‘Ritual Individualisation’: Creative Genius at Sentencing, Mitigation and Conviction

Abstract

Judges and lawyers must regard themselves as upholding cherished values, including: the presumption of innocence; free defendant choice and participation; and attention to the unique individual. Yet, everyday criminal work also demands compliance with a system of perfunctory, mass case-disposal. How is this potential contradiction addressed? Conceiving the criminal-penal process as a tripartite rite of passage, the article originates the concept of ‘Ritual Individualisation’ (RI). RI’s creative pre-sentencing case-work accomplishes four key transformations in how the person is re-presented to the court for sentencing. Firstly, the person’s unique voice and personal story is revealed, exhibiting her as a freely participating individual. Secondly in doing so, the pertinence of social disadvantage tends to be minimised. Thirdly, ambiguous admissions of guilt are translated as freely-given, full and sincere confessions. Fourthly, the person is manifested as a culpable offender ready for punishment. The article considers new research agendas opened up by the implications of Ritual Individualisation.

Keywords: sentencing, mitigation, guilty pleas, individualisation, efficiency, professions, court communities

I would like to thank the following people for their helpful comments on earlier drafts of this paper: Kevin Cheng, Stewart Field, Louise Johansen, Kathy Mack, Peter Mascini, Mike Nellis, Nicky Padfield, Sharyn Roach Anleu, Saskia Vermeylen, Javier Velasquez, as well as the three anonymous journal referees and members of the journal Editorial Board.

I INTRODUCTION

What do I mean by 'Ritual Individualisation'? In brief, Ritual Individualisation is a stylized, sequential, symbolically meaningful performance, requiring the shared and heightened attention of court professionals. Through its creative case-work, it manifests to the professional court community that the person proceeded against (defendant/convicted person)[1] is treated as a unique individual who participates freely in the criminal process, which she regards as fair.

1. *Purpose*

I originate the concept of 'Ritual Individualisation' so as better to understand the daily practices of the lower and intermediate criminal courts.[2] It is not my intention in this article to take a normative stance, but rather to advance a deeper understanding of these daily practices. As professionals responsible for justice, lawyers and judges face every day a potentially troubling dilemma. How can cases be disposed of efficiently without violating the central legal norm of free choice and participation exercised by each unique defendant? I will explain how the practice of Ritual Individualisation resolves this dilemma.

Since my purpose is to arouse fresh thinking, I acknowledge at the outset that the concept of Ritual Individualisation is incomplete in some important respects. For example, the shape is different in inquisitorial systems – a point returned to in the Conclusion. Nonetheless, by arousing fresh thinking, I seek to kindle conceptual and empirical development by fellow scholars about three key propositions. Firstly, the competing values of free participation by the unique individual and efficient case-disposal cannot be satisfactorily resolved by the self-talk of individual professionals. Their resolution requires the *manifestation* of the defendant's participation and consent to her deserved punishment. Secondly, through the defendant's demonstrable participation and acceptance of the fairness of the process, the work of individualising processes tends to enable, rather than obstruct, expeditious case-disposal. Thirdly, individualisation-work achieves case-normalisation, thus managing the potential menace of ambiguous or seemingly defiant defendant postures.

Importantly, successful Ritual Individualisation does *not* denote empty or meaningless gestures. Nor is it a charade or pretence, nor necessarily oppressive. Equally, it should it not be assumed that Ritual Individualisation is necessarily or invariably either inclusive or

[1] I use the term 'person proceeded against' (or more simply 'person') to cover a range of statuses including: 'defendant', 'accused', 'convicted person', 'sentenced person' etc. Although the term 'defendant' is used even after the person has pled guilty, it should not be taken too technically: this article is concerned with the ambiguous status of the person.

[2] The term 'lower and intermediate criminal courts' refers to the vast bulk (typically at least 90%) of first instance court cases. In most adversarial jurisdictions countries these are non-jury-triable (summary) cases.

degrading. Although such evaluative judgements are not the purpose of this article, effects on the person are likely to be contingent and variable.

The 'genius' character of Ritual Individualisation accomplishes status-change. By 'genius' I am implying neither moral admiration nor sarcastic condemnation. Rather, I reclaim its older meaning: a *creative, tutelary (i.e. protective, guardian)* guiding force or spirit. [3] The creative work of Ritual Individualisation transforms and normalises cases, and in so doing, it protects and tutors cherished professional values.

The article explains how Ritual Individualisation resolves the problem of the potential status-ambiguity of the person proceeded against. The resolution of status-ambiguity is accomplished through case-normalisation, preparing and manifesting the person as suitable for the next stage in her journey: sentencing. She is transported to a new, settled and approved identity: a culpable offender who is regarded by the court as freely and sincerely accepting her impending punishment.[4]

2. *Doing Individualisation*

Having set out my purpose, let us begin by interrogating a fundamental dilemma facing the daily work of the lower and intermediate courts. How can cases be disposed of efficiently without violating the central legal norm of free choice and participation exercised by each unique individual defendant? A widespread academic and professional concern is that the values of participation and attendance to the unique individual are too often bulldozed by the sterile demands of system efficiency.[5] By enabling the court to be informed about the unique individual appearing before it and allowing her personal, human story to be told, more humane, contextualised and tailored sentencing decision-making is made possible. Individualisation, (the investigation and presentation of the person as an individual), is widely seen as an essential to supplement to the narrow gaze of legal justice with an awareness of the role of social disadvantage, and allowing the person to give voice to the unique reality of her

[3] Although 'genius' is now widely used to refer to virtuoso ability, here the paper recalls its older meaning from the Latin root 'gignere' (i.e. beget) as a *creative and tutelary, (i.e. protective, guardian), force or spirit*. (OED 2001).

[4] Whether or not and in what ways, the person proceeded against is partly or fully aware of this transformation is not the subject of this article, though it is a vital and neglected question. Often for pragmatic reasons (e.g. ethics and access), research has tended to neglect the longitudinal study of the subjective experiences of defendants/sentenced people, instead reporting the perceptions of professionals about they believe defendants/sentenced people experience.

[5] See, for example, recently: J.Ward, 'Transforming 'Summary Justice' through Police-led Prosecution and "Virtual Courts" – Is 'Procedural Due Process' Being Undermined?' (2015) 55 *British Journal of Criminology* 341; L.Welsh The Effects of Changes to Legal Aid on Lawyers' Professional Identity and Behaviour in Summary Criminal Cases' (2017) 44 *Journal of Law & Society* 559; L.Welsh and M,Howard 'Standardization and the Production of Justice in Summary Courts' (2019) 28 *Social & Legal Studies*, Advance Access; K.Franko Aas *Sentencing in the Age of Information* (2005).

life.[6] It allows the person to have a voice in proceedings where, in the typical reality of guilty plea cases, the person's 'voice', (her views about the process and her life-story), would not otherwise be heard. In adversarial systems the work of individualisation is conducted between conviction (typically via a guilty plea) and sentence. It is usually conducted through the defence lawyer's plea-in-mitigation work and the investigation and use of a pre-sentence report or similar individualising enquiry about the person.

3. *Who is Individualisation For?*

The virtues of system-efficiency and the voice of the unique individual are widely seen as mutually competing. The more attendance there is to the voice of the unique individual the less efficient the process is thought to be in getting through the list of cases and vice versa. Humanistic approaches, most notably Therapeutic Jurisprudence (TJ) and Procedural Justice (PJ), however, promise a happier resolution to this deadlock. TJ[7] and PJ[8] propose, albeit in different ways, that fair and humane process (e.g. being treated as a unique individual; being listened to; having a voice etc), enhances the legitimacy of decision-making as perceived by those subject to it, thus smoothing efficient compliance. TJ and PJ hold out the chance of a win-win for individual fair treatment and efficient case-disposal.

While not necessarily disputing the propositions of TJ and PJ, this article approaches individualisation differently. Rather than focusing on how individualisation boosts legitimacy in the eyes of those subject to the force of law, the article inverts the gaze. It asks how those responsible for law's force perceive individualisation in boosting participation, legitimacy, and thus compliance. As professionals who are the practical custodians of justice, judges and lawyers necessarily require signs of individualisation, (and concomitant participation and

[6] Individualisation prior to sentencing is almost universally regarded by scholars, judges, sentencing councils etc world-wide as an essential counterweight to the requirements of efficiency and consistency. (E.g. M.Nellis, 'Humanising justice', in *Handbook of Probation*, ed. L.Gelsthorpe and R.Morgan (2007) 25). The importance of individualised justice shown to the participating person features prominently in moral penal philosophy (e.g. R.A.Duff, *Trials and Punishment* (1986)). Following Durkheim, H.Joas *Punishment and Respect* (2008) develops the idea of the 'sacrality of the person' which is culturally central to the justification of punishment. The unique participating individual is a central trope in lawyer and judicial habitus, which is seen to balance consistency and efficiency. (E.g. P Bourdieu 'The Force of Law: Towards a Sociology of the Juridical Field', (1987) *Hastings Law Journal* 38: 814—53; R Lenoir 'A Living Reproach' (1999) in P Bourdieu et al *The Weight of the World* Stanford University Press 239-253; F.Jamieson, 'Judicial Independence: the Master Narrative in Sentencing' (2018) *Criminology & Criminal Justice* (2018 forthcoming); N.Hutton 'Sentencing as a Social Practice' in *Perspectives on Punishment* eds. S.Armstong and L.McAra (2006) 155; S. Roach Anleu and K.Mack Roach Anleu and K Mack *Performing Judicial Authority in the Lower Courts* (2017)). Honouring the idea of the unique participating individual can also be seen in codes of professional lawyer ethics and judicial conduct guides as well as trait models of professions exemplifying commitment to the individual case (e.g. T.H. Marshall 'The Recent History of Professionalism in Relation to Social Structure and Social Policy' *Canadian Journal of Economics and Political Science* 5(1939) 325; T Parsons Professions and Social Structure'*Social Forces* 17 (1939) 457).

[7] D. Wexler 'New Wine in New Bottles: the Need to Sketch a Therapeutic Jurisprudence "Code'' of Proposed Criminal Processes and Practices' (2014) 7 *Arizona Summit Law Review* 463.

[8] T.Tyler 'Procedural Justice, Legitimacy and the Effective Rule of Law' 30 *Crime and Justice* 283-357; T.Tyler, and Y.Huo, Y (2002) *Trust in the Law*

acceptance of fairness), to be *shown convincingly to them* by those about to be subject to punishment. Illustrated by earlier sentencing research, I will suggest that in manifesting the voice of the unique person, practices of individualisation also demonstrate to the professional court community that the person is treated as a unique individual, who freely accepts the fairness of her impending punishment.

4. Map of the Article

The article proceeds as follows. Part II establishes why court professionals, (especially judges and defence lawyers[9]), necessarily have to care about the legitimacy of the process they constitute. It argues that the professional perception of the problematic gap between ideals and reality is managed by the enactment of social practices, not merely an internal dialogue of self-justification. This, Part III explains, is achieved through the transformative tri-partite work of Ritual Individualisation which, by individualising, normalises the representation of the person to the court. Part IV outlines and illustrates four key accomplishments of Ritual Individualisation. Concluding, Part V sums up before signposting future directions of research.

Illustrating the concept and work of Ritual Individualisation, the article draws on research examining a key but under-explored moment in the adversarial criminal process: when the defendant who has pled (or been found) guilty presents to the court her story of the offence and attitude to the impending sentence. This enquiry into the individual's character, personal and social and circumstances, and especially her attitude to the offence to which she has formally pled guilty is a key moment when court professionals seek confirmation of her acceptance of the legitimacy of the court. On it pivots the question of whether or not her guilty plea truly represents a full, free and sincere acceptance of guilt. At stake is whether she accepts, or, challenges, (implicitly or explicitly), the fairness of the criminal process and thus the impending violence of sentencing. Through ethnographic study and

[9] Generally speaking, in nominally adversarial systems, responsibility for investigating and attending to the unique individual defendant bears particularly heavily on defence lawyers and judges, typically assisted by pre-sentence investigators (who may be social workers, probation officers or others from a range of backgrounds). This is not to deny that prosecutors play a part, and indeed their individualisation work is often much more central in nominally inquisitorial systems. (See for example: S. Field, 'State, Citizen and Character in French Criminal Process' *Journal of Law & Society* 33 (2006) 522; S. Field, '"Ritual Individualisation" and French criminal justice: preliminary comparative observations' Paper presented to the *Law & Society Association Conference,* 2018; J.Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in A.Duff, L.Farmer, S. Marshall, V.Tadros (eds) *The Trial on Trial (vol 2)* (2006) 223; J.Hodgson, and L.Soubise 'Understanding the Sentencing Process in France' (2016) 45 *Crime & Justice* 221).

'shadow report-writing',[10] court observations, judicial focus groups, interviews, and simulated sentencing hearings, the multi-method research cited here followed the same cases from the construction of pre-sentence reports, through to their interpretation and use in the sentencing process. Conducted over four years, the study followed how individual reports are constructed, what the writer sought to convey and how sentencing judges and defence lawyers interpret and use those individual reports in intermediate court non-jury triable cases in Scotland.[11]

II WHY JUDGES AND LAWYERS HAVE TO CARE ABOUT LEGITIMACY AND THEIR 'GAP PROBLEM'

The international research literature on the lower and intermediate criminal courts has long established that it is orientated to the high-volume throughput and disposal of cases, standardisation, and speed; the minimisation of uncertainty; the value of court workgroups or communities; the maintenance of inter- and intra-professional relations; and the avoidance of conflict.[12] Speed and routinisation seem to be privileged over the unique stories of individuals. What is important to everyone is the 'efficient' disposal of cases (i.e. disposing of as many cases as possible with as little effort as possible). Defendant docility and acquiescence are facilitated and encouraged in the lower and

[10] S.Halliday, N.Burns, N.Hutton, F.McNeill, C.Tata, 'Shadow Writing and Participant Observation' *Journal of Law and Society* 35 (2008) 189; C.Tata, N.Burns, S.Halliday, N.Hutton, and F.McNeill 'Assisting and advising the sentencing decision process' (2008) *British Journal of Criminology* 48 (2008) 835.

[11] The research incorporated four elements: 1.An ethnographic study of the construction of pre-sentence reports in two sites in Scotland. This deployed the use of 'shadow' report-writing in which the field-based researcher prepared a 'shadow' (i.e. mock) report based on the same information available to the pre-sentence report writer who prepared the real report. This elicited a comparison between the 'shadow' report and the real report (Halliday et al, id). 2. An observational and interview court-based study of the use of these same (and other) cases, with interviews with the sentencing judges, defence lawyers and prosecutors. 3. A series of focus group discussions with intermediate court judges throughout Scotland discussing general and specific issues in using specific pre-sentence reports, pleas in mitigation etc. 4. A series of simulated sentencing hearings with pre- and post-interviews with intermediate court judges and defence lawyers using anonymized case papers whose production and sentencing had already been observed. ESRC Award Number RB000239939.

[12] For example: J Baldwin and M McConville, *Negotiated Justice* (1977); K Cheng, 'The Practice and Justifications of Plea Bargaining by Hong Kong Criminal Defence Lawyers' *Asian Journal of Law & Society* 1(2014) 395; M Feeley, *The Process is the Punishment* (1979); M Heumann *Plea Bargaining* (1978); M Heumann, "A Note on Plea Bargaining and Case Pressure" *Law and Society Review* 9 (1975) 515; J. Jacobson, G Hunter, A Kirby *Inside Crown Court* (2015); L.Mather, *Plea Bargaining or Trial* (1979); D McBarnet *Conviction* (1981); P. Thomas 'Plea Bargaining in England' *Journal of Criminal Law & Criminology* 69 (1978)170; A.Mulcahy, 'The justifications of justice' *British Journal of Criminology*, 34 (1994)411; C Tata (2007) 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work' *Journal of Law & Society* 34(2007) 489

intermediate courts by a pervasive culture of presumed guilt enveloped in a disposition of case-triviality.[13]

So far, so relatively simple. However, court professionals (especially lawyers and judges), can, in varying ways, be confronted with a potential degree of uncertainty, awkwardness or doubt about the gap between venerated Rule of Law values to which they must, at some level, subscribe as opposed to the disappointing daily reality of high-volume case-disposal. These venerated values include ‘the golden thread’[14] of the presumption of innocence; free and informed choice by the defendant; fair opportunity for the defendant to participate in her own case; legal equality; consistency balanced with judging each case as a unique individual.

In necessarily subtle and implied ways, court professionals may observe their own embarrassment or awkwardness. Typically, they allude to unease in not having as much time as they would like to really get to grips with individual cases. Not surprisingly, this observation is more readily made about the work of *other* professionals, than their own personal work.[15] When it is acknowledged, it is expressed in relatively muted and awkward terms. For example:

> “On a practical level sometimes you don’t have as much time when you’re doing summary criminal legal aid work as you perhaps should have with individuals […It is] is a poor admission, but this reflects reality of working in a busy sort of summary [intermediate] court.” [Interview defence lawyer[16]]

Similarly, in their advice to novices, judges and lawyers signal the pragmatic need quickly to come to terms with the disappointing reality of daily criminal work.[17] Here we can see the professional discomfort about what scholars call ‘the gap problem’: the gap between the ideals of law and its everyday reality: between what ought to be and

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[13] For example: Baldwin and McConville, id; Feeley, id; Jacobson et al id; McBarnet id; Mulcahy, A. (1994) ‘The justifications of justice’ *British Journal of Criminology*, 34(4): 411–430; K.Mack and S.Roach Anleu ‘Getting through the list’*Social and Legal Studies* 16 (2007) 341.

[14] Woolmington v DPP 1935 articulated the idea of the presumption of innocence as ‘the golden thread’: the precious, binding and supreme principle of the criminal process. Even if it is alleged that in reality a presumption of guilt pervades lower and intermediate court-work, for a lawyer or judge openly and plainly to deny the value of the presumption of innocence would also be to deny his/her own validity.

[15] We should not expect judges and lawyers openly to speak of a sense of inadequacy about their *own* work. To do so would be to undermine their professional claims to ethicality, public service and individual responsibility (Tata, op cit (2007a) n.10).

[16] C Tata, N Burns, S Halliday, N. Hutton, and F. McNeill 'Assisting and advising the sentencing decision process: the pursuit of 'quality' in pre-sentence reports' (2008) *British Journal of Criminology* 48(6):835-855

[17] For example: Feeley; Heumann 175, 1978; McConville et al; Tata 2007a op cit, n.12. Nevertheless, lawyers and judges they cannot simply deny the value of these elevated principles. The application of abstract, esoteric knowledge (e.g. legal principles) is key to the claims of professions and their work (cf A Abbott *The System of Professions* (1988)

what is. In accounts which may occasionally be nostalgic, the common complaint among judges and lawyers is not having as much time as they would like to get grips with individual cases: of 'running on empty'; feeling 'under the pump'[18]; in an assembly line process, a sausage machine, a factory of mass case-disposal necessitated by overwhelming case-volume. While such complaints are not new and indeed may not necessarily be wholly objectively true[19], they voice the frustration that the high ideals of the Rule of Law have to be scarified to the demands of mechanical system-efficiency. How is the perceived gap between daily assembly-line practice and cherished legal principles reconciled?

1. *How is the Potential Felt Gap Problem Reconciled?*

In seeking to explain how the perceived gap is addressed, previous work has concentrated on how the gap is explained by individual practitioners, through techniques of internal self-justification. For example, the importance of most cases is often said to be too low to merit a contested trial. Cases may be derided as 'rubbish', 'dross', 'crap', 'nonsense',[20] enveloped in an 'ideology of triviality'[21] and a pervasive presumption of guilt.[22] Here, some of the propositions of Sykes and Matza's famous work on juvenile delinquents[23] explaining how they justify their transgressions has been applied to the explanations of judicial sentencers. For example, Tombs and Jagger[24] argue that, like Sykes and Matza's delinquents, judicial sentencers neutralise potential criticisms by justifying and excusing their decisions to imprison relatively non-dangerous people through a series of internal denials (e.g. denying responsibility for one's decisions; telling oneself that there is no alternative etc).

While not disputing that an internal and inter-personal dialogue of self-justification plays an important role in sentencing work, my contention is that there is much more to

[18] Roach Anleu and Mack Roach Anleu, op cit, n.6

[19] From both international and historical perspectives the link between plea bargaining and caseload pressure appears rather tenuous (e.g. Feeley, op.cit. n.12; Heumann 1975, 1978; op. cit., n.12).

[20] Heumann, op. cit., n12; Mulchay, op. cit, n.8; D Newman, D 'Still Standing Accused: addressing the gap between work and talk in firms of criminal defence lawyers' (2012) *International Journal of the Legal Profession* 19(1): 3-27.

[21] McBarnet, op cit, n.12.

[22] Cheng, op. cit., n 12; Feeley, op. cit., n12; M.McConville and M.Marsh (2014) *Criminal Judges: legitimacy, courts and state-induced guilty pleas in Britain*; McBarnet op cit n12; Mulcahay op cit n 12; Newman op cit n20; A Sanders, and R.Young *Criminal Justice* p.443; Tata 2007 op. cit., n 12.

[23] G Sykes and D Matza Techniques of Neutralization: A Theory of Delinquency (1957) *American Sociological Review* 22(6) 664-670; see also S.Maruna and H.Copes 'What Have we Learned from Five Decades of Neutralization Research?' 32(2005) *Crime and Justice* 221.

[24] J Tombs, and E Jagger 'Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison' (2006) *British Journal of Criminology* 46(2006) 803

it than that. The comparison with juvenile delinquents is weak. For three reasons, the self-awareness of relatively high social-status and professional responsibility demands *an enacted resolution* which is *shown to* judges and lawyers.

First, judges and lawyers have every day to face at close-quarters the palpable suffering of most people coming before them. That face-to-face encounter requires justification[25], especially where one knows one is immediately responsible for another person: a deeper responsibility than faced by Sykes and Matza's juvenile delinquents. The evident distress of another human being whom I have to face, particularly when I am aware I have the *direct ability* to alleviate that distress, demands that I account for my actions. Failure to do so leads to uncertainty and doubt, (the bête-noir of expeditious case disposal), a kind of debilitating paralysis.[26] Especially in the lower and intermediate courts, professionals are starkly reminded every day of their immediate duty to consider the desperate plight of people about whom they have to make decisions. As one judicial sentencer put it, they are faced with a relentless parade of human misery:

> " 'If you've got any feelings at all, you're seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out; you're seeing women with young kids having to go to jail, you're seeing young - you know, young men in their mid twenties who ought to be in the absolute prime of their life just raddled by drugs and alcohol and coming into court with terrible injuries from fights and teeth missing, and you see mentally affected people, people who are schizoid and paranoid through overuse of drugs, all of this misery, day in, day out.' "[27]

Secondly, lawyers and professional judges, (who are lawyers by background[28] and 'habitus'),[29] tend to regard themselves as exemplars of the 'trait model' of the professions. Although in the academy approaches to the power of professions[30] have long-taken a critical turn, legal professional self-identity tends to be based on a more benign understanding of professional work centred on honour, altruism and duty.[31] Among its defining features, this trait model of professions guarantees ethical and

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[25] cf E.Goffman 'On Face-Work' (1967) essay in *Interaction Ritual*
[26] E Levinas *Totality and Infinity* 1961
[27] Roach Anleu and Mack, op. cit., n.6.
[28] Variations in judicial background and habitus are important. Although in most of the English-speaking world most criminal cases are heard by judges who are drawn from the ranks of practising lawyers, in England and Wales most cases are heard by lay people (lay magistrates).
[29] Bourdieu op. cit., n6; R Lenoir op. cit.,n6.
[30] Abbott, op. cit., n 17; T.Johnson, *Professions and Power* (1972)
[31] Marshall op. cit., n.6; Parsons op cit. n.6; H Sommerlad 'The "Social Magic" of Merit' (2015) *Fordham Law Review* 87:3225-2347.

altruistic behaviour in which the best interests of the client and public service are paramount, trumping narrow personal (e.g. pecuniary) self-interest.[32]

In his influential essay extolling the sentiments of professional self-identity, TH Marhsall observed that professional service must be "supported by *individual* responsibility which cannot be shifted on to the shoulders of others".[33] Despite its collaborative character, the claim to be 'a professional' necessitates a sense of enacting unavoidable, personal, individual moral duty. The professional "does not give only his skills. *He gives himself*….[A legal professional] is called upon to show judgement and an understanding of human nature, as well as knowledge of […] law".[34] The sense of duty in honourably carrying out one's inescapable individual and personal responsibility in service of the client and/or of the public is a central organising lens through which lawyers and judges prefer to see themselves.[35] Indeed, it is one from which they successfully claim considerable honour,[36] social status and moral elevation.[37] For judges, sentencing is particularly difficult because, though collaborative[38], it is nevertheless experienced, through the 'master narrative' of judicial independence, as a solitary, unavoidable, personal burden, weighing heavily in judicial consciousness[39].

Thirdly, because professions seek ownership of a territory of social problems[40], sentencing is jealously guarded by lawyers and judges as an area of work which belongs to them. Lawyers and especially judges are expected, and (albeit expressed in variable ways) expect themselves, to be the practical custodians of justice.

Thus, as legal professionals, judges and lawyers have to regard themselves, albeit in varying ways, as carrying a triple-burden of duty: first, as human beings aware of their direct ability to alleviate the palpable distress of those they are faced with everyday; secondly, as professionals ethically and dutifully serving their client and/or the public; and, thirdly, as the practical custodians of justice. Accordingly, legal professionals have to *regard themselves enacting* a process which is just and legitimate, or at least not decidedly unjust and illegitimate. The threat of doubt and uncertainty cannot be resolved merely by asserting that cases are inconsequential, nor, that one is not truly responsible. Internal dialogues of self-deception are neither necessary nor sufficient.

[32] Parsons, id.
[33] Marshall, op cit, n6, p.331.
[34] Marshall, id, p.328, emphasis added.
[35] Abbott, op cit, n.17 ; Tata, op cit, n.12
[36] Sommerlad, op cit, n.31
[37] Bourdieu, op cit, n.6; S. Roach Anleu *Law and Social Change* (2009)
[38] C.Tata 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' *Social & Legal Studies* 16 (2007) 425
[39] Jamieson, op. cit., n.6.
[40] Abbott, op cit, n.17; C Tata et al, op cit, n.10

Rather, by *witnessing and participating in the enactment of* individualisation processes, legal professionals can observe the person freely and sincerely acknowledging her culpability and more or less accepting the fairness of her impending punishment. Thus, court professionals are, through their collaborative work, able, literally, *to see* expeditious case-disposal as compatible with the venerated values of free choice and participation by the unique individual.

By both witnessing and participating in its collective performance[41], judges and lawyers experience the enacted individualisation of the person. Such enactment is deeper and more convincing than is possible through an internal dialogue of self-justification. Explaining David Hume's premonitory approach to understanding the making of moral judgements as a social practice, Sparks observes neatly that the deeper creators of morality are found in "neither introspection nor rule following… It is *only in communication* that we are able to render our inchoate initial feelings into calmer, 'corrected' standards or principles."[42] Even in the lower and intermediate courts, court professionals can, and must, at least to some degree, genuinely believe in the venerated values with which they identify: free choice and participation by the unique individual. They can believe in these values at the same time as seeking speedy case-disposal because these values are not simply espoused, but, through individualisation practices, they are seen to be enacted by the person and shown to the court.

However low-key summary justice may be compared to the majesty of the higher courts, court professionals are faced every day with implied challenges to the legitimacy of the process which they embody. Through these moments of explicit and, more commonly, implicit resistance, the legitimacy of the criminal process is seen to be tested, and through the practices of individualisation, revalidated, re-energising a sense of professional values, identity and belonging. So how is potential doubt and uncertainty about the legitimacy of the criminal process addressed is through the creative and protective practices of Ritual Individualisation?

III THE WORK OF RITUAL INDIVIDUALISATION

1. *Taking Ritual Seriously*

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[41] Judges, lawyers and other court actors are, at the same time, both participants and each other's audience (for example: L Baum *Judges and Their Audiences* (2006); C Tata, 'Accountability for the Sentencing Decision Process –Towards a New Understanding' (2002) in C Tata and N Hutton (eds) *Sentencing and Society: International Perspectives* pp399-428

[42] R. Sparks 'Divided Sympathies: David Hume and Contemporary Criminology' in S Karstedt, I Loader, H Strang (eds) *Emotions, Crime and Justice* (2014) 317 at p.323-5, emphasis added.

The evidentially-contested criminal trial in the higher courts is easily conceived as ritual par excellence.[43] However, in the hum-drum reality of the intermediate and lower courts, where an evidentially-contested trial is relatively rare, it is widely said that cases are simply disposed in routinised, sterile, mechanical ways.[44] Unlike the drama and emotional energy of the higher courts, it may be supposed that there is no need for the performance of ritual since the driving imperative is simply expeditious case-disposal.[45] Yet high drama and pomp are not essential to successful ritual. In its relatively low-key form such ritual is, nonetheless, central to expeditious case-disposal work in the lower and intermediate courts.

Let us think about the meaning of ritual. Among legal and criminological scholars, mention of ‘ritual’ can evoke instantaneous normative reactions. These reactions may colour empirical conceptualisations of the criminal process as ritual. Ritual can be regarded with suspicion, even hostility, synonymised as irrational, meaningless repetition, degrading, fake and secretive. For example, Garfinkel’s classic short essay is commonly represented as compelling evidence that ritual is synonymous with human degradation.[46] In response, others argue for the normative benefits of ritual (e.g. its socially-inclusive and restorative power).[47] However, both effects on the person may be true. Normative preoccupations about the pitfalls and promises of specific ritual practices should not lead us to fear or valorise ritual per se. In itself, ritual is neither inherently a ‘good’ nor ‘a bad thing’. Ritual is simply indelible to and inextricable from social life. Ritual practices are unavoidable. Thus, normative evaluation is better focused on the processes and results of specific ritual practices. For that reason, let us first examine the work ritual does in the criminal-penal process before beginning to focus on the normative implications.

2. *What Does Ritual Do?*

Ritual enacts meaning and classification of the world. Through its performance, it locates human activity within the wider natural order of the cosmos, constituting and

[43] For example: Hodgson, op cit, n 9.
[44] For example: Baldwin and McConville, op cit, n 12; McBarnet, op cit, n12; P Carlen, *Magistrates’ Justice* (1976)
[45] See D. Tait ‘Sentencing as Performance: restoring drama to the courtroom’ (2002) in C. Tata and N.Hutton (eds) *Sentencing and Society: International Perspectives* 469.
[46] H Garfinkel, H. (1956) ‘Conditions of Successful Degradation Ceremonies’ (1956) *American Journal of Sociology* 61(5) 420-424; similarly, Carlen, op cit n 44.
[47] S Maruna ‘Re-entry as a rite of passage’ (2011) *Punishment & Society* 13(1): 3-28; M Rossner ‘Emotions and Interaction Ritual: a micro analysis of Restorative Justice’(2011) *British Journal of Criminology* 51:95-115; J Braithwaite and S Mugford ‘Conditions of Successful Reintegration Ceremonies’ (1994) *British Journal of Criminology* 34(2):139-171; Tait, op cit, n.45.

reproducing social community, belief and belonging by classifying and dividing the sacred as opposed to the profane.[48] The precise definition of ritual is contested.[49] Nevertheless, it can be conceived as having certain key 'family' resemblances. These include ritual practice being: recursive; symbolically meaningful; aesthetically elevated; formalised and stylised sequential, rhythmical social activity; spatially and temporally framed. It is a meaningful performance which achieves action to address a perceived social problem. In so doing, ritual addresses the potential threats of doubt about venerated ideas which are core to the constitution of group identity.

Ritual addresses a perceived collective problem; attended by an audience, whose emotional attention is demanded.[50] Successful ritual practice helps to resolve discrepancy between sacred ideals and the messiness of everyday life. "Why do we engage in seemingly pointless rituals? Rituals appear to perform a crucial, cathartic function when individuals are facing epistemically threatening life events, especially transitions and turning points"[51]. "Effective ritual is the solution to a seemingly insoluble problem, the management of collectively held, otherwise unmanageable distress.'" [52]

Successful rituals produce "a momentarily shared reality, which generates solidarity and symbols of group membership"[53]. In successful ritual practices participants, (who are also its audience), genuinely believe in the transformation of its subject. Ritual secures beliefs and belonging against doubt-producing ambiguities and uncertainties.[54] Far from being empty, or, a pretence, successful ritual enacts ideals convincingly by performing the resolution of problems. Seen in this way, communities are sustained and invigorated by collectively paying homage to their symbols of sacred ideals and beliefs. By addressing the problem of status-ambiguity and beholding its resolution, communities fortify social solidarity and feelings of communal well-being. In ritual's successful management of a perceived problem, what is being tested and celebrated is not simply the activity in itself, but the validity of shared beliefs and social solidarity.[55] "Rituals do honour to what is socially valued."[56]

[48] For example: C Bell *Ritual: perspectives and dimensions* (1997); Douglas, M *Purity and Danger* (1966/2002); Douglas, M *How Institutions Think* (1986 / 2011); D. Marshall 'Behaviour, Belonging and Belief: a theory of ritual practice' (2002) *Sociological Theory* 20(3):360-380.

[49] Bell, id; B Stephenson *Ritual* (2015)

[50] R. Collins *Interaction Ritual Chains* (2004)

[51] Maruna, op cit, n47, p8.

[52] Scheff 1979: 133 cited by Maruna, id, p8

[53] Collins, op cit,n.50, p7

[54] Marshall, op cit, n.48

[55] E. Durkheim *The Elementary Forms of Religious Life* (1912/2001)

[56] Collins, op cit,n.50, p25.

Taking part and witnessing performance is tutelary. Participation in socially-enacted practices ensures deeper faith in ideals and sacred symbols than is ever possible through solitary, individual reflection. "A ritual draws power through participation. Belief follows action even if it did not precede action."[57] Participation in successful ritual is far from being a pretence. The immediacy of social situations demands that we perform according to "the demands of sociality in the here-and-now'"[58]. Beliefs and feelings are performed, enacted and embodied, generated through ritual, not simply through individual abstract reasoning. Participation in the showing of a ritual demands the attentiveness of its participants. Ritual efficacy depends not just on the doing of a ritual, but upon *the showing* of that doing, by, in some sense, taking part and so contributing to its resolution. Let us now think about how these ideas may help to explain individualisation-work in the criminal-penal process.

3. Ritual Individualisation in the Criminal Process

In the lower and intermediate criminal courts the central collective problem facing justice professionals is how to dispose of cases with minimum effort and in a way which is consistent with the venerated professional values of close attention to the unique individual who freely participates. This problem is addressed through the work of individualisation.

Let us recall that the criminal process is also a process of normalisation. Research has established the claim that each person is treated as a unique individual and that each case turns on its own facts to be a cognitive and cultural impossibility. Cases are created and transformed; facts are selected, edited and constructed; stories are typified; the unique is normalised: rendered familiar and easily recognisable.[59] The ideal norm to which the defendant should approximate is one who exhibits full, sincere, and free admission of individual guilt, an informed and rational decision-maker who accepts her culpability, but is perhaps seen to benefit from some degree of mitigation by a humane process. The defendant is seen to have participated; her unique voice has been listened to and is seen to comply with (better still co-author) her own fate.

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[57] O. Chase *Law, Culture and Ritual: disputing systems in cross-cultural context* (2005) p.115.

[58] Collins, op cit, n.50, p.16

[59] For example: R. Emerson, R. 'Holistic Effects in Social Control Decision-Making (1983) *Law & Society Review* 17(3):425:456; D. Sudnow, 'Normal Crimes' *Social Problems* 12 (1965) 255; C Tata 'Conceptions and representations of the sentencing decision process' (1997) *Journal of Law and Society* 24 395; Tata, op cit, n.38

A straight, unambiguous denial of guilt tends to be unwelcome. However, what is more awkward and troubling is the non-ideal defendant who formally pleads guilty, but whose position is taken by court professionals to query (explicitly or implicitly) the legitimacy of the process. This includes the person who exhibits: a contradictory (e.g. exculpatory), or, an insincere admission of guilt,[60] equivocal guilty plea[61], or, obvious disengagement, cynicism, reluctant conformity, or, 'passive acceptance'[62]; or, is palpably not an informed, rational decision-maker. This manifested ambiguity and doubt about the voluntariness and sincerity of the formal admission of guilt cannot be ignored. If court professionals are to believe in their work as fair and legitimate, it cannot be left as it is. Change is required in the person's posture to that of a culpable offender who is seen to show a full and sincere admission of guilt.[63]

Ritual achieves the transition from one displayed category of social status to another. In the criminal-penal process, ritual practices change the person's uncertain status from a defendant whose innocence is formally presumed, but whose avowal appears to be less than wholehearted, to that of a culpable offender who is *shown* sincerely and completely to accept her own punishment. This manifested status-change is accomplished through a specific form of ritual: a rite of passage.[64]

(a) *Criminal-Penal Process as a Rite of Passage*

At first blush the idea of the criminal process as a 'rite of passage' may seem strange. We tend to think of rites of passage as denoting a positive step forward in some way, their successful completion being a matter for communal excitement and celebration. Life-course events (entry e.g. to the world (birth), adulthood, marriage, the after-life (death) are perhaps the best-known examples. It may seem strange, then, to see as a rite of passage the conversion of an ambiguous defendant to a culpable offender. However, what really counts is not so much any chronological or biological change, but the *cultural conferment of change in social status*. A rite of passage is a journey which accomplishes a *socially approved* change of identity. The defendant whose presentation,

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[60] A Bottoms and J McClean *Defendants in the Criminal Process* (1976).
[61] For example, S Bibas *The Machinery of Criminal Justice* (2012).
[62] Jacobson et al, op cit, n.12
[63] S. Bandes 'Remorse and Criminal Justice (2015) *Emotion Review* 8(1):14-19; Martel, J 'Remorse and the Production of Truth' (2010) *Punishment & Society* 12(4): 414–437; I.Van Oorschot, P.Manscini, D.Weenick 'Remorse in Context(s)' (2017) *Social & Legal Studies* 1-19; R. Weisman, (2009) 'Being and Doing: The Judicial Use of Remorse to Construct Character and Community' *Social & Legal Studies* 18(1):47-69; R. Weisman *Showing Remorse* (2014).
[64] Bell, op cit, n.43; V.Turner 'Betwixt and Between: the liminal period in rites de passage' (1964) in *The Proceedings of the American Ethnological Society Symposium on New Approaches to the Study of Religion;* V.Turner *The Forest of Symbols* (1967).

despite her formal admission of guilt, is seen to raise explicit or implicit questions about the freeness or sincerity of her formal admission presents the professional court community with an acute problem. Transformation from that ambiguous and doubtful status to the settled status of 'culpable offender' who is seen freely and sincerely to admit her true culpability is, from the perspective of professional court communities, socially desirable and approved.[65]

So how does this rite of passage transition the ascribed status of the person from doubt-inducing ambiguity to the certainty of a 'culpable offender'? van Gennep and Turner[66] proposed that all rites of transition are marked by a tripartite process: first, "symbolic behaviour signifying detachment of the individual"[67] from the normal populaton; secondly, margin (or *limen*) requiring a limited period of seclusion and '*pupation'*, and third, with this new social identity aggregation into a definable social group or category.

Bell explains that the social anthropology of van Gennep identified:

> "[A] three-stage sequence: separation, transition, reincorporation. Through this sequence of activities, rituals effect the person's removal from one social grouping, dramatize the change by holding the person in a suspended betwixt and between state for a period of time, and then reincorporate him or her into a new identity and status within another social grouping. The first stage, separation, is often marked by rites of purification and symbolic allusions to the loss of the old identity (in effect, to the death of the old self): the person is bathed, hair is shaved, clothes are switched, marks are made on the body, and so on. In the second stage the person is kept in a place that is symbolically outside the conventional sociocultural order (akin to a gestation period): normal routines are suspended while rules distinctive to this state are carefully followed …. In the third stage, symbolic acts of incorporation focus on welcoming the person into a new status…"[68]

Let us consider how this tri-partite framework can help us to understand how successful status-transformation is achieved.

(i) The First-Phase.

The first-phase is preparatory (arrest, bail, charge and 'not guilty' plea). At this time, there is a heightened display of *formal* due process, especially the presumption of

[65] Weisman (2014), op cit, n.63
[66] Van Gennep *The Rites of Passage* (1960); Turner (1964), op cit, n.64.
[67] Turner (1967), op cit, n.64 p.94
[68] Bell, op cit, n.48,p.36

innocence. The first-phase is symbolic separation from the normal community, often marked by "symbolic allusions to the loss of the old identity (in effect, to the death of the old self)."[69] The defendant is shown to have entered a special zone, which in the adversarial system is blind to her individual characteristics and social situation. It is a phase of waiting in which time and space are the property of the process.[70] Formally neutral, in reality this waiting and separation subjects the person to 'process costs'.[71] Yet at the same time, *informally*, the defendant's prospects at sentencing are presaged, heralding the opportunity for individualisation, concomitant humanity and mitigation, but *only if* a guilty plea is tendered. The defendant who chooses to maintain the high-risk option of a 'not guilty' plea denies herself the opportunity to reduce the prosecution charges. Instead she has to anticipate the likelihood of more severe sentencing consequences of such a plea if she is found guilty at trial.

This first-phase in the rite of passage of the non-ideal defendant ends when a formal guilty plea is attained. However, this may not be accompanied by convincing signs of full, free and sincere admission of culpability. This is achieved in the second-phase.

(b) The Second-Phase.

The second-phase is the key transitional period of 'pupation'[72] or 'gestation'[73] in the journey of the problematic person. The person is no longer a defendant formally presumed innocent, but neither can she, as yet, be regarded as a culpable and punishable offender until she is seen to express more or less full, free and sincere admission of culpability. Her status is uncertain, ambiguous and troubling: neither one thing nor another. She is 'betwixt and between' two acceptable identities. She does not fit any approved classification. She is neither a formally innocent defendant, nor can she, as yet, be shown to be a culpable offender, whose sentence can seen to be deserved. For example, her account may be ambiguous, or, seen to be at odds with the formal plea; palpably confused; explicitly, or, more often, implicitly defiant; exculpatory; or tactical in some way. This second 'pupation', or, 'gestation' phase resolves the ambiguous status of the person

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[69] id, p.36
[70] Carlen, op cit, n.44. It is also a phase of waiting for legal professionals and court staff, held in suspense until a guilty plea has been attained. In this first phase, the key question is: 'has s/he pled yet?' Routine talk of 'a plea' means only a plea of 'guilty'.
[71] Feeley, op cit, n.12.
[72] Turner (1964), op cit, n.64
[73] Bell, op cit, n.48

Following a formal guilty plea accomplished in the first-phase, at the start of the second-phase there remains a display of strict equality and uniformity of treatment. At the start of this liminal phase, before individualising examination (e.g. pre-sentence investigation, plea in mitigation) begins, "persons are said to have no status, property, insignia, secular clothing, rank, kinship position, nothing to demarcate them structurally from their fellows."[74]

Yet at the same time as this blindness to individual character and social position is displayed front-of-stage in court, simultaneously there is the back-stage preparation of the possibility of mitigation *on the condition that* she fully and freely admits guilt and exhibits cooperation. This opportunity may often help to achieve status-pupation into the culpable offender who will be seen to give a willing, closed and unambiguous account of her guilt. By preparing her for individualising examination, her seemingly contradictory position is discussed, (typically with the defence lawyer), with reference to sentencing expectations. Of key concern is the danger of maintaining a posture which may be seen to present a challenge (whether explicitly or more often implicitly) to the legitimacy of the process.

Through the promise of mitigation, the individualising examination in the second-phase solicits the person's account. It converts disengagement into active participation; transmutes disingenuous to sincere admission of guilt; mutates postures of exculpation to admissions of culpability; transfigures resistance to apparent acceptance; and transforms the ambiguous liminal subject into a manifestly culpable offender, who is seen to accept the legitimacy of the imminent punishment.

Paradoxically, then, the process and content of individualising examination tends to solicit and yield normalisation. As Foucault observes, examination about the individual cannot be accomplished without some comparison to the norm (at the same time constituting the norm):

> "[I]t refers individuals to a whole, that is at once a field of comparison, a space of differentiation and the principle of a rule to be followed. It differentiates individuals from one another, in terms of the following rule: that the rule be made to function as a minimal threshold, as an average to be respected, or as an optimum toward which one must move…..[It] compares, differentiates, hireachizes, homogenizes, excludes. In short it normalises."[75]

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[74] Turner (1967), op cit, n.64, pp98-99.
[75] M.Foucault *Discipline and Punish: the birth of the prison* (1977) pp182-3

(c) The Third-Phase.

The third-phase consummates the transition of the ritual subject.[76] It declares with confidence the person's new settled criminal identity as a guilty, punishable offender who is shown to have been given a voice, listened to her unique life story. In explaining her offending she freely admits the truth of her culpability. The person can then be shown to be incorporated into her new world, seen to begin serving her sentence as a culpable and fairly-sentenced offender, who is now amenable to the possibility of rehabilitation.[77]

In their understated expressions of professional pride in a job well done, we can see (and in illustrations below) a quiet celebration among court professionals of the accomplishment of this transition. For example, judges tend to recall incidents of how despite having received a significant sentence, the person acknowledges the judge's fairness. A judge or defence lawyer may observe with understated pleasure that their rapport with and individualised treatment of the person boosts her self-esteem. Judges may tend to be gently amused by the weight of 'excessive' individualised information reported to them about the person to be sentence: absolutely everything about the person has been covered. Court professionals tend to observe the reaction of the sentenced person as she leaves the court-room, noting signs of acceptance or resistance. Indeed, signs of remorse are sought by court professionals, at least in part, precisely because they are the ultimate exemplar of complete, free and sincere acceptance of culpability and the court's impending punishment: so much so that through her remorse the person is seen to be punishing herself.[78]

Having outlined its three-phase process, let us now outline and illustrate four specific accomplishments of Ritual Individualisation.

IV FOUR ACCOMPLISHMENTS OF RITUAL INDIVIDUALISATION

Here I suggest four accomplishments of the protective, tutelary and creative genius of Ritual Individualisation.

[76] Turner (1964), op cit, n.64.
[77] M, Hall *The Lived Sentence* (2016)
[78] Roach Anleu and Mack, pp137-162, n.6; Weisman, op. cit., (2014), n63; Bandes, op. cit.,n63; van Oorschot, n.63.

1. *The Display of Listening to the Voice of the Unique Individual Re-Presents Disengaged Postures as Participation and Acceptance*

In nominally adversarial systems, investigation about the individual is conducted in the second-phase: after the first-phase of conviction typically as a result of a guilty plea, but prior to sentence. In conducting this examination through the defence lawyer's plea-in-mitigation work and/or pre-sentence investigation, it is seen to give the person fair opportunity to participate and tell her unique story. In this way, two central but opposing ideas are seen to be respected: attention to the unique individual counter-balances the need for consistency in the expeditious mass disposal of cases. For example:

> "you're putting before the judge what you would describe as a sort of generic fabric within which you're going to address, so he has a sort of feel for the human being before him. And it makes the procedures slightly more humane." [Interview, defence lawyer 8]

(a) *Individualisation is Felt to Enhance the Person's Self-Esteem*

Defence lawyers rely on individual pre-sentence investigations and reports not only to gain valuable information about the client to put to the court. Current and previous reports can also be put to use in the first-phase or second-phase of the rite of passage so as to develop rapport with a client. Defence lawyers can themselves harvest the commercial value of such individualised inquiries. They tend to reassure the client *and so her lawyer,* that the client is being treated humanely as an individual. Some lawyers consciously use it as a way of demonstrating to clients, and to themselves, that they know them to be unique individuals. In some defence firms, lawyers remember the unique details of clients' lives (ironically described below as 'run of the mill routine data') via a client database:

> Defence Lawyer: A bit of rapport. Most clients actually, the complaint they have when they see someone who they haven't seen before is that, 'you don't know my case.' […] We keep the [pre-sentence] reports and we store them on a database […] And it's extremely helpful when a client comes in and you haven't seen the client for a year […]. We can withdraw the […] report and in two minutes flat, you have a full history of your client and you can then speak to the client on the basis that – 'How's your child getting on? How's this, that, the next thing? How are you getting on?' So you know exactly what the client history is. Everybody in the office actually has a

> very full and detailed picture of the client and you get it - it's just immediate. […] If I'm sending a lawyer to a prison and the lawyer's not seen the client before, he gets an old […] report. By the time he hits the prison, he can speak to this client as if he's known him for a hundred years *and he can also speak to the client in the sense that the client recognises that this lawyer has shown an interest: 'this [lawyer] knows about me'.*[…] And most reports are quite exceptional when it comes to recording that information. […] *It makes an immense [difference to] the client actually: you also enhance his esteem.* [Interview, defence lawyer 8]

Here, then, the person has been *shown to* the defence lawyer as having been respected as a unique individual who, rather than feeling degraded by the indifference of a mechanical system, has had his/her esteem enhanced by its individualisation. Happily, this is thought to mean greater co-operation and satisfaction: a win-win for legitimacy *and* efficiency.

(b) The Complaint of 'Excessive' Individual Information also Serves to Underline Fairness

Although research has shown that far from simply conveying detailed and neutral information about individuals, pre-sentence reports are edited, purposive and normalising constructions,[79] lawyers and judges tend to depict them as a comprehensive, 'biographical', 'encyclopaedic' examination of the individual. This is often articulated as a gentle complaint. Reports about the individual are, it is said, so thorough to the point of excess. In this way, judges and lawyers delight in recounting the absurd lengths to which reports are said to go in documenting the individual: whether it be the nature of the individual's birth or his/her golf handicap, or, educational attainment.

Normally judges, (and so defence lawyers), skip read the (constructed) sections about the individual which are dismissed as 'background' or 'encyclopaedic'. Yet, this 'detail' is also regarded as essential. Where a report does not include such 'detail' it is believed to have failed in its task: "It was a bit lacking, I think. […] It's a bit thin." [Post moot interview judge 3]. Judges, defence lawyers need to feel the weight of this individualised investigation *in order that* they can (often if not always) be assured it has been addressed and so move ahead to completing the disposal of the case. This, in turn, has important implications for the role of information about social inequality and disadvantage, to which we now turn.

[79] For example: Halliday et al; op cit, n.10.

2. *Individualised Examination Minimises the Impact of Social Disadvantage*

Individualising examination exhibits close attendance to the importance of social context, disadvantage and inequality. Yet, in doing so, it tends to minimise and nullify it. By exhibiting the depth and comprehensiveness of the back-stage investigation into the deprivation and disadvantage of defendant lives, it is then seen to have been addressed.

In the second phase of Ritual Individualisation, the display of awareness of social inequality through indvidualised information evidences the court's awareness and sensitivity to the context of the lives of those before it. Yet the individualised character of this information *also* means that systemic factors (e.g. poverty and disadvantage) are maginalised. Because the effects of poverty are so pervasive in cases brought before the criminal courts, it is felt to make little difference to culpability. Judges and lawyers are confronted daily with repeat individualised stories of social deprivation, unemployment, childhood neglect and abuse, addictions etc., that they can come to see them as unremarkable, developing a weary insouciance to accounts of deprivation and disadvantage. By repeatedly focusing only on *the unique individual* (rather than also placing her in the context of the wider *general* population) deprivation comes to be seen as the unremarkable norm. It becomes the benchmark from which an 'interesting' exception is sought.[80]

This examination personifies the individual, (whether explicitly or implicitly), by means of a baseline of judgement; a comparison with any given (and preferred) 'normal population'. Thus, it is only where a person is considered unusual (e.g. privileged) that his/her social circumstances are considered worthy of particular note. For example, in the case of 'Mr Laverty' most judges missed the reference in the 'Education' section of reports to his 'learning difficulties' and having attended 'a special school':

Judge 7: I didn't need to know what school he went to […..]
Judge 5: [For] example [if] he was a product of Eton, Oxford or The Guards and was up on this sort of offence, you would be saying: 'Wait a minute, what's all this about?!'
Judge 6: Now, you've just made my point for me!
Judge 7 : If I went to the local school, left without qualifications, fine, I mean I don't think it matters. But if somebody did go to somewhere unusual like Eton or Harrow or whatever then maybe that's something we should throw into the equation.

[80] Foucault (1977), op cit, n.75,pp182-192

3. *Individualisation Re-Manifests Denial and Ambiguity as Free and Sincere Admissions of Guilt*

Where, in the first-phase of the rite of passage, a defendant wishes to maintain a plea of 'not guilty' she is confronted with a dilemma, for example by her defence lawyer. On the one hand, it is explained that if innocence continues to be professed even after conviction at trial, the sentence will be inflated. Mitigation and the humanising opportunity of individualisation will be lost and she can expect to be portrayed in a poor light. She will be seen as still being 'in denial', and unwilling to 'engage' or 'work with' services trying to help her address her offending. On the other hand, if after conviction at trial she chooses to take up the opportunity of individualisation and mitigation by recognising her guilt, she can expect to be seen as 'a chancer', seeking to exploit the system. She will have been seen to have knowingly wasted the court's time. Thus, the low-risk option is to change to a guilty plea.

(a) *Disengaged and Doubt-Provoking Postures*

The paradigm case in the lower and intermediate courts hinges on a free and sincere admission in which the person is shown to accept willingly the legitimacy of the process and so her own punishment. "For if punishment is to be more than coercion, it must be justified *to* the person on whom it is imposed, … *which she should come to accept and will for herself*."[81] However, following the guilty plea accomplished by the first-phase, individualisation in the second-phase may yield the appearance of an inconsistent, reluctant, or insincere guilty plea. For it is in the very need to display individualisation that their candid accounts have to be reported. This can open a Pandora's Box of doubt about the voluntariness and legitimacy of the process.

Paradoxically, court professionals can never be sure whether the person's account is authentic,[82] precisely because that account is given in the shadow of the power of the court. On the one hand, free and sincere admissions of guilt and responsibility are encouraged and incentivised through the promise of humane treatment as an individual and the chance of mitigation. Yet on the other hand, the availability of that incentive,

[81] Duff op cit,n.6, p.263, emphasis added, except 'to'.

[82] Bandes, op cit, n.63

(and threat of worse), necessarily entails potential doubt whether that admission is freely given and sincere.[83]

People who to a greater or lesser extent, engage with an individualising inquiry, may voice accounts, which appear to be ambiguous, confused, insincere, or, appear to contradict their formal admission/plea.[84] Thus, the court is faced with explicit or implicit resistance.[85] Paraphrased, examples of such resistance include: 'I only pled guilty to get it over with (e.g. I was being held in pre-trial detention)'; 'I was told to plead guilty by my lawyer'; 'I pled guilty for the sentence reduction'; 'I'm taking the rap for someone else'; I'm not guilty but no I don't trust the system to believe me (e.g. because I've been in trouble before'; 'I'm pleading guilty but I don't accept I'm truly culpable - it wasn't really my fault'.

On the other hand, a person who formally pleads guilty to a crime yet is seen to have failed to engage with the inquiry about her as an individual (e.g. in discussions with the defence lawyer, the pre-sentence investigation, or interaction in court) may be thought to display an unacceptable contempt for the process.[86] Silence may be taken as tacit resistance. Avowal of the material confirmation of a factual truth

> "is insufficient: we demand an avowal that fulfils the dramaturgical role." The court demands: "'Don't simply tell me what you did without telling me, at the same time and through this, who you are.'"[87]

Such potentially threatening disengagement is converted by individualising work in the second-phase into displays of greater, (and ideally full), acknowledgement of guilt and acceptance of the impending sentence. Consider, for example, the pre-sentence investigation and report about 'Craig Henderson', who pled guilty to breaking into a church. When discussing his attitude to the offence at the interview with the report writer, Craig presents a somewhat disengaged demeanour, cynical about the fairness of

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[83] Weisman (2009, 2014), op cit, n.63

[84] For example: Bottoms and McLean,op cit,n.60; van Oorschot et al, op cit,n.63

[85] The controversial American phenomenon of 'Alford Pleas' (sometimes called a best interests plea) permits defendants to plead guilty, while protesting innocence. Bibas (op cit, n56 pp.61-4) observes that judges dislike Alford Pleas, and indeed equivocal guilty pleas more generally, because of the "the message which they send. Pleas without confessions leave victims unvindicated and defendants defiant and resistant to treatment….Moreover, some judges and prosecutors worry that equivocal guilty pleas undermine public confidence, leading defendants' family, friends, and the public to suspect injustice….Guilty-but-not-guilty pleas send mixed messages, breeding public doubt, uncertainty, and lack of respect for the criminal justice system. " Equivocal guilty pleas fail to *show* that the admission of guilt is sincere and accepted by the defendant.

[86] Weisman (2009, 2014),op cit,n.63; Martel, op cit,n.63.

[87] Foucault, M *Wrong-Doing, Truth-Telling: the function of avowal in justice* (1981/2014) edited by F Brion and B Harcourt, p.215

the criminal process. He denies that he broke into the church, (he says it wasn't locked), but remarks that there was little point in him pleading 'not guilty' since he has a significant criminal record which the report writer focuses his attention on. In his report, 'Fergal' presents Craig as 'fully aware' and accepts that a custodial sentence is likely. Under the heading 'Custody' Fergal writes:

> "Mr Henderson has served previous custodial sentences and he indicated that *he is fully aware* that the court may consider the imposition of a custodial sentence regarding the current matter. *He accepts this situation*." [case 28, emphasis added].

In this way, Craig's passive cynicism manifested in a critical posture is conflated with awareness, converted into deemed acceptance of the likely sentence.

Ambiguous guilty pleas and/or resistance, (usually implicit but occasionally explicit), also raise doubt and uncertainty among legal professionals.[88] It questions the legitimacy of their role. The reader may recall that, as exemplar professionals who regard themselves as carrying the heavy triple-burden of personal responsibility for justice in the instant case, lawyers, and especially judges are almost bound to take signs of resistance personally. Persistent ambiguity is particularly threatening:

> "To portray oneself as not responsible for one's transgressive behaviour is to suggest that whatever punishment is meted out is undeserved…Those who do not accept responsibility… are the objects of judicial outrage."[89]

The cherished idea of the free, voluntary admission of guilt accepting and, ideally even, willing one's own punishment demonstrated by "a posture of abjection and surrender before the authority of the law"[90] is tainted by the implicit and explicit appearance of resistance. An ambiguous guilty plea raises a question mark as to whether the decision to enter a formal plea of guilty was a truly free. Normally the second-phase succeeds in neutralising this threat.

The person who appears to present an inconsistent, or, insincere admission of guilt is faced with a problem. She is expected *both* to explain openly and sincerely the background, causation of and attitude to the offence *and also* display contrition, remorse, and willingness to change. In their study of the performance of remorse, van

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[88] Bibas,op cit, n.85, pp61-64.
[89] Weisman (2009), op cit,n.63,pp53-65.
[90] Weisman (2009), id,p.66.

Oorschot et al (2017) explain "the catch-22 situation" which such defendants face.[91] On the one hand, defendants are required:

> "to 'tell their story' and give a causal and temporal account of what happened, [yet on the other hand] defendants must simultaneously 'take responsibility' [for the offence]…"[92].

The person whose formal admission of guilt is not matched by a fulsome or sincere admission has to reconcile a dilemma: to be both completely candid and also to accept full responsibility. The low-risk option is for the person, and for those re-presenting her story, to revise her position so that it is seen be compatible with the formal guilty plea.

(b) *The Key Role of the Defence Lawyer*

It is imperative that the defence lawyer ensures that the explanation which a client gives to the report writer for the offence does not appear to contradict the formal plea of guilty.

> Defence lawyer: "[If] the client wasn't so sure [he is guilty but….] he'd instructed you to plead guilty then […] I would say to them, 'if you say to the social worker you didn't do this or you're innocent then that will cause you problems and it'll cause me problems[…] If you deny this offence when you speak to a social worker, it's not going to help you." [Interview, defence lawyer 10]

By heralding the opportunity of individualisation and mitigation, the person's account is aligned more closely with that of the ideal defendant who shows she fully accepts individual responsibility and her punishment. By presaging the opportunity of a positive interview with a report writer, the person is invited to edit irregularities in her own account of offending which jars with her guilty plea. It places the onus of the opportunity on the defendant. Defendants may be told: this is your chance and your responsibility to win over the report writer and get a more favourable sentence. In so doing, defence lawyers may be careful to depress optimistic sentence expectations meaning that the person is seen to be relieved, even occasionally grateful for, the sentence which the court later passes.

4. *Ritual Individualisation Transforms the Person into a Culpable Offender*

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[91] van Oorschot et al, op cit, n.63,p.15

[92] id,p.2

Through the second-phase of Ritual Individualisation, defendant docility is transformed into a display of active acceptance; confusion into rational calculating decision-making. This is because individualisation requires *both* the person to voice 'what happened' *and* perform an authentic posture of acceptance (ideally remorse).[93] A key source of ambiguous admissions of guilt is the law itself. The distinction between legal and 'common-sense' versions of culpability can be non-intuitive. "[D]efendants are required to navigate between a legal and a moral account"[94]). Hardly surprising, then, that lay people are regarded by lawyers and judges to make claims to a legal 'defence' to a crime to which they have already formally admitted guilt, rather than as mitigation at sentencing. For example, in discussing his pre-sentence report, a focus group of judges find that Mr 'Laverty', (and whose brief mention in the report of 'learning difficulties' and possible difficulties of 'comprehension' were missed by the judges), is regarded to be trying a tactical legal manoeuvre. He is interpreted to be trying to justify his actions by claiming the legal self-defence of provocation[95] while at the same time gaining the sentencing benefits of pleading guilty:

Judge 17: He also has tried to justify his actions as well – 'He held her wrists for fear of her throwing something at him'. So he's throwing in there a wee self-defence prerequisite…
Judge 18: But if that was true he wouldn't have pled guilty.
Judge 17: But if that was true he wouldn't have pled guilty, yeah.
Judge 18: So the circle goes round. [Focus group 6]

For the judges Mr Laverty is regarded as trying to 'have his cake and eat it' by seeking both to gain the benefits of a guilty plea and potential mitigation while simultaneously also claiming a legal defence to the crime (self-defence) to which he has already pled guilty.

V. CONCLUSIONS AND IMPLICATIONS

By avoiding evidentially-contested trials, lawyers and judges are faced with a potentially troubling dilemma. On the one hand, there is a shared professional obligation

[93] van Oorschot et al,op cit,n.63
[94] van Oorschot et al, op cit,n.63,p.7
[95] For example, 'provocation', to take the example mentioned below, can in Scots law both form part of a legal defence to a charge or simply mitigate the sentence.

to dispose of cases speedily, with as little fuss and conflict as possible. The passivity of most defendants both facilitates and is facilitated by the ‘efficiency’ of guilty pleas. Yet, on the other hand, in the awareness of this passivity, court professionals are also faced with the prospect of doubt about whether the person has participated freely; been humanely treated; had the context of her unique life recognised; and whether her formal admission of guilt is fully informed and sincere. These questions potentially cast doubt on whether punishment is legitimate. The felt dilemma between the requirements of free participation by the unique individual and expeditious case-disposal cannot be resolved by an internal dialogue of self-justification, self-deception and denial of responsibility. The triple-burden of responsibility, which weighs heavily in lawyer and especially judicial self-image, means that fair process to the unique individual has to be made manifest to them by, in some way, witnessing the person to be sentenced freely accepting her guilt and the legitimacy of her punishment. This is achieved neither through self-deception nor pretence, but through the creative case-work of Ritual Individualisation (RI). Successful RI transforms the posture of the person shown to the court.

Thus, successful RI should *not* be confused with the possible self-deception of professional self-talk, nor any simple notion of performance as pretence. It would be a mistake to dismiss RI as a vacuous exercise in professional deceit. Successful RI is far from that. Rather, as a result of individualisation-work, RI achieves a re-presentation of the person’s orientation to the authority of the court. Through the person’s own displayed communication, the legitimacy of the court is shown to the court community to be re-validated. By beholding convincing signs of the person’s participation in and consent to the process, expeditious case-disposal is convincingly shown to be compatible with a fair and humane process. Successful RI makes manifest to the court the person’s full and free admission of culpability, her active participation as a unique individual and her acceptance of punishment.[96]

1. *Implications for Further Research*

(a) Professional Belief and Belonging

Effective Ritual Individualisation restores faith in elevated professional beliefs and symbols, so renewing confidence in professional purpose and identity. In accounts illustrating a sense of professional pride, judges and lawyers tend to note that most

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[96] In other words, it is not the case that individual practitioners undertake self-deception, (some may sometimes some may not), but rather that the ‘objective’ manifestation of the case has changed.

people accept the fairness of the process and sentence. The successful work of Ritual Individualisation constitutes and affirms cherished beliefs about the criminal process. Although the instant case has been ticked off the list, more importantly, the court community's moral universe is seen to have been tested and re-validated. This revalidation is the deeper achievement, without which the 'efficient' disposal of the instant case would be more problematic. Rather than seeing the performative and expressive characteristics of ritual as opposed to efficient case-disposal, Ritual Individualisation facilitates expeditious case-disposal. By solidifying the accused as a familiar culpable subject who accepts her own punishment, professional self-belief and identification with court communities are fortified.

There are, of course, instances when Ritual Individualisation fails convincingly to demonstrate the person's transformation. That a relatively small minority of defendants maintain a not guilty plea and are not convicted need not, however, necessarily threaten legal professional self-image. It can serve to show the professional court community that defendants always have a free choice and that the system is not rigged. Far more problematic is where, even after individualising work, the person presents a posture which casts doubt on the freeness and sincerity of her formal admission of guilt, thus presenting doubt about the fairness of the process to the professional court community. In systems regarded by court professionals as more or less fair, most of the time that doubt tends to be erased by the work of RI. Indeed, instances of initial resistance, which are followed by the manifestation of sincere acceptance of deserved punishment may be seen as particularly potent illustrations of the court's legitimacy.

The argument of this article also raises questions about the role of humanistic values promoted by Thereapeutic Jurisprudence and Procedural Justice, (e.g. participation by and treatment of the person as an individual), in enhancing trust in officials and so legal compliance among those who come before law.[97] While not necessarily disputing the propositions, this article suggests a different research focus. To-date research has concentrated on what lawyers, judges and other professionals believe humanistic process values do for those who come before them. The renewed interest in inclusive rituals and humanistic treatment in the legal process[98] could now also consider its impact on professionals. To put it another way, research should now develop a focus on what TJ and PJ also do for professionals.

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[97] For example Wexler,op cit, n.7.

[98] For example: Hunter, B, S Roach Anleu, K Mack (2016) 'Judging in lower courts' *International Journal of Law in Context* 12(3):337-360; Rossner,op cit,n.47; Maruna, op cit,n.47.

That said, we know remarkably little about how people subject to it experience the criminal-penal process, *as a process*. There is an urgent need to know more about how individualisation is experienced by those subject to its processes. Longitudinal studies of persons subject to the justice system are rare, yet the potential gains of such a follow-through are significant. It can begin to tell us for instance how the individualisation process is experienced differently, (or similarly), by professionals *and* by those subject to them in the same cases.

(b). *Is Two-Stage Adversarial Procedure, in Reality, Fused?*

The implications of this article also query the sharp distinction between adversarial and inquisitorial models of the criminal procedure.[99] Adversarial procedure is composed of two separate stages: guilt determination followed separately by sentencing.[100] So as not to contaminate the separate and prior question of criminal conduct, the court is blind to the character and social status of the defendant unless and until it is proved that she can no longer be presumed innocent of the charge. By contrast, inquisitorial systems more or less simultaneously examine character alongside alleged criminal conduct, since one is integral to the other. For Anglo-American legal scholars, however, the apparent failure to separate questions of alleged conduct from character can appear to be fundamentally illiberal. Those steeped in adversarial principles sometimes disparage inquisitorial procedure as 'fused': a joining of two otherwise distinct entities (conduct and character).

However, the reality of everyday routine practices of the adversarial system might more properly be described, albeit in different ways, as 'fused'. This is not merely because the first stage (an evidentially-contested trial) is usually by-passed by a guilty plea. Rather, it is because the second stage (sentencing) looms so large in the decision about the first stage (plea). By heralding the coming opportunity of humane individualisation and mitigation, the two-stage distinction collapses into one. By presaging questions of defendant character, attitude to the (alleged) offence if convicted, suitability for rehabilitation etc, the process (and promise) of individualisation stimulates the 'contamination' of what is formally labelled matters of guilt together with matters of punishment. Indeed the formal temporal order of conviction followed by the separate stage of sentencing is, in effect, fused. Typically, therefore, sentencing is seen by court

[99] For example: Field 2018 op cit 9; Hodgson and Soubise 2016,op cit,n.9.
[100] Horovitz,A (2007) 'The Emergence of Sentencing Hearings' *Punishment & Society* 9(3):271-299.

actors as the ‘real’ primary, practical question which, in effect, takes priority, so in effect, *preceding* the almost ‘inevitable’ conviction via a guilty plea.[101]

Whether, and in what ways, the consequences and practices of individualisation are shared or differ between (and within) national jurisdictions is a question which comparative research could fruitfully develop. Are the consequences of individualisation practices recognisable across jurisdictions? What are the nature of the similarities and differences? Despite these differences, do individualisation practices, as has been argued here, tend also to function as a way of managing the person's displayed posture?[102] Do individualisation practices in different places also tend to re-present the person as a participating individual whose unique voice has been attended to and who freely accepts her impending punishment?[103] If that is more or less recognisable as a broad consequence of individualisation-work, what are the varying legal and cultural dynamics which achieve such normalisation?

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[101] For example, and perhaps tellingly, informal professional and policy talk tends to speak routinely of ‘a plea’ to denote *only* a plea of guilty.

[102] See for example, Field, S (2018) ‘Remorse, responsibility and the unique individual: the enactment of political cultures before the French *Cour d’Assises*’ Paper presented to the *International Workshop on Remorse and Responsibility: Comparing Cultural Expectations in the Construction of the Ideal Defendant* Cardiff Law School September.

[103] See for example: Field id; Hodgson and Suboise, op. cit., n.6; L.Johansen (2017) ‘Between standard, silence and exception: How texts construct defendants as persons in Danish pre-sentence reports’ 29 (2017) *Discourse & Society* 123.