. *Id.* 36.

156. *Id.* at 47.

157. *Id.* at 119, 151 (concluding that the defendant does best to describe the crime in the manner that the court understands it and to refrain from implying what the judge should do in sentencing).

158. United States v. Beserra, 967 F.2d 254, 255–56 (7th Cir. 1992) (Posner, J.).

159. *Id.*

160. Xu, *supra* note 7.

161. *Id.*

also undercut his remorse display by failing to take responsibility for the crime. He blamed his crime on "party culture" and the "dangers of . . . college life."[162]

The ambiguity created between Turner's emotional proclamation of remorse and his deflection of criminal responsibility on to "college life" led to a debate about the sincerity of his remorse. His victim and some media reports portrayed Turner as remorseless due to his failure to accept responsibility for the crime.[163] Yet Turner's remorse seemed credible to the sentencing court, and we cannot know precisely why or whether biases played a role.

It may be asked whether judges misjudge remorse due to cultural, class, or gender differences in communication styles. In his statement to the court, Turner's writing style reflects his college education, and this may have resonated with the court. Most judges are members of the upper class and enjoy an income of at least twice that of the average American household.[164] We can assume that many defendants are unable to marshal language in this manner that Turner did during his sentencing hearing. The majority of defendants are poor, qualifying for public defender services.[165] How would the court interpret a different way of talking about remorse that the judge perceived to be less emotionally descriptive and precise?[166] Let's assume that a wealthy, white judge is evaluating the demeanor of a black defendant from a low-income neighborhood. Is it possible that they were raised with such radically different communication styles that the defendant's expression of remorse is unintelligible to the judge?[167] At least some evidence suggests that communication

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162. Sam Levin & Julia Carrie Wong, *Brock Turner's Statement Blames Sexual Assault on Stanford 'Party Culture'*, GUARDIAN (June 7, 2016, 8:17 PM), https://www.theguardian.com/us-news/2016/jun/07/brock-turner-statement-stanford-rape-case-campus-culture.

163. Katie J.M. Baker, *Here Is the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 3:17 PM), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.nfeLdRv1VM#.vnxepZ9LwR.

164. Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142 (2013) (discussing implicit socioeconomic bias in the judiciary in Fourth Amendment and child custody cases).

165. In the largest counties, eighty-two percent of criminal defendants are indigent. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(f) (4th ed. 2015).

166. For a discussion of how defendants attempt to verbalize remorse in court, see GRUBER, *supra* note 15, 122–33 (discussing informal and "nonstandard" conversational styles in defendants' allocutions in federal court), and Michele LaVigne & Gregory Van Rybroek, *"He Got in My Face So I Shot Him": How Defendants' Language Impairments Impair Attorney-Client Relationships*, 17 CUNY L. REV. 69, 75 (2013) (discussing pragmatic language impairments that may negatively affect the speaker's ability to communicate in a social context).

167. Bandes, *supra* note 16, at 16 ("A cultural gulf may separate the expression norms of the defendant from those of the decision-maker."); *see also* Ronald S. Everett & Barbara C. Nienstedt, *Race, Remorse, and Sentence Reduction: Is Saying You're Sorry Enough?*, 16 JUST. Q. 99, 117–18 (1999) (Based on their study of the "acceptance

between social groups is more difficult than communication within one social group because the meaning of gestures varies.[168]

Recent scholarship in cross-cultural communication suggests, however, that broad generalizations about how cultural differences can affect communication are "misleading."[169] Although cultures may have norms for communicative behavior, those norms represent the averages of wide ranges of communication styles within one culture, and few individuals act like the statistically average person.[170] As a result, one finds vast differences among individuals within one culture. Individual variation may be greater than intercultural variation, as at least one study has found.[171]

Whether there are generalizations that we can make about how different cultural and social groups express remorse is a question I leave for another day. For the purposes of this article, the significance of differences in remorse displays – whether attributable to culture or individualized variables – is that the differences make it difficult for the judge to objectively measure remorse. They introduce ambiguity into the decision-making process, ambiguity that must be resolved in order to decide whether the defendant is truly remorseful.

In sum, remorse remains a powerful variable in sentencing despite difficulties with assessment. To express remorse effectively and credibly in a sentencing hearing is no easy matter. The defendant has a motive to feign remorse for leniency, so all expressions of remorse will be viewed with a jaundiced eye. The sentencing authority will desire authentic emotion, but the courtroom setting is not conducive to heartfelt expressions of contrition, especially when they must be directed toward the judge rather than the victim. Nonverbal behaviors may be difficult to accurately interpret, and most verbal expressions of remorse will stray widely from what the court might consider ideal. Considering these challenges, almost every remorse display will contain some ambiguities for the court to resolve.

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of responsibility" factor in federal sentencing, the authors hypothesize that racially disparate applications of the "acceptance of responsibility" factor could be due to cultural differences in communication styles between judges and defendants.)

168. For the intercultural communication researcher, the hypothesis is that the greater the "experiential differences between individuals, the greater is the disparity in perceptions likely to be." Marshall R. Singer, *Culture: A Perceptual Approach, in* INTERCULTURAL COMMUNICATION: A READER 62–63 (Larry A. Samovar & Richard E. Porter, eds.) (1985).

169. Hee Sun Park et al., *Individual and Cultural Variations in Direct Communication Style*, 36 INT'L J. INTERCULTURAL REL. 179, 179–80 (2012).

170. *Id.*

171. Park et al. found that fifteen percent of the differences in direct communication style were between cultures, and eighty-five percent of the differences were among individuals within single cultures. *Id.* at 184.

III. IMPLICIT ASSUMPTIONS OF CRIMINALITY

"Thus grew up a double system of justice, which erred on the white side by undue leniency . . . and erred on the black side by undue severity . . ."[172]

This Part discusses implicit bias as a type of cognitive social processing that has been subject to rigorous research over the past twenty-five years. Laboratory studies of mock criminal proceedings and anthropological studies of criminal courts both highlight one aspect of implicit bias that has the potential to dramatically skew outcomes in criminal proceedings: the unconscious association between African Americans and criminality. I conclude that implicit assumptions about criminality are likely to exacerbate the difficulty that courts have assessing the remorse of defendants. Whether because of language and demeanor that differs from the court's cultural expectations or through a priori biased character assessments, sentencing authorities are likely to view African American defendants' expressions of remorse as insincere. Moreover, to the extent that the judge sees the defendant as inherently criminal and dangerous, she will perceive any display of remorse as "forensically resourceful" or manipulative. Remorse separates the defendant from the crime, but the implicit assumption of inherent criminality renders all remorse displays inauthentic.

At the outset, it is important to note that explicit bias associating African Americans with criminality has been part of U.S. political discourse for centuries. Apologists for slavery advanced the theory that slavery was necessary to domesticate (render harmless) otherwise savage (and thus dangerous), inferior people from the African continent.[173] The narrative of black dangerousness and criminality continued after the civil war, supported by pseudo-scientific theories of genetic differences. Near the end of the nineteenth century, statisticians such as Frederick Hoffman started using inaccurate and misleading crime statistics to argue that African Americans are inherently criminal and, thus, incapable of integrating in the fabric of American life.[174] Statistical ar-

172. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 84 (Millennium Publications 2014) (1903).

173. Brief for the National Black Law Students Association as Amicus Curiae in Support of Petitioner at 7–8, Buck v. Davis, 137 S. Ct. 759 (2017) (No. 15-8049) [hereinafter NBLSA Amicus Brief] (citing GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914 (1987)).

174. KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 51 (2010) (citing FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (Clark, New Jersey, The Lawbook Exchange 2003) (1896)) ("Hoffman combined crime statistics with a well-crafted white supremacist narrative to shape the reading of black criminality while trying to minimize the appearance of doing so.").

guments, which appeared objective and scientific on their face, served to "justify disenfranchisement, lynching, and Jim Crow segregation" in the South and "municipal neglect, joblessness, and residential segregation" in the North.[175]

While it became much less common to hear explicit endorsements of the fiction of inherent black criminality in the mid-twentieth century, the belief may have simply moved from conscious thought into unconscious belief. Narratives about black criminality became more "coded and subtle" after the civil rights movement.[176] The narratives continue to find expression in, for example, political campaigns that use examples of high-profile crimes committed by black men to discredit political opponents' law enforcement record;[177] disproportionate television news coverage of crimes committed by African Americans; and widespread fictionalized portrayals of African American men as criminals in television shows and movies.[178]

The association between African Americans and criminality and dangerousness matters at sentencing. Recently, the Supreme Court addressed an explicit claim, made by an expert during the penalty phase of a death penalty case, that African Americans are prone to violence.[179] Mr. Buck's defense attorney called an expert who testified, inter alia, that Mr. Buck's race was a factor in assessing his future risk of violence, claiming that Mr. Buck was more likely to act violently in the future because of his race.[180] The Court agreed that defense counsel was constitutionally ineffective in calling a witness who testified that "the color of Buck's skin made him more deserving of execution," noting that it would be "patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race."[181] The Court reasoned that defense counsel's incompetence likely affected the jury's decision to impose death because the expert's opinion echoed "a powerful racial stereotype – that of black men as violence prone" – that would lead the jury to determine he

175. *Id.* at 153.

176. NBLSA Amicus Brief, *supra* note 173, at 17.

177. *See* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 105–07 (2014) (discussing 1988 presidential campaign's use of Willie Horton, African American man convicted of violent crime while released on furlough in Massachusetts, to discredit political opponent who was then governor of Massachusetts).

178. NBLSA Amicus Brief, *supra* note 173, at 24 (citing Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM. 131 (2000) (finding approximately fifty percent overrepresentation of African American suspects in television news)); Brandon K. Thorp, *What Does the Academy Value in a Black Performance*, N.Y. TIMES (Feb. 19, 2016), https://www.nytimes.com/2016/02/21/movies/what-does-the-academy-value-in-a-black-performance.html.

179. Buck v. Davis, 137 S. Ct. 759 (2017).

180. *Id.* at 767.

181. *Id.* at 775; *see also* Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 898 (2015) (noting the corollary stereotype, that white men are "disassociated with violence").

would be a danger in the future.[182] The stereotype that concerned Justice Roberts in his majority opinion in *Buck* usually operates on an unconscious or implicit level and likely affects sentencing hearings even in the absence of expert witnesses making explicit race-based claims about a proclivity towards violence.

Implicit bias testing reveals that, although explicit arguments linking African Americans to criminality are widely rejected today, this explicit rejection has not scrubbed the unconscious association between African Americans and crime from the American consciousness.

A. The Origins of Implicit Racial Bias Research

Cognitive grouping is a normal process through which we organize information to simplify the process of making decisions. In her seminal article about the role of cognitive bias in employment discrimination, Professor Linda Hamilton Krieger explains that cognitive bias is a product of the necessary mental process of categorizing things into groups, a task that is essential to learning.[183] For example, a preschool-aged child will develop categories for food, dogs, clothing, and so on. Without such categories, the world is too complicated to understand.

The first studies applying cognitive grouping theory to social settings emerged in the second half of the twentieth century and verified that we create cognitive categories for people just like we create categories of things.[184] We form "normative stereotypes" that are a "composite of one's expectations as to how members of a particular group should behave."[185] As Krieger puts it, "[T]he price of this cognitive economy is that categorical structures . . . bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later."[186]

Social scientists have long sought to identify the implicit cognitive biases that we attach to different social groups and have developed simulation tests to measure the nature and strength of those biases. Simulation tests can measure implicit social cognition in different ways. IATs, for example, provide information about automatic thinking by calculating the response time of participants who are asked to categorize information or make decisions as rapidly as possible.[187] "The wisdom behind the IAT holds that statistically significant

182. *Buck*, 137 S. Ct. at 776 (internal quotation marks omitted) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion)).

183. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1163–64 (1995). For an overview of the early experiments in social cognition, see *id.* at 1191–95.

184. *See id.* at 1190.

185. *Id.* at 1173.

186. *Id.* at 1190.

187. *See* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 193 (2010) (suggesting

speed and accuracy-based differences in a person's ability to categorize different types of information reflect something meaningful in that person's automatic cognitive processes."[188] The IAT measures implicit racial bias by measuring the association between race and good or bad attributes, and some researchers have developed IATs that measure associations that are more specific to the context of criminal law.[189] To determine whether implicit racial bias affects judgments of guilt in criminal cases, for example, Professor Justin D. Levinson et al. developed an IAT that measures the strength of unconscious associations between race and criminal guilt.[190]

Two general observations from early social cognition theory are relevant to a discussion of specific methods of testing implicit racial bias. First, our bias in favor of ourselves causes us to attribute our mistakes to external, situational factors and the mistakes of others to stable, internal factors, such as personality.[191] This phenomenon, called the Ultimate Attribution Error,[192] or Fundamental Attribution Error, extends beyond ourselves to the group with which we identify.[193] This means that, when someone within our social group commits a crime, we attribute the crime to situational factors. When someone outside of our social group commits a crime, we attribute the crime to his character.

Second, we find it is easier to empathize with people within our social group than with people outside our social group.[194] Empathy – defined as awareness and appreciation of the thoughts and feelings of others – affects how we punish by allowing us to imagine the inner worlds of others. While the French proverb "to understand all is to forgive all" may be overstating the case,[195] empathy certainly increases accuracy in communication. Without empathy, the judge or parole commissioner may misread the emotional content of the defendant's demeanor or words.

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that legal scholars were first introduced to IAT's by Jerry Kang's article, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1539 (2005)).

188. *Id.* at 191.

189. *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 881, 883, 885–87 (2004) (finding that research subjects primed with crime-related words or photographs were drawn to black faces earlier and for longer periods than white faces).

190. Levinson et al., *supra* note 187, at 189–90.

191. *See generally* FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958) (discussed in Krieger, *supra* note 183, at 1204–05); EDWARD E. JONES ET AL., ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 79–80 (1971).

192. Thomas F. Pettigrew, *The Ultimate Attribution Error: Extending Allport's Cognitive Analysis of Prejudice*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 461, 464–66 (1979).

193. *Id.*

194. Smith et al., *supra* note 181, at 899–900.

195. *See* JOHN D. BARRY, INTIMATIONS: A COLLECTION OF BRIEF ESSAYS DEALING MAINLY WITH ASPECTS OF EVERYDAY LIVING FROM A POINT OF VIEW LESS CONTROVERSIAL THAN INQUIRING AND SUGGESTIVE 3–4 (1913) (discussing the proverb

The problems of the Fundamental Attribution Error and empathy deficits extend well beyond the American racial categories of black and white, and I will return to discuss how both the Fundamental Attribution Error and empathy deficits may affect remorse assessments in racially disparate ways in Part III.C.[196]

Although decades of research confirm that implicit social cognition distorts our perception of others through a strong bias toward our own social group, implicit bias – and its manifestation as unintentional discrimination – operates in our courts in ways largely immune from legal remedy.[197] Legal theory and practice disavow the unconscious and, instead, build on the contrary proposition that the decision-maker can reflect on his own thoughts and know whether his conclusions are rational or infected by inaccurate assumptions.[198] As a result, efforts to reduce discrimination in legal arenas have historically focused on intentional discrimination, which is a product of explicit, conscious bias.[199] The focus on intentional discrimination not only limits remedies for discrimination, but it also obscures the fact that implicit and explicit bias are not coextensive within individuals.[200] While implicit and explicit bias are correlated,[201] people who disavow explicit biases may score higher on tests that measure levels of implicit bias than people who explicitly endorse biased views.[202] As a result, a judge who disavows any explicit biases may be making

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in relation to a public prosecutor who turned away from punishment and toward reparative approaches to crime when "[h]e realize[d] that to understand is not only to forgive, but to sympathize, to feel with others, to put oneself in the other's place").

196. *See* discussion *infra* Part III.C.

197. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330–31 (1987).

198. Implicit bias supports the conclusion that our thoughts and decisions are affected by unconscious processes, negating the legal fiction that "a person has direct knowledge of the best imaginable kind of the workings of his own mind." Krieger, *supra* note 183, at 1185 (quoting GILBERT RYLE, THE CONCEPT OF THE MIND 13–14 (1949)). Although law and legal practice ignores implicit bias, legal scholars have been discussing its impact for at least thirty years. *See, e.g.*, Lawrence, *supra* note 197, at 330–36.

199. In discussing the requirement that the plaintiff show intent as part of the disparate treatment analysis in employment discrimination suits, Krieger notes that courts adopted the belief that discrimination stems from intentional intergroup animus from the social science research from the 1920s through the 1980s, which, she notes, was "before the emergence of a cognitive approach to intergroup relations." Krieger, *supra* note 183, at 1174.

200. *See* Lawrence, *supra* note 197, at 324–25.

201. Brian A. Nosek, *Moderators of the Relationship Between Implicit and Explicit Evaluation*, 134 J. EXPERIMENTAL PSYCHOL. 565, 579–80 (2005) (study finding statistically significant correlation between implicit and explicit evaluation processes and identifying variables that moderate their relationship).

202. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129–30 (2012). These forms of bias affect the courtroom setting: explicit, implicit,

decisions infected by implicit biases without knowing it. Nor would it be simple to prove the influence of implicit bias on a judge's decision in any individual case. We thus have decades of social science research on the unconscious processes that lead us to stereotype, disfavor, blame, and fail to empathize with people we perceive as different from us. Unsurprisingly, specific stereotypes, like the association between African Americans and criminality, have a distinct impact on how defendants in criminal cases are judged.

B. Relevant Quantitative Research on Implicit Racial Bias

Biases and stereotypes "fill in" the gaps in our understanding of other people when the information we have about them is incomplete or ambiguous.[203] Examples of ambiguity in the criminal justice system include whether a person walking down the street is engaged in dangerous criminal activity, whether circumstantial evidence establishes guilt, whether bad acts are a product of bad character, whether the defendant intended his actions, and whether the defendant will pose a danger in the future.[204]

A now large body of implicit bias studies suggests that when decisionmakers in the justice system are faced with ambiguous evidence, they may unconsciously resort to implicit associations between African Americans and criminality in order to resolve the ambiguity.[205] This Part offers a sampling,

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and institutional. *Id.* at 1133. They can function independently and in concert. *See id.* at 1133–34.

203. Lorie A. Fridell, *Racial Aspects of Police Shootings: Reducing Both Bias and Counter Bias*, 15 CRIMINOLOGY & PUB. POL'Y 481, 484–85 (2016) (citing Marianne Bertrand et al., *Implicit Discrimination*, 95 AM. ECON. REV. 94, 94–98 (2005); SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL (2000)).

204. Some biases at play in criminal justice decisions are unrelated to race and ethnicity. The implications of race bias research are applicable to a vast array of biases, many of which have no explicit, ideological basis. A defendant's attractiveness, for example, correlates with the amount of bail that judges set in misdemeanor cases. A. Chris Downs & Phillip M. Lyons, *Natural Observations of the Links Between Attractiveness and Initial Legal Judgments*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 541, 544–45 (1991) (data on bail amounts for over 2000 arrestees reveals that judges set lower bails in misdemeanor cases for physically attractive defendants); John E. Stewart II, *Appearance and Punishment: The Attraction-Leniency Effect in the Courtroom*, 125 J. SOC. PSYCHOL. 373, 376 (1985) (observation study of sixty criminal defendants in live courtroom found, inter alia, a correlation between defendants' attractiveness and severity of punishment).

205. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998); Bernd Wittenbrink et al., *Evidence for Racial Prejudice at the Implicit Level and Its Relationship with Questionnaire Measures*, 72 J. PERSONALITY & SOC. PSYCHOL. 262 (1997). The operation of the black-dangerousness implicit association is dramatically illustrated in cases in which juries accept self-defense as a complete

rather than a comprehensive review, of studies that have established the pervasiveness of the unconscious association between African Americans and criminality. Although the pattern is unmistakable, the mental processes involved are not static. Many factors influence the degree of bias on decisions, such as stress, time pressure, participant training, and whether the participant was primed with pro-stereotypical images. These variables may be important to developing strategies to reduce the effect of implicit bias in punishment decisions in general and remorse assessments in particular.

1. Studies of Implicit Bias Associating African Americans with Criminality

Perhaps the most well-studied area of implicit bias in the criminal justice system comes from observations and laboratory simulations of police officer interactions with the public. For example, some studies have shown that implicit bias causes police officers to interpret ambiguous behavior of African Americans as criminal or dangerous.[206] Police officers are more likely to perceive black and Hispanic men to be "large" and are more likely to stop, frisk, search, and use force against African American and Hispanic men whom they perceive to be tall and heavy-set.[207] On-the-street data suggests that bias influences stop-and-frisk decisions and escalates brief stop-and-frisk procedures into full-blown searches even in the absence of probable cause.[208]

In the laboratory setting, computerized simulations of police-citizen encounters allow researchers to isolate race as a variable in order to measure implicit bias in the decision whether to shoot a potentially dangerous stranger.[209] Although the results of the studies contain some unresolved contradictions,[210] some studies have shown that research subjects are quicker to shoot computerized images of armed black men than armed white men and slower to refrain

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defense in homicide cases in which unarmed black men are killed. *See, e.g.*, Lee, *supra* note 21, at 1580–85.

206. *See, e.g.*, Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 165–66 (2013) (discussing police officers' implicit bias in drug arrests).

207. Adrienne N. Milner et al., *Black and Hispanic Men Perceived to Be Large Are at Increased Risk for Police Frisk, Search, and Force*, PLOS ONE, Jan. 2016, at 5–6.

208. *See* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2035–39 (2011) (examining police behavior in light of implicit social cognition research).

209. *See, e.g.*, Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

210. One study found that police participants who scored high on IAT tests were under-vigilant with armed black suspects, making the error to shoot unarmed white men more than unarmed black Men. Lois James et al., *The Reverse Racism Effect: Are Cops More Hesitant to Shoot Black than White Suspects?*, 15 CRIMINOLOGY & PUB. POL'Y 457, 470–71 (2016).

from shooting unarmed black men than unarmed white men.[211] Early studies were conducted with college students.[212] Later studies with trained police officers demonstrated that they made fewer errors in the ultimate decision whether to shoot but still demonstrated bias against African American suspects as measured by the time it took to decide whether to shoot.[213]

While the police officer interprets ambiguous information about dangerousness in a matter of seconds or minutes, judges have more time to consider the evidence and reflect on their own thinking before making judgments about ambiguous evidence. Nevertheless, research suggests that implicit bias causes courtroom actors to resolve ambiguity about dangerousness and criminality in race-biased ways.

To determine guilt, for example, the judge or jury must assign meaning to ambiguous evidence and remember the most salient evidence presented. Studies show that mock jurors interpret ambiguous evidence in hypothetical trials as more probative of guilt of black defendants than white defendants.[214] In one study, research participants completed two IATs, one measuring associations between black or white people and guilty or not guilty verdicts and another measuring associations between black or white people and pleasant or unpleasant associations.[215] Primed to believe the suspect was either white or black, participants were asked to weigh the probity of ambiguous evidence of guilt. High scores on both IATs (linking of black with guilty and unpleasant) correlated with research subjects assigning more weight to ambiguous evidence against black defendants.[216] A piece of evidence that might, for example, have an innocent explanation was perceived as damning against the black defendant but not particularly probative of guilt against the white defendant.[217]

A study in which students recounted the facts of a story about a physical confrontation concluded that students misremembered facts in a way that wrongly attributed aggression to African American and Hawaiian characters

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211. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–15 (2007); Correll et al., *supra* note 209, at 1314. A similar pattern of bias emerged in a study comparing decisions to shoot black suspects compared to Hispanic and Asian suspects, respectively. Melody S. Sadler et al., *The World Is Not Black and White: Racial Bias in the Decision to Shoot in a Multiethnic Context*, 68 J. SOC. ISSUES 286, 297–98 (2012) ("Racial bias in the amount of time needed to correctly determine whether or not to shoot Blacks perseveres in a multiethnic context.").

212. *See* Correll et al., *supra* note 209, at 1315.

213. Correll et al., *supra* note 211, at 1020; Sadler et al., *supra* note 211, at 298.

214. Levinson et al., *supra* note 187, at 190.

215. *Id.* at 202–03.

216. *Id.* at 206.

217. *See id.* Mock jurors have also found ambiguous evidence more probative of guilt when the photo of the defendant's forearm showed darker skin. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 338 (2010).

and deflected blame from white characters.[218] The same effect occurs in school discipline. Simulation studies conducted as early as 1980 demonstrated that study subjects viewed identical classroom misbehavior as more aggressive and threatening when done by African American students.[219]

We forget or distort our memories in ways that preserve our assumptions and stereotypes.[220] Because memory failures and distortion happen outside of our conscious awareness, we are rarely prompted to test the accuracy of our memory against the facts.[221] Implicit bias thus likely affects what judges remember from the evidence presented at trial and even in a short statement of the facts preceding a plea bargain.[222] When applied to sentencing, judges likely recall and rely on evidence that conforms to their implicit biases in systematic ways, highlighting evidence that confirms the association between African Americans and criminality and discounting evidence that negates it.

2. Variables Affecting Implicit Bias Associating African Americans with Criminality

Some evidence suggests that the application of implicit bias in judging can be reduced or controlled. At least one study used an IAT to show that judges who harbored implicit racial bias overrode their biases in a written sentencing hypothetical that alerted them to the issue of racism.[223] Once aware of the role of race in the study, they inhibited activation of their biases. Explicitly raising the issue of racism to trigger conscious awareness of unconscious bias so that it can be observed and controlled has been called "making race salient" and will be discussed further in Part V.[224]

The divergent results of laboratory studies that simulate police shooting decisions may shed light on how these judges overcame their implicit bias in

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218. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–99 (2007).

219. *See* H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980) (cited in Krieger, *supra* note 183, at 1202–03 & nn.181–84).

220. Research subjects will also interpret ambiguous evidence as more probative of guilt if the defendant is black. *See* Levinson & Young, *supra* note 217, at 332, 338–39.

221. Levinson, *supra* note 218, at 376–78.

222. *Id.* at 372–73.

223. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1232 (2009). According to Judge Bennett, this is one of only two studies utilizing IATs to test the biases of actual, sitting judges. Bennett, *supra* note 27, at 398. The second study of sitting judges tests implicit bias against Jewish and Asian defendants in sentencing. Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017).

224. *See* Lee, *supra* note 21, at 1563.

decision-making. Some police officers who test as biased against African Americans on the IAT demonstrate in the laboratory setting that they can override their biases and make accurate shooting decisions.[225] One possible explanation is that implicit bias involves a two-stage process of "activation" and "application."[226] Bias "activation" occurs when we make an unconscious assumption about ambiguous stimuli.[227] Bias "application" occurs when we decide to act on the unconscious assumption.[228] A police officer whose IAT scores reveal high levels of implicit bias associating black men with crime may be able to control application of that bias in shooting decisions, at least in the laboratory setting where the police officer knows he is in no real danger.[229] Likewise, making race "salient" in the courtroom may help a judge prevent application of implicit bias.

Of course, cognitive override of racial bias may be more difficult in stressful situations, such as when police officers are fearful, angry, or fatigued.[230] In the courtroom setting, time and attention may reduce the effect of cognitive biases. In the school discipline context, for example, implicit bias against black students may be reduced through awareness but exacerbated by fatigue, stress, time pressure, and other forms of cognitive overload.[231] Likewise, within the context of a criminal case, judges may have more difficulty controlling application of their implicit biases if they are experiencing stress or "cognitive depletion."[232] A courtroom setting with a lengthy and fast-moving docket, with little time dedicated to each sentencing hearing, would thus be more likely to trigger the judge's implicit biases than a courtroom with few cases and ample time allotted to each disposition. The studies described above represent a fraction of the research on the effects of implicit bias against African Americans in criminal investigations, prosecutions, and courts. They

225. Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias and the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 201, 207 (2014).

226. Fridell, *supra* note 203, at 482.

227. *Id.*

228. *Id.*

229. *Id.* at 483 (citing Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267 (2012)) (positing that "controlled responses" might prevent bias activation); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010); *cf.* Kang et al., *supra* note 202, at 1124; Rachel A. Hernandez et al., *Fostering Students' Reflection About Bias in Healthcare: Cognitive Dissonance and the Role of Personal and Normative Standards*, 35 MED. TCHR. 1082 (2013).

230. Correll et al., *supra* note 225, at 210–11.

231. *See* Kent McIntosh et al., *Education Not Incarceration: A Conceptual Model for Reducing Racial and Ethnic Disproportionality in School Discipline*, 5 J. APPLIED RES. ON CHILD. 1, 4–5 (2014) (discussing decision points in school discipline that are particularly vulnerable to the effect of implicit bias).

232. Levinson, *supra* note 218, at 380–81.

demonstrate a common theme of resolving ambiguities using the unconscious association between African Americans and criminality. The studies also demonstrate that implicit bias varies depending on context and exposure to other information. The latter point is key to considering what steps we might take to ameliorate the problem of implicit bias in remorse assessments, which is discussed in more detail in Part V.

C. Qualitative Research on Implicit Bias in the Courtroom

Observational studies suggest that the prevalence of implicit associations between African Americans and criminality permeates the culture of many criminal courts, creating an atmosphere that frustrates defendants' attempts to show remorse and worthiness for lenient treatment. In her ethnographic study of the criminal courts of Cook County, Illinois, Van Cleve presents qualitative data from over one thousand hours of court observation to demonstrate a courtroom culture that perceives most criminal defendants as fundamentally different and separate from normal middle class people.[233] She describes prosecutors and court officers treating African American defendants as a literal mass that could be tallied by total weight as part of a game to help the courtroom professionals pass the time.[234] Defense attorneys she interviewed described "a court culture of indifference, disrespect, and hostility" toward criminal defendants.[235] Prosecutors and other courtroom professionals dismissively referred to defendants as "mopes," a term signifying that the defendants are "uneducated, incompetent, degenerate, and lazy."[236] Particularly relevant to defendants' attempts to express remorse, she cites instances in which court personnel, including probation officers arguing for revocation of probation and imposition of sentence, use vernacular expressions associated with African Americans to mock defendants' explanations of their own conduct.[237]

The assumption that the defendants before the Cook County Criminal Court were part of a group destined for criminality and incarceration likely shaped the sentencing practices of the judges. As one defense attorney puts it,

233. *See generally* VAN CLEVE, *supra* note 33.

234. *Id.* at 54–57 (referring to STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE (2005), in which he described a game played by prosecutors in the 1980s and 1990s that involved estimating weight of all defendants convicted by each prosecutor on a given day. The prosecutor who had secured convictions for the highest amount of total weight would win the day's contest. Van Cleve observed the same game played in Cook County in 2014.)

235. *Id.* at 55.

236. *Id.* at 61.

237. *Id.* at 59. In another example, the sheriff's banter included one calling the defendants in lock up "kids" and the other sheriff correcting him by calling them "chitlans." *Id.* at 60.

the defendants before the court were "de-futurized" – people who are pre-destined to lives of convictions and incarceration.[238] In contrast, the relatively rare white defendants who were able to adequately present themselves as middle-class people were given special consideration, particularly for low-level crimes involving drugs and alcohol.[239] Their crimes were not treated as the inevitable product of their characters but as evidence of aberration or illness and the need for intervention.[240]

Without quantitative data, it is impossible to know the prevalence of behavior like that described in Van Cleve's examples of implicit bias.[241] The detailed qualitative descriptions she provides, however, highlight two additional aspects of unconscious social cognition important to understanding implicit bias in punishment decisions: The Fundamental Attribution Error and the problem of out-group empathy. As discussed *supra* in Part III.A., the theory of Fundamental Attribution Error asserts that we attribute mistakes made by people outside of our social group to intrinsic causes and mistakes made by ourselves and people like us to situational causes.[242] Thus, a judge who perceives the defendant as outside of the judge's social group is more likely to attribute the crime to the defendant's inherent criminality than to transient, external circumstances.[243]

The role of Fundamental Attribution Error in punishment decisions was illustrated in a 1985 study in which study participants were asked to read a description of a transgression, predict whether the transgressor was likely to do it again, and recommend punishment.[244] If the transgression seemed consistent

238. *Id.* at 55. "Here, being a felon is part of an inevitable destiny, where the boundaries of race and criminality are blurred into a single narrative about the defendants as an underclass. Most frighteningly, those who hold this view of defendants' 'destiny' have the power to make that destiny come true." *Id.* at 102.

239. *Id.* at 65–66.

240. *Id.* at 102 (interview with private attorney confirming that a "white skinny kid charged with a gun crime" gets a lighter sentence than an African American kid charged with the same).

241. On this point, I disagree with Dean L. Song Richardson, who characterizes the bias displayed in Van Cleve's ethnography as explicit, rather than implicit. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L. J. 862, 865 (2017) (reviewing VAN CLEVE, *supra* note 33). Even though they displayed highly visible racial bias, these courtroom professionals probably did not see themselves as racist and would likely disagree with explicitly racist claims that African Americans are inherently criminal.

242. Pettigrew, *supra* note 192, at 464–66.

243. Krieger, *supra* note 183, at 1205–07. We extend external attribution to the group with which we identify so that we attribute in-group behavior to situational factors and out-of-group behavior to intrinsic factors. Pettigrew, *supra* note 192, at 464–66.

244. Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 268, 279 (1985) (discussed in Krieger, *supra* note 183, at 1205–06). In a second experiment, Bodenhausen and Wyer found that participants recalled the life

with the study participant's stereotypical view of the transgressor, the study participant was more likely to predict that the transgressor would transgress again in the future and more likely to recommend a harsher punishment.[245]

One can easily imagine a judge or probation officer unconsciously acting in accordance with this study. If the judge believes that the crime is a product of the defendant's intrinsic character, she will predict recidivism, be less interested in life circumstances or external influences, and punish more harshly. If, on the other hand, the judge sees the crime as inconsistent with her stereotype of people like the defendant, she may search for an external explanation for the defendant's actions and assume that the defendant is not likely to recidivate unless similar external circumstances persist. The Fundamental Attribution Error may make it impossible for the judge to credit the defendant's remorse.

In one sentencing hearing observed by Van Cleve, for example, the defendant "began sobbing while she spoke so that she was ultimately gasping for air between words" while apologizing and pleading "not to die in prison."[246] In response, the judge told her that she was "'a *bad* . . . *bad* woman' and then he began to yell in a rant that degraded her character."[247] This anecdote may stand as an example of the categorical rejection of remorse by a judge who could only view the defendant's words and demeanor through a lens of the crime as a product of her character.[248]

Given the courtroom culture that Van Cleve described, it is not surprising that judges have difficulty empathizing with defendants who seem at once radically different from the judge's social group and irretrievably flawed. The second aspect of implicit social cognition important to understanding implicit bias in punishment is the problem of out-group empathy.[249] Empathy allows us to "read" the emotional expressions of others more accurately or at least pose the right questions so that understanding is possible. As discussed *supra* in Part II, accurately communicating feelings like remorse is difficult. The receiver must assign meaning to ambiguous information from the defendant's actions, countenance, and demeanor. As Rachlinski et al. note, "dissimilarity can impede forgiveness," leading to the troubling hypothesis that the apology of a white-collar defendant might result in more leniency than the apology of a blue-collar defendant.[250] One judge interviewed in the Van Cleve study stated that the "least satisfying aspect of his job" was his interaction with the

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circumstances of transgressors whose transgressions were inconsistent with the stereotype of the transgressors, apparently searching for external factors to which to attribute the transgression. *Id.* at 272, 279.

245. *Id.* at 272.

246. VAN CLEVE, *supra* note 33, at 51.

247. *Id.* at 52.

248. *See* GRUBER, *supra* note 15, at 144.

249. *See, e.g.*, Richardson, *supra* note 241, at 883 (discussing "racial empathy gap" in context of implicit bias in the courtroom).

250. Rachlinski et al., *supra* note 59, at 1232 (citing Julie Juola Exline et al., *Not So Innocent: Does Seeing One's Own Capability for Wrongdoing Predict Forgiveness?*, 94 J. PERSONALITY & SOC. PSYCHOL. 495, 512 (2008)).

defendants and their families.[251] The judge stated, "You're dealing with the underworld, the underbelly of society. Every day you have to fight to understand people. You can barely understand them."[252]

Echoing Van Cleve's findings, Bandes has written in her work on remorse assessments that "[t]he empathic divide between the white juror and the black defendant is deep and tenacious."[253] In their study of jurors in death penalty cases, Bowers et al. found that white jurors were much less likely than black jurors to believe that black defendants were expressing sincere remorse.[254] Empathy deficits can thus stand in the way of accurately interpreting remorse displays offered by people perceived to be outside of the decision-maker's social group.

Although empathy deficits and the Fundamental Attribution Error are often apparent in the courtroom, more research is needed to measure how these phenomena influence remorse assessments.[255] And we need more research on the degree to which people harbor implicit biases related to social groups to which they belong. What we can say at this point is that an implicit bias associating African Americans with criminality influences some decisions made in criminal prosecution and punishment. The Fundamental Attribution Error, which causes us to attribute other people's actions to their character faults, may reinforce this implicit association between African Americans and criminality, particularly where the judge sees the defendant as part of a racially, culturally, or socioeconomically different group. The less the judge can identify with the defendant – based on race, culture, or socioeconomic background – the more difficult it will be for the judge to empathize with the defendant in a way that facilitates accurate assessment of remorseful sentiment.

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251. VAN CLEVE, *supra* note 33, at 62.

252. *Id.*

253. Susan Bandes, *Remorse and Demeanour in the Courtroom: Cognitive Science and the Evaluation of Contrition*, *in* THE INTEGRITY OF CRIMINAL PROCESS: FROM THEORY INTO PRACTICE 310, 316 (Jill Hunter et al. eds, 2016).

254. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 215–16 (2001).

255. Bandes, *supra* note 16, at 18 (noting the need for studies that ask, "For example, how do cross-racial evaluations differ from same-race evaluations? What role do implicit cultural rules about the display of emotion play in the expression and interpretation of remorse?").

IV. FAILED EFFORTS TO CURB IMPLICIT BIAS THROUGH REDUCED DISCRETION AND COLOR-BLIND JUSTICE

"Leopards break into the temple and drink to the dregs what is in the sacrificial pitchers; this is repeated over and over again: finally it can be calculated in advance, and it becomes part of the ceremony."[256]

In Franz Kafka's parable, quoted above, the leopards are a phenomenon that cannot be controlled. Implicit bias, happening outside our conscious awareness, functions like the leopards breaking into the temple. It influences sentencing decisions despite any individual decision-maker's efforts at fairness and objectivity. This Part first illustrates how the impulse to excise bias from the courtroom through rules that limit discretion or rules that limit access to bias-triggering information fails. Second, it argues that efforts to sanitize racial information from the courtroom will also fail to reduce implicit bias in sentencing decisions like remorse assessment.

A. Reducing Discretion Is an Inadequate Solution to Reducing the Impact of Implicit Bias

The trend for the past forty years has been to attempt to keep bias out of sentencing by reducing discretion.[257] More rigid decision-making, it is argued, reduces bias by reducing the judge's ability to sentence based on intuitive judgment calls about character, blameworthiness, and rehabilitative potential.[258] There is some truth to this claim, and it is borne out in sentencing data on states with voluntary sentencing guidelines.[259]

Racially disparate sentencing, however, has continued despite sentencing guidelines, capital sentencing procedures, and the reduction of availability of discretionary parole.[260] This may be due in part to bias in other stages of criminal prosecution. When judicial discretion is reduced, implicit bias expresses itself elsewhere, such as in policing practices and prosecutorial charging decisions.[261] But it is also due to continued racial disparity in sentencing, as judges

256. FRANZ KAFKA, PARABLES AND PARADOXES 93 (Schoken Books 1958) (1935).

257. *See* discussion *infra* Part IV.A.1.

258. *See* John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 236 (2006).

259. *Id.* at 274–76. In Blakely v. Washington, 542 U.S. 296, 313–14 (2004), the Supreme Court ruled that mandatory sentencing guidelines are unconstitutional in state prosecutions. All federal and state sentencing guidelines are now voluntary, meaning that the judge may depart from the sentence recommendation of the guidelines at her discretion. *See* United States v. Booker, 543 U.S. 220, 259 (2005).

260. *See* Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 96 (2013).

261. *Id.* at 94 (discussing the enhanced power of prosecutors within the Federal Sentencing Guidelines within the context of racially biased punishment decisions); *see*

continue to make subjective judgments about defendants' remorse and amenability to reform under most guideline regimes. Unless a completely mandatory term-of-years is required by statute, the judge's subjective judgment of the defendant's character plays a role in sentencing.

Moreover, what is lost when judicial discretion is reduced or eliminated is the ideal of individualized treatment in sentencing. Traditional sentencing strives toward the ideal of "consider[ing] every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[262] The "punishment should fit the offender and not merely the crime."[263] Reducing discretion forecloses opportunities for leniency when it is warranted and takes us farther from the goal of individualized sentencing in which the punishment is tailored to the defendant rather than solely to the crime.[264]

The first wave of concern over racial disparity in sentencing came in the 1970s through criticism of indeterminate sentencing and arbitrary application of the death penalty.[265] I discuss both here, seriatim.

1. Sentencing Guidelines

The 1980s saw a bipartisan effort to reduce judicial discretion in sentencing through the Sentencing Reform Act ("SRA"). Republican politicians supported the SRA because they believed it would reduce the unwarranted leniency of some judges, while Democrats supported the SRA because they believed it would reduce rampant discrimination in sentencing.[266] The newly minted U.S. Sentencing Commission developed sentencing guidelines that were mandatory until 2005 when, in *Booker*, the Supreme Court rendered the

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also James Babikian, Note, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines*, 42 AM. J. CRIM. L. 139, 145–46 (2015) (discussing racial bias in prosecutors' charging decisions but arguing for additional guidelines for prosecutors to curb bias).

262. Koon v. United States, 518 U.S. 81, 113 (1996); *see also* Pennsylvania *ex rel*. Sullivan v. Ashe, 302 U.S. 51, 55 (1937) (sentencing judge should consider "the character and propensities of the offender").

263. Pepper v. United States, 562 U.S. 476, 487–88 (2011) (quoting Williams v. New York, 337 U.S. 241, 247 (1949), in a discussion of the broad discretion sentencing judges have to consider all evidence of defendant characteristics in fashioning an appropriate sentence).

264. Lynch, s*upra* note 260, at 123 ("[T]he Guidelines and statutory mandatory sentencing schemes have aimed to minimize the human aspects of sentencing in ways that excise an individualized and potentially empathic sentencing procedure.").

265. *See* David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1475 (2014).

266. The motives for the SRA were mixed. Republicans supported it as a way to get tougher on crime. Democrats supported it as a way to reduce sentencing disparity. *See id.* at 1490–92.

Guidelines purely advisory, once again investing the sentencing judge with discretion to shape the sentence to the individual defendant and case.[267]

Despite guidelines that purported to promote uniformity and control arbitrariness, [268] racial disparity in sentencing continued unabated.[269] In his *New York Times* editorial opinion endorsing legislation to roll back mandatory minimums, former Attorney General Eric Holder noted continued racial disparity in federal sentencing from 1983 through the 2000s.[270] In fact, after the Sentencing Reform Act of 1984, the length of African American defendants' sentences increased twelve percent as compared to their white counterparts.[271]

The federal guidelines have been ineffective in eliminating racial disparity in sentencing for a variety of reasons. First, they shift discretion from judges to prosecutors who make charging decisions.[272] Executive decisions from policing practices to prosecutorial charging decisions evince ongoing racial disparity.[273]

Second, the guidelines have always allowed for variation based on subjective factors related to the judge's perception of the defendant and the defendant's allocution.[274] The SRA left intact the statutory provision providing that the sentencing judge may consider "information concerning the background, character, and conduct of" the defendant and that "[n]o limitation" shall be put on such evidence.[275]

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267. United States v. Booker, 543 U.S. 220, 226–27 (2005).

268. In his former role as a member of the U.S. Sentencing Commission, Justice Breyer described the purpose of the Commission was "to reduce 'unjustifiably wide' sentencing disparity." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

269. Kang et al., *supra* note 202, at 1148. There was a twelve percent increase in sentence length given to federal black defendants after the Sentencing Reform Act of 1984. *Id.* Further, a meta-analysis of studies measuring bias in the criminal justice system found a sentencing disparity of 1.40 years for white defendants to 2.44 years for black defendants convicted of a crime with a mean sentence of 5 years. *Id.* at 1151.

270. Eric H. Holder, Jr., Opinion, *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), http://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html.

271. Kang et al., *supra* note 202, at 1148.

272. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 13 (2013).

273. *Id.* at 28–29 (finding in a quantitative study that, inter alia, prosecutors are twice as likely to charge black men with crimes carrying mandatory minimum sentences).

274. *See id.* at 12.

275. 18 U.S.C. § 3661 (2012); *see also* Pepper v. United States, 562 U.S. 476, 488–89 (2011) (noting that Congress re-codified this provision in the SRA without change, and the Sentencing Commission incorporated it into its regulations at U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (U.S. SENTENCING COMM'N 2010)).

Moreover, as discussed *supra* in Part II, the Guidelines permit consideration of "Acceptance of Responsibility." This factor is often used to reward pleas of guilty and cooperation with the prosecution, and, in many cases, the courts may depart downward in sentence for defendants who appear remorseful during allocution.[276] The right to allocute, combined with the permissible consideration of acceptance of responsibility, carves out an area of judicial discretion in which implicit bias may affect the interpretation of ambiguous information.[277]

To the extent that guidelines reduce racial disparity in sentences, they seem to do so by functioning as "signposts" that help judges reduce the effect of unconscious variables in their sentencing practices.[278] The results from guideline regimes can thus best be described as mixed. Overall, racial disparity in sentencing continues to increase.[279] At the same time, variation among judges appears to decrease in jurisdictions with voluntary guidelines.[280]

Neither voluntary guidelines nor pure, discretionary sentencing provides meaningful appellate review that can sufficiently ameliorate the effects of implicit bias.[281] No appellate court would second guess a trial court's conclusion that the defendant's remorse was sincere or feigned. Factual findings, such as the defendant's acceptance of responsibility or display of remorse, are entitled to great deference under the abuse of discretion standard.[282] Sentencing involves so many variables that the record will almost always contain some permissible reason for the sentence imposed. For comparison, consider *Batson* challenges to the improper use of peremptory challenges to strike jurors based

276. 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, 1511 (1997).

277. *See id.* at 1512.

278. Pfaff, *supra* note 258, at 283–84 (discussing possible reasons why voluntary guidelines work including, inter alia, as "signposts": "A judge might sentence two similarly situated defendants differently without realizing it (and despite a desire to act otherwise), perhaps because he was in different moods at each sentencing hearing, because he forgot the exact sentence imposed at the earlier hearing, or because he improperly (but unconsciously) took into account factors like the defendants' race or sex. By providing judges with a sense of the proper sentence for each crime, guidelines (whether voluntary or presumptive) help them combat these unconscious acts"); *see also* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 706 (2010) (pointing out that federal judges continue after *Booker* to use the guidelines as an anchor in exercising sentencing discretion).

279. Starr & Rehavi, *supra* note 272, at 39.

280. *See* Pfaff, *supra* note 258, at 268.

281. *See* Stephanos Bibas, Blakely*'s Federal Aftermath*, 16 FED. SENT'G REP. 333, 338–39 (2004); Pfaff, *supra* note 258, at 237–38. Federal sentences that deviate from the guidelines are subject to review only for abuse of discretion. Gall v. United States, 552 U.S. 38, 51 (2007).

282. *Gall*, 552 U.S. at 51.

on race.[283] The attorney exercising peremptory challenges need only give a race-neutral explanation for the challenge.[284] The appellate court will have difficulty discounting the race-neutral explanation absent a showing of overt racism. This permits deliberate dissembling[285] and fails to ferret out unconscious racism.[286] In the same way, it is exceedingly difficult to establish race bias in sentencing, and guidelines do not fully ameliorate the problem.

2. Cabining Discretion in the Capital Context

The failure of limiting discretion as a means for reducing arbitrary and discriminatory sentencing is further illustrated in the death penalty context. Decades of data show that judges and juries impose death sentences disproportionately on black defendants and on defendants who kill white people.[287] The Supreme Court first expressed concern over racially disparate death sentencing practices in its plurality opinion in *Furman v. Georgia*, in which Justices Marshall and Douglas specifically credited statistical evidence of racial disparity in death sentences as a justification for finding Georgia's death penalty statute unconstitutional.[288]

The *Furman* Court required, and states enacted, protocols intended to limit discretion and guide the decision to kill. Thirty-five states responded to *Furman* by either eliminating all discretion from capital sentencing or by enacting laws that guided and regulated the imposition of death sentences.[289]

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283. Batson v. Kentucky, 476 U.S. 79 (1986).

284. *Id.* at 98.

285. *See* Foster v. Chatman, 136 S. Ct. 1737, 1754–55 (2016) (affirming that a *Batson* violation requires clear evidence that prosecutors used peremptory challenges to rid the jury of African Americans).

286. *See* Antony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180–84 (2005); *cf.* State v. Rashad, 484 S.W.3d 849, 860 (Mo. Ct. App. 2016) (Amburg, C.J., concurring) (calling on judiciary not to overlook growing body of evidence of implicit bias and its effect on judging).

287. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 357–59 (1995) (discussing failure of post-*Furman* efforts to regulate the death penalty as failing to adequately address Eighth Amendment concerns).

288. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that due to arbitrary application, "the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments"). Justice Stewart wrote that the arbitrary application of the death penalty might be based on racial discrimination, as Justices Marshall and Douglas both suggested, but that it had not been proven in the case. *Id.* at 310 (Stewart, J., concurring); *id.* at 250–51 (Douglas, J., concurring); *id.* at 364 (Marshall, J., concurring); *see also* Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 525 (2014) (analyzing Justice Marshall's concurrence in *Furman*).

289. See the discussion of state responses to *Furman* in Gregg v. Georgia, 428 U.S. 153, 179–80 (1976) (noting that thirty-five states enacted new death penalty statutes

Recognizing that mandatory death sentences would create unduly harsh results in cases in which the defendants could present compelling mitigating evidence, the Supreme Court rejected mandatory death sentences that fail to provide individualized consideration of culpability.[290] The Court held that defendants in death penalty cases have the right to present all evidence that mitigates culpability.[291]

In *Gregg v. Georgia*, the Supreme Court upheld the constitutionality of a new statute aimed at guiding discretionary imposition of the death penalty.[292] In so doing, the Court conveyed confidence that regulations and guidelines would ensure fair and unbiased application of the law.[293] Provisions of the new statute included a judicial questionnaire for the trial judge to complete and appellate review of the death sentence that required Georgia's highest court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."[294]

As early as 1987, it was clear that *Gregg* death protocols did not reduce racial disparity in the imposition of the death penalty.[295] Although jurors were presented with mitigating evidence – at least in some cases – they likely weighed mitigation evidence differently depending on their implicit biases. Studies suggest that capital jurors tend to see black men as more remorseless, dangerous, and cold-blooded than white defendants who have similar histories and committed similar crimes.[296]

Despite acknowledging its concern over the racially disproportionate use of the death penalty, the Supreme Court rejected efforts to challenge the constitutionality of capital sentences based on statistics demonstrating that the death penalty is applied in a racially discriminatory manner.[297] In *McCleskey*, the Supreme Court acknowledged that black defendants were sentenced to death more frequently than their white counterparts but rejected the proposition that statistical data could be used to challenge the death sentences in individual cases,[298] noting that each jury was unique and based its decision on case-specific considerations. In short, the Court said that the presence of data showing racially skewed outcomes does not mean that any one case is the product of racism.[299] This effectively closed the door to appellate review of implicit racial

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after *Furman* that specify the "factors to be weighed and the procedures to be followed").

290. *Id.* at 188 (quoting *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring)).

291. Sumner v. Shuman, 483 U.S. 66, 85 (1987) (holding unconstitutional mandatory death penalty for defendants convicted of murder while serving life without parole).

292. *Gregg*, 428 U.S. at 207.

293. *See* Levinson et al., *supra* note 288, at 526

294. *Gregg,* 428 U.S. at 212 (White, J., concurring).

295. McCleskey v. Kemp, 481 U.S. 279, 285 (1987).

296. Levinson et al., *supra* note 288, at 540.

297. *McCleskey*, 481 U.S. at 291–97.

298. *Id.* at 293–95.

299. *Id.* at 294–97.

bias, which is unexposed in the record of any individual case and only evidenced through statistics on sentencing trends in the aggregate. The failure of the *Gregg-McCleskey* fixes to capital punishment is a lesson in the failure of guidelines to fix racially discriminatory sentencing practices in non-capital cases.

3. Sanitizing Information About Race

Noting the rampant and difficult-to-control nature of implicit bias, one scholar has suggested sanitizing race, gender, and other bias-related variables out of criminal court through virtual reality technology.[300] The judge and jury would never see the defendant and would learn nothing about the defendant that could trigger implicit biases. Given the current state of technology, we could conduct entire trials and sentencing hearings in virtual reality. A modest version of this proposal can be found in Judge Bennett's suggestion that federal pre-sentence reports abandon the practice of including a photograph of the defendant because it may trigger racial disparity based on implicit bias against Afrocentric features.[301]

The fundamental problem with an invisible defendant or a virtual trial is that our minds tend to fill in informational gaps. Although not a perfect analogy, recent outcome data on the "ban the box" laws is instructive.[302] "Ban the box" laws were designed to prevent employers from asking whether a job applicant has a criminal record. Although designed to reduce discrimination against people with criminal records, the ban on criminal record information is resulting in greater employment discrimination against African Americans.[303] It seems that race-based discrimination in hiring increased because employers assume African American applicants have criminal records.[304] Stated differently, the box functioned to assure the employers that some African American applicants do not have criminal records. Without that information, some employers assume that African American job applicants have criminal records. This highlights the way implicit bias thrives in situations in which we know very little about a person and attempt to fill in the details using cognitive grouping techniques. Given limited information about defendants, judges and juries will fill in the details using unconscious assumptions that will often reflect bias. A juror may assume the defendant is black and the victim is white, for example, as the juror fills in the missing details in his imagination in a virtual trial.

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300. ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 267–70 (2015).

301. Bennett, *supra* note 27, at 404.

302. *See* Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (Univ. Mich. Law & Econ. Research Paper, No. 16-012, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795.

303. *Id.* at 4.

304. *See id.* at 5.

Limiting discretion and creating virtual courts have in common the effort to eliminate the possibility of acting in discriminatory ways, yet, in both cases, implicit bias can still find expression.

V. RECOMMENDATIONS AND CONCLUSION

A. Potential Strategies for Reducing Remorse Bias

Remorse is an extra-legal variable in sentencing that is particularly vulnerable to biased assessment due to its ambiguity.[305] Problems with extra-legal variables in sentencing may require extra-legal solutions imported from other disciplines, such as the social sciences. IAT tests and field studies demonstrate how implicit bias unintentionally affects how individual human beings make decisions about one another and thus have broad application to assessing defendants' remorse displays.[306] The question remains how we can use these scientific insights on racial bias to make sentencing fairer.

Based on the social science that exists today, this Part proposes several recommendations designed to integrate awareness of implicit racial bias into sentencing hearings so that remorse can be assessed more fairly. Rather than pursuing a goal of a color-blind courtroom, we should address the danger of racial bias by keeping the issue of racial bias in the court's awareness as it makes punishment decisions based on defendants' displays of remorse. First, this Part discusses the theory of "making race salient" articulated by Professor Cynthia Lee and concludes that judicial training on implicit bias is necessary but insufficient to make race salient in the courtroom. More is needed than occasional bias trainings to ensure that racial bias remains an active judicial concern. Potential strategies include frequent reference to the dangers of implicit racial bias during courtroom proceedings; regular oversight, review, and feedback of judicial sentencing decisions; and docket management strategies that reduce cognitive depletion.

Before embarking on these specific recommendations, it is essential to stress that we need more research on the relationship between implicit racial bias and remorse assessments. Participants in a laboratory setting could, for example, rate the videotaped remorse display of a defendant at sentencing. Their scores could be compared to their performances on IAT tests. Additional

305. Robinson et al., *supra* note 13, at 742, 745 (quantitative survey study of the effects of eighteen extra-legal factors on punishment decisions).

306. In the capital context, participants who demonstrated high levels of bias on a "value of life" IAT (devaluing black compared to white life) were more likely to sentence a black defendant to death. Levinson et al., *supra* note 288, at 554, 562. The study did not find an overall correlation between the race of the defendant or the race of the victim and the likelihood that a participant would vote for death but found correlations related specifically to the participants' implicit and explicit racial bias. *Id.* at 562.

studies are needed to measure how much social group factors like Fundamental Attribution Error and empathy deficits influence remorse assessments.[307]

1. Making Race "Salient"

In her article examining the role of implicit bias in the acquittal of George Zimmerman for killing Trayvon Martin, Lee discusses studies that suggest that "making race salient" reduces the impact of implicit bias.[308] Courtroom professionals can make race salient by discussing racial stereotypes openly during opening statement,[309] lay and expert witness testimony,[310] jury instructions,[311] and closing argument.[312] Making race salient accepts, using Kafka's analogy, that leopards break into the temple and incorporates that fact into the proceedings so it can be accounted for.

As the implicit bias research discussed *supra* in Part III suggests, people may be able to override the effects of implicit bias on their judgment if someone brings the reality of racial bias to their conscious attention in a setting conducive to reflective thought. Samuel Sommers and Phoebe Ellsworth conducted a series of studies on the effect of consciously raising the issue of race and racism with mock jurors and found that explicit mention of race reduced the effects of implicit bias to the extent that jurors treated white and black defendants equally.[313] Making race salient by exposing study participants to ra-

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307. Bandes, *supra* note 16, at 18 (noting the need for studies that ask, "For example, how do cross-racial evaluations differ from same-race evaluations? What role do implicit cultural rules about the display of emotion play in the expression and interpretation of remorse?").

308. Lee, *supra* note 21, at 1562–63.

309. *Id.* at 1593–94.

310. *Id.* at 1595–97.

311. *Id.* at 1597–1600. Professor Lee quotes from one judge's jury instruction on implicit bias. U.S. District Court Judge Mark Bennett tells jurors,

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions.

Id. at 1598 (quoting Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 859 (2012)).

312. *Id.* at 1600–01.

313. Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003); Samuel R. Sommers & Phoebe C. Ellsworth, *Race*

cial slurs also reduced the impact of implicit bias. In another study by Sommers and Ellsworth, mock jurors were asked to decide whether to convict and how much to punish a basketball player who allegedly committed an assault.[314] If the hypothetical described the defendant as one of two black (or white) players on the team who was the subject of prior racial slurs, mock jurors showed no bias in conviction rates or punishment between the black and white defendants.[315] Just the reminder of the existence of racism appeared to reduce the application of implicit bias in punishment decisions.

Making race salient presents practical challenges, such as who will raise the concern of racial bias and in what manner. While litigants, such as defense attorneys, can raise the issue of racial bias,[316] such efforts may be viewed as adversarial tactics rather than neutral reminders to be fair. Ideally race can be made salient through the court system itself, model jury instructions, and direct language in court rules and judicial bench books.

2. Judicial Education and Training

Another way to make race salient in the courtroom is by increasing judicial awareness of biases and providing strategies for inhibiting biases so that they do not infect punishment decisions.

Judicial training on biases in decision-making should include IAT testing to provide judges with more objective information about their biases. Most judges are aware of implicit biases but underestimate the effect of implicit bias on their decisions. When asked to rate their ability to refrain from decision-making based on prejudice or bias, for example, ninety-seven percent of administrative law judges rated themselves as in the top half of judges in their ability to be fair.[317] Because ninety-seven percent of randomly selected judges cannot all be in the top half of a fairness ranking, the only explanation is that some judges overestimate their capacity to be fair and free from prejudicial bias. Another survey found that ninety-two percent of senior federal judges rated themselves in the "top 25% of respective colleagues in their ability to make decisions free from racial bias."[318] Many of the judges surveyed would benefit from taking IATs to measure their unconscious associations and preferences, yet few have taken the IAT. Judge Bennett reported that fewer than

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in the Courtroom: Perceptions of Guilt and Dispositional Attributions, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000).

314. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 210–11 (2001).

315. *Id.* at 216. If the hypothetical mentioned only race of the defendant, mock jurors convicted black defendants at a higher rate than their white counterparts and recommended more severe punishments. *Id.* at 217–19.

316. *See, e.g.*, Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1022–42 (2013).

317. Rachlinski et al., *supra* note 223, at 1225–26.

318. Bennett, *supra* note 27, at 397.

ten out of 500 judges who participated in his implicit bias training had taken an IAT test before.[319] While IAT test results may not correlate directly with discriminatory behaviors,[320] they provide valuable insight into the less well-lit corners of subjective decision-making, such as whether a defendant is remorseful and deserving of a second chance. Simply requiring judges to take IAT tests and to reflect on their scores could help them control the application of implicit bias in their decisions.[321]

In addition to IAT tests that measure bias based on race, those making punishment decisions must stay aware of more nuanced aspects of implicit bias against Afrocentric features and darker skin tones.[322] Judge Bennett suggests that judges may be able to control bias for race as an abstract concept but inadvertently allow implicit bias based on Afrocentric features to influence their decisions.[323] He also recommends that anyone who influences sentencing decisions – including defense attorneys, prosecutors, and probation officers who prepare pre-sentence reports – should participate in implicit bias training.[324] The list should include parole and pardon board members as well.

After sentencing authorities become aware of their implicit biases, strategies to diminish the biases can be tested. As discussed in Part III, some techniques, such as exposure to counter-stereotypical information, have proven promising in reducing implicit bias. Pro-white bias on IAT tests has been shown to reduce through a twelve-week process that begins by confronting participants with their implicit, pro-white bias (through IAT testing) and then implementing five strategies to reduce automatic stereotyping, including, inter alia, exposure to counter-stereotypical images and opportunities for interpersonal contact in counter-stereotypical settings.[325]

Both the National Center for State Courts and National Consortium on Racial and Ethnic Fairness in the Courts have offered implicit bias training for

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319. *Id*.

320. *See* Patrick S. Forscher et al., A Meta-analysis of Change in Implicit Bias 34–35 (July 1, 2017) (unpublished manuscript), https://osf.io/b5m97/download (noting lack of clear and consistent correlation between implicit and explicit bias, and between implicit bias and behavior).

321. Richardson, *supra* note 241, at 887 (noting importance of "awareness of implicit bias and doubting one's objectivity" (footnote omitted)).

322. "[D]arker skin tone, wider noses, coarser hair, darker eyes, and fuller lips . . . influence the length of a criminal sentence, because defendants with these characteristics are perceived as more likely displaying a Black stereotype of aggressiveness, criminality, dangerousness, and recidivist law-breaking." Bennett, *supra* note 27, at 403 (citing numerous studies); *see also* William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 352 (2005) (finding an impact on sentencing decisions).

323. Bennett, *supra* note 27, at 403.

324. *Id.* at 404.

325. Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL. SOC. PSYCHOL. 1267, 1269–71 (2012).

state court judges.[326] Many of the strategies suggested to judges in these trainings fit on a one-page "Implicit Bias Bench Card" and include allotting enough time for cases that might trigger implicit bias, reflecting on emotional responses to cases, keeping detailed notes rather than relying on memory, and seeking feedback from others about the fairness of decisions.[327]

Judicial training on implicit bias could be elaborated upon to clarify the risk of implicit assumptions about black criminality infecting remorse assessments. As discussed earlier, it is impossible to excise remorse from sentencing decisions within a regime of discretionary sentencing because it is so integral to a gut-level assessment of the character of the defendant.[328] Moreover, defendants cannot refrain from providing remorse-related information to the court. Even when a defendant chooses to say nothing, his countenance and demeanor is observable. In this sense, he is forced to communicate his reactions to the court by his very presence in the courtroom. Since remorse assessments are here to stay, we must focus on improving how it is assessed in sentencing decisions.[329] Judges and others making punishment decisions, such as parole and pardon boards, should be aware of the lack of evidentiary support for the proposition that we can intuitively sense sincere remorse and the likelihood that implicit biases infect remorse assessments.

Awareness of one's own bias, and the concomitant reduction in confidence in one's objectivity, may reduce the effect of implicit bias in remorse assessments. As discussed earlier,[330] implicit bias appears to work in two phases: activation and application. In studies simulating police officer shooting decisions, some police officers with demonstrated implicit bias did not apply the bias to the shooting decision. Similarly, judges aware of their biases and skeptical of their own objectivity might be able to use that knowledge to refrain from applying an implicit association between African Americans and criminality when they are assessing remorse.

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326. National Center for State Courts conducted a three-year pilot education program in state courts between 2009–2012. *See Helping Courts Address Implicit Bias: Resources for Education*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/ibeducation (last visited May 21, 2018). In 2014, courts in fourteen states and the District of Columbia participated in implicit bias training courses through the National Consortium on Racial and Ethnic Fairness in Courts. *Implicit Bias Training*, NAT'L CONSORTIUM ON RACIAL & ETHNIC FAIRNESS CTS., http://www.national-consortium.org/Implicit-Bias/Implicit-Bias-Training.aspx (last visited May 21, 2018).

327. *See* Minn. Judicial Branch, *Implicit Bias Bench Card*, NAT'L CONSORTIUM, http://www.national-consortium.org/~/media/Microsites/Files/National%20Consortium/Implicit%20Bias/Implicit-Bias-Bench-Card.ashx (last visited May 21, 2018).

328. *See supra* Part II.

329. Susan A. Bandes, *Evaluation of Remorse Is Here to Stay: We Should Focus on Improving Its Dynamics*, *in* CRIMINAL LAW CONVERSATIONS 198, 198–99 (Paul H. Robinson et al. eds., 2009).

330. *See supra* Part III.B.2.

3. Prompt and Frequent Feedback on Sentencing Decisions Involving Remorse Assessment

An occasional judicial training is insufficient to guard against the effects of implicit bias because vigilance recedes as the daily tasks involved in judging cases and court administration crowd the mind. A system that provides judges with frequent feedback, both from court observation and from frequent analysis of their sentencing practices, is likely to be more effective than occasional trainings.

Implicit bias is invisible to the person possessing it, but it is often visible to observers. In Van Cleve's study of Cook County criminal courts, for example, the court observers witnessed and documented indicia of bias that might have been invisible to the courtroom professionals they observed.[331] The observation and feedback should exceed what is generally meant by "court watching" conducted by citizens, activists, or social scientists.[332] Observations should be conducted by implicit bias experts who can provide judges with regular feedback that could be compared with the judge's sentencing practices documented in the case files. In practice, judges receive almost no feedback other than through appellate reversals and rare moments of public outcry in high-profile cases.[333] Systematic observation and feedback, offered as part of judicial continuing education, might do much to spur reflection on implicit biases and their effect on sentencing decisions. Moreover, if feedback occurs frequently, it will serve to keep race salient in the courtroom.[334]

4. Improving Cognitive Capacity to Reduce Biased "Shortcuts"

Cognitive stress, caused by time pressure, multi-tasking, or exhaustion, is associated with the activation of implicit biases.[335] Many criminal courtrooms, especially in cities with high rates of prosecution, are overwhelmed with cases

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331. In this analysis, I depart from Richardson's characterization of the bias described in Van Cleve's study as explicit bias. It was evident, and thus explicit, to the observer, but the courtroom professionals may have been completely unaware of it. *See* Richardson, *supra* note 241, at 865.

332. Court watching programs alone would be inadequate. *Id.* at 886–87 (discussing that, while court watching is valuable, it provides a limited view of implicit bias and its affects).

333. *See* David K. Kessler, *The More You Know: How 360-Degree Feedback Could Help Federal District Judges*, 62 RUTGERS L. REV. 687, 694 (2010).

334. In addition to changing the thought processes of individual judges, testing, training, and feedback promote shifts in judicial culture, making it more acceptable for judges to acknowledge that, despite their sworn duty to impartiality, they are influenced by their unconscious assumptions and biases. *See generally* Anne Bloom, *The "Post-Attitudinal Moment": Judicial Policymaking Through the Lens of New Institutionalism*, 35 L. & SOC'Y REV. 219 (2001) (book review); *see also* Pfaff, *supra* note 258, at 283–84.

335. *See* Richardson, *supra* note 241, at 881–82.

that are disposed of as quickly as possible, a process referred to as "systemic triage."[336] Dean L. Song Richardson notes that "implicit biases flourish in situations where individuals make decisions quickly and on the basis of limited information, exactly the circumstances that exist under systemic triage."[337]

While cognitive stress is correlated with implicit bias, there is little evidence that reducing cognitive stress reduces implicit bias.[338]Nevertheless, one cannot help but think that a judge who is aware of her own biases and reflects on them during important decisions would be better able to do so given adequate time and focus. In such a scenario, combining judicial education, regular prompts to keep race salient, and changes designed to reduce cognitive stress could, in theory, reduce the impact of implicit biases in remorse assessments.[339]

B. Conclusion

Current efforts to reduce incarceration bring to the foreground the question of how best to weigh evidence of amenability to rehabilitation or, alternatively, the need for incapacitation. Discretion in sentencing allows judges to consider a myriad of variables in determining what sentence is warranted. In addition, efforts to reduce incarceration are leading to expanded use of parole and clemency to permit early release of prisoners who demonstrate rehabilitation.

Within this context, state and federal sentencing judges, parole officials, and pardon boards across the country weigh the sincerity of defendants' expressions of remorse as part of their assessment of general character and specific attitude toward the crime itself. The remorseful defendant is viewed as rejecting his crime and, thus, less likely to reoffend.

The remorse assessment – always a difficult if not impossible task – is rendered less reliable by the danger that the decision-maker will unwittingly employ implicit biases to interpret ambiguous expressions of remorse. The well-documented implicit bias associating African Americans with dangerousness and criminality infects criminal justice decisions at multiple levels, from initial contact with police officers through sentencing. Implicit racial bias likely plays a role in assessing the countenance, gestures, and sometimes words of defendants who stand before the judge or parole official who is making a decision about their punishment. While large bodies of research exist on implicit racial bias and on the difficulty of assessing remorse, more research is needed to confirm and explore implicit bias in remorse assessments.

When defendants are invited to discuss their crimes and comment on their punishment, compelling acts of mercy sometimes take place. It remains unclear, however, how we can allow for individual consideration of subjective

336. *Id.* at 866.

337. *Id.*

338. Bennett, *supra* note 27, at 394.

339. This is Richardson's ultimate conclusion. *See* Richardson, *supra* note 241, at 888–89.

and unquantifiable personal attributes such as remorse while correcting for the effects of bias. As this article concludes, the correction is more likely to occur through extra-legal changes to courtroom processes than through judicial review of sentences or legislative changes to sentencing schemes.