

REMORSE AND SENTENCING IN A WORLD OF PLEA BARGAINING¹

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ABSTRACT

That the presence or absence of remorse is felt to be central to sentencing decision-making is now well established. Most scholarship has focused on normative questions of whether and how remorse ought to influence sentencing decisions. More recently, research is exposing the difficulties and dangers faced by judicial sentencers seeking to evaluate the authenticity of expressions of remorse. Distinctively, this paper asks why, despite its apparent irrationality, judges and lawyers seem compelled to focus on the attitude of the person to be sentenced. Illustrated by recent research into sentencing and guilty pleas, we reveal how a perception of 'zero-sum gamesmanship' appears to defendants and judges and lawyers to pervade the daily workings of the courts, most especially in plea bargaining practices. It argues that the inability of these court professionals to know, and confidently to believe they know, the 'real' attitude of the defendant is intensified by the very practices court professionals feel obligated to pursue.

1 – SORRY, BUT WHAT'S THE POINT OF REMORSE?

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In the sentencing decision process, what function, if any, is served by remorse? Remorse scholarship has tended to focus on normative questions of whether and how remorse ought to influence sentencing decisions. More recently, research is exposing the difficulties and dangers faced by judicial sentencers seeking to evaluate the authenticity of expressions of remorse. Distinctively, however, we ask why, despite its apparent irrationality, judges and lawyers seem compelled to focus on the attitude of the person to be sentenced.

This chapter identifies a central paradox facing professionals in their search for signs of remorse. The attitude of the person to be punished, especially whether or not she shows signs of remorse (or seemingly similar feelings), plays a pivotal role in sentencing. Yet it can be difficult, if not impossible, for judges and lawyers to know whether a person is truly remorseful, especially in the moments before sentencing. Why then do judges and lawyers seem so compelled to focus on the person's attitude – especially whether there are any signs of feelings approximating remorse?

Illustrated by recent research into sentencing and guilty pleas, we will reveal how a perception of 'zero-sum gamesmanship' appears to defendants, judges and lawyers to pervade the daily workings of the courts, most especially in plea bargaining practices. We will argue that the inability of judges and lawyers to know, and confidently to believe they know, the 'real' attitude of the defendant is intensified by the very practices judges and lawyers feel obliged to pursue. Even where remorse may be heartfelt, the process by which expressions of remorse are curated undermines their credibility.

In noting that judges and lawyers seem compelled to focus on the person's attitude (and signs of remorse), we seek to avoid the scholarly temptation to dismiss this professional focus on remorse as little more than misconceived or irrational. Instead, we develop an explanation which is informed by the systemic gearing of the criminal process towards expeditious case disposal, not least through the practices of plea bargaining and its solicitation of (early) guilty pleas.

Drawing on findings from a recent study of the lower and intermediate courts in Scotland, we suggest that legal professionals' preoccupation with

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searching for authentic remorse is the consequence of a legitimacy dilemma, generated by their own practices, that only the appearance of 'signs of genuine remorse' (or at least its approximation) can seem to resolve.

A – SEEKING 'REAL' REMORSE

The idea of remorse has a longstanding and intuitive appeal in sentencing:

That expressions of remorse – when believed – mitigate punishment in law and diminish the social disapproval of transgressors in more informal settings is by now a commonplace observation amply documented both in legal and criminological scholarship and in experiments in social psychology, respectively.²

This intuitive appeal exists even though scholars have shown that, in normative terms, there is only a limited principled basis as to why remorse ought to affect a sentence.³ Remorse is mostly considered irrelevant to arguments for proportionality in sentencing as it does not in itself affect the culpability or harm of the offence.⁴ *Displays* of remorse also have tenuous normative links to other espoused aims of sentencing, such as rehabilitation.⁵ Thus, while questions of remorse are commonly considered at sentencing, the value of remorse is difficult to articulate in abstractly rational terms.

² Richard Weisman, "Being and Doing: The Judicial Use of Remorse to Construct Character and Community," *Social & Legal Studies* 18, no. 1 (March 2009): 47–69, <https://doi.org/10.1177/0964663908100333>.

³ For example, Mirko Bagaric and Kumar Amarasekara, "Feeling Sorry? – Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing," *The Howard Journal of Criminal Justice* 40, no. 4 (November 16, 2001): 364–76, <https://doi.org/10.1111/1468-2311.00215>.

⁴ For example, Andrew Ashworth, Julian V Roberts, and Andrew Von Hirsch, *Principled Sentencing: Readings on Theory and Policy* (Hart, 2009); Julian V Roberts, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011)..

⁵ The link between displays of remorse and internal attitudes relevant to rehabilitation is unproven. For example, see Susan Bandes, "Remorse and Criminal Justice," *Emotion Review* 8, no. 1 (2016): 14–19, <https://doi.org/10.1177/1754073915601222>.

An additional complication is that despite the term's common usage, remorse can mean different things depending on one's epistemological vantage point.⁶ Indeed, despite meritorious efforts, an agreeable narrow definition remains elusive. For example, Proeve and Tudor note that:

*The single study in which all four emotions [guilt, shame, regret and remorse] were compared (Proeve 2001), failed to show distinctive features of remorse. Prototypical features of remorse were also prototypical features of regret or guilt, and in some cases shame... These findings suggest that regret, remorse, guilt and shame have a common core cognitive feature, namely a wish that things were other than they are.*⁷

This is not to say that a more elaborate definition is impossible. For example, Bandes distinguishes remorse from guilt and shame (arguing that remorse is forward-looking while guilt and shame look backwards).⁸

By contrast, however, judges and lawyers tend to adopt a permissive view of what constitutes remorse. For instance, in research in Canada, it was found that (with one exception): "Judges do not offer a definition of remorse, nor do they specify the nature of remorse (e.g., as cognition, emotion, etc.), although some do refer to feelings of remorse."⁹

Accordingly, this chapter does not seek to draw any precise distinction between remorse and its emotional or cognitive 'near neighbours' of shame, guilt, contrition, regret, etc.¹⁰ Instead, following the permissive and 'flexible' ways in which professional decision-makers talk of remorse, we resist getting drawn into attempts to define in abstract rational terms 'the essence' of

⁶ Michael. Proeve and Steven. Tudor, *Remorse : Psychological and Jurisprudential Perspectives*. (Taylor and Francis, 2016).

⁷ Proeve and Tudor, *Remorse : Psychological and Jurisprudential Perspectives.*, 63.

⁸ Bandes, "Remorse and Criminal Justice," 8.

⁹ Linda A Wood and Clare MacMartin, "Constructing Remorse: Judges' Sentencing Decisions in Child Sexual Assault Cases," *Journal of Language and Social Psychology* 26, no. 4 (December 1, 2007): 346, <https://doi.org/10.1177/0261927X07306979>.

¹⁰ For example, a discussion of "near neighbours" of remorse see Proeve and Tudor, *Remorse : Psychological and Jurisprudential Perspectives.*, 33–37..

remorse (as useful as that enterprise can be).¹¹ Rather, we are interested in how court professionals (judges, lawyers, probation officers etc), whether rightly or wrongly, think about remorse – and more specifically why these professionals take part in a quest which, at the level of normative scholarly enquiry, can seem on its face to be futile, even irrational.¹²

Accordingly, we interrogate the permissive view of what constitutes remorse that is frequently adopted by lawyers and judges - the “know it when I see it” approach.¹³ We are seeking to explain why, despite well-documented problems identifying ‘genuine’ remorse, professional decision-makers nonetheless feel compelled to search for signs of it. Thus, presently, we are not preoccupied with a normative analysis of whether and how remorse *ought* to be used in decision-making.¹⁴ Indeed, contemporary scholarship is unearthing valuable new knowledge about how the operation of remorse by sentencing decision-makers may be irrational, conveying unarticulated and uncontrolled effects in deepening social inequalities.¹⁵ Our purpose in this

¹¹ Kate Rossmanith, Steven Tudor, and Michael Proeve, “Courtroom Contrition: How Do Judges Know?,” *Griffith Law Review* 27, no. 3 (July 3, 2018): 366–84, <https://doi.org/10.1080/10383441.2018.1557588>.

¹² It could be suggested that judges and lawyers particularly focus on signs of remorse (and the attitude of the person more generally) because remorse is officially listed in many jurisdictions as one of the potential ‘mitigating factors’ which the court must consider in its sentencing decision-making. However, there many aggravating and mitigating factors which are listed officially (e.g. in sentencing guidelines, appellate court judgements, statutes), constituting a reservoir of resources drawn upon in the complex dynamics of sentencing decision-making (e.g. Tata 2020). Few, if any, form as powerful a lens for sentencing as the perceived attitude of the person (especially feelings approximating to remorse).

¹³ Bandes, “Remorse and Criminal Justice,” 16.

¹⁴ There is extensive and excellent normative literature interrogating the jurisprudence of remorse and whether or how it should have a role in sentencing decision-making (and parole). To mention but a few, see for example: Christopher Bennett, “The Role of Remorse in Criminal Justice,” *Oxford Handbooks Online*, October 5, 2016, <https://doi.org/10.1093/OXFORDHB/9780199935383.013.37>; Hannah Maslen, *Remorse, Penal Theory and Sentencing* (Bloomsbury Publishing, 2015); Andrew von Hirsch, *Censure and Sanctions, Oxford Monographs on Criminal Law and Justice* (Oxford: Oxford University Press, 1996), <https://doi.org/10.1093/acprof:oso/9780198262411.001.0001>; Susan Bandes, “Remorse and Judging,” *SSRN Electronic Journal*, 2020, <https://doi.org/10.2139/ssrn.3535062>.

¹⁵ For example: Bandes, “Remorse and Judging.”; Louise Victoria Johansen, “‘Impressed’ by Feelings-How Judges Perceive Defendants’ Emotional Expressions in Danish Courtrooms,” *Social & Legal Studies* 28, no. 2 (April 22, 2019): 250–69, <https://doi.org/10.1177/0964663918764004>.; Irene van Oorschot, Peter Mascini, and Don Weenink, “Remorse in Context(S),” *Social & Legal Studies* 26, no. 3 (June 12, 2017): 359–77, <https://doi.org/10.1177/0964663916679039>.; Irene van Oorschot, *The Law Multiple: Judgment and Knowledge in Practice, Cambridge Studies in Law and Society* (Cambridge: Cambridge University Press, 2020),

paper is related but different. We seek to take seriously (if not literally) the apparent incoherence and contradictions in how professional decision-makers search for remorse, (and its near neighbours), so as to ask: why, despite its incoherent uses and effects, do signs of remorse (and similar feelings) matter so much to professional decision-makers?

B – PROFESSIONALS' SEARCH FOR GENUINE REMORSE

Even within the broad notion of remorse popular in legal discourse, one critical distinction *is* drawn between displays of remorse considered to be authentic and inauthentic – such as the genuine remorse over the wrongfulness of one's actions and seemingly self-interested displays of regret (e.g. 'I'm sorry I got caught'). When legal professionals talk of remorseful offenders, they are quick to home in on the need to identify 'genuine' as opposed to inauthentic remorse.¹⁶ However, genuine remorse is notoriously tricky to determine for several reasons:

*Currently, there is no good evidence that remorse can be evaluated based on facial expression, body language, or other nonverbal behavior. Conversely, there is evidence that legal decision-makers evaluating remorse do so through their own cultural and emotional lens, and that evaluating remorse via demeanor is particularly problematic across racial and cultural divides and where the defendant is a juvenile, intellectually disabled, mentally ill, or taking psychotropic drugs.*¹⁷

It is almost universally acknowledged that a central indicator of genuine remorse is a guilty plea, or at least that the absence of a guilty plea shows a lack of remorse.¹⁸ Here, however, court professionals (judges, lawyers, probation officers, etc) are faced with a paradox. On the one hand, a

<https://doi.org/DOI>; Irene van Oorschot, "Culture, Milieu, Phenotype: Articulating Race in Judicial Sense-Making Practices," *Social and Legal Studies*, 2020, <https://doi.org/10.1177/0964663920907992>.

¹⁶ For example, Rossmanith, Tudor, and Proeve, "Courtroom Contrition: How Do Judges Know?"

¹⁷ Bandes, "Remorse and Criminal Justice," 15.

¹⁸ Wood and MacMartin, "Constructing Remorse: Judges' Sentencing Decisions in Child Sexual Assault Cases," 344.

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defendant who pleads guilty can seem to be acting against her/his interests: accepting punishment by pleading guilty. Nevertheless, at the same time, court professionals are also well aware that a guilty plea may be due to self-interested considerations arising from a desire to avoid the 'process cost'¹⁹ of criminal proceedings (e.g. remand, stress, uncertainty), especially from a trial, or from plea bargaining.²⁰ Indeed, so pervasive is plea bargaining as a potential inducer of guilty pleas (or at least earlier guilty pleas) that in several jurisdictions (e.g. England and Wales) there is a judicially granted 'sentence reduction' that is argued to be a legally separate (strategic) consideration from remorse: remorse is taken as a potentially mitigating factor that can reduce a sentence.²¹

2 – REMORSE AND THE PARADOX OF EXPEDIENCY

Court professionals, (especially judges and lawyers), are confronted with a dilemma. How is it possible to regard themselves doing justice while simultaneously being 'efficient'? On the one hand, lawyers and judges are charged with upholding core legal principles, including the presumption of innocence and freedom of choice as to how to plead. Judges and lawyers cannot simply dismiss their responsibility for carrying out 'justice'. To do so

¹⁹ Malcolm M Feeley, "The Process Is the Punishment," in *Crime, Law and Society* (Routledge, 2017), 139–88.; Kevin Kwok-yin Cheng, "Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts," *British Journal of Criminology* 53, no. 2 (2012): 257–75.; Jay M Gormley and Cyrus Tata, "To Plead? Or Not to Plead? 'Guilty' Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries," in *Handbook on Sentencing Policies and Practices in the 21st Century*, ed. Cassia Spohn and Pauline Katherine Brennan (New York: Routledge, 2019), 208–34. Feeley, "The Process Is the Punishment"; Cheng, "Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts"; Gormley and Tata, "To Plead? Or Not to Plead? 'Guilty' Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries."

²⁰ Cyrus Tata and Jay Gormley, "Sentencing and Plea Bargaining: Guilty Pleas versus Trial Verdicts in M Tonry (Ed) *Criminal Courts and Prosecutors* (Criminology & Criminal Justice, Oxford University Press) DOI: 10.1093/Oxfordhb/9780199935383.013.40," in *Criminal Courts and Prosecutors*, ed. MICHAEL TONRY (Criminology & Criminal Justice, Oxford University Press, 2016), <https://doi.org/10.1093/oxfordhb/9780199935383.013.40>.

²¹ Plea Bargaining may have historical links to the Royal Prerogative of Mercy and the formation of Plea Bargaining has been argued to have drawn "on the language and forms of the time-honored tradition of episodic leniency and reformed it" (Mary E Vogel, *Coercion to Compromise: Plea Bargaining, the Courts, and the Making of Political Authority*. (Oxford University Press, 2007), 133.).

would be to deny their own validity.²² As professionals, lawyers and judges derive and regenerate social, moral and economic status from the idea that they can be trusted to do justice in individual cases. Accordingly, judges and lawyers have to:

Regard themselves...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 every day; 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.²³

Yet, on the other hand, as court professionals, judges and lawyers are mindful of what they see as an opposing instrumental obligation: to process cases as efficiently as possible. 'Efficiency' means disposing of cases not only as quickly as possible, but also with as little conflict as possible. Despite proclaimed adversarialism, and for ethically-justifiable reasons which mesh with commercial considerations,²⁴ most of the time, lawyers, (and indeed judges), seek to *avoid* conflict. Conflict, (most notably in the form of an evidentially-contested trial), expends not only financial resources but, more importantly, it expends one's professional cognitive, emotional, and social resources.²⁵ There are many good reasons for avoiding conflict, including: the stress of uncertainty and loss of control of the case; the knock-on effect in managing one's case-load; conflict with other professionals which may risk

²² Cyrus Tata, "'Ritual Individualization': Creative Genius at Sentencing, Mitigation, and Conviction," *Journal of Law and Society* 46, no. 1 (March 2019): 112–40, <https://doi.org/10.1111/jols.12144>.

²³ Tata, "'Ritual Individualization': Creative Genius at Sentencing, Mitigation, and Conviction," 121.

²⁴ Roach Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan UK, 2017), https://doi.org/10.1057/978-1-137-52159-0_1; Cyrus Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work," *Journal of Law and Society* 34, no. 4 (December 1, 2007): 489–519, <https://doi.org/10.1111/j.1467-6478.2007.00402.x>.

²⁵ William L.F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...," in *Theoretical and Empirical Studies of Rights*, 2018, <https://doi.org/10.4324/9781315236353-12>; Lynn M Mather, *Plea Bargaining Or Trial?: The Process of Criminal-Case Disposition* (Lexington Books Lexington, MA, 1979); Cyrus Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work," *Journal of Law and Society* 34, no. 4 (December 1, 2007): 489–519, <https://doi.org/10.1111/j.1467-6478.2007.00402.x>.

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future convivial relations or reputational damage in the eyes of other professionals.²⁶ Yet, the mass production of guilty pleas by a process which (most especially in the lower and intermediate courts) can appear to court professionals to be perfunctory. This tension raises the disturbing possibility that one may be taking part in a process which puts undue pressure on defendants to plead guilty – a possibility that, as research reported here illustrates, lawyers and judges are acutely sensitive to and anxious to deny.

How, then, do legal professionals, especially judges and lawyers, manage the gap they perceive between a process which fails to live up to the very standards they themselves so vehemently espouse? By and large, scholarship on this question has located its explanation at the level of the individual. The apparent contradiction between 'the ought' of the rules of law and 'the is' of the daily reality of practice is said to be explained away by a dialogue which is internal to the individual. The predominant scholarly portrayal is one in which lawyers and judges, as autonomous individual professionals, in various ways 'deny responsibility',²⁷ telling themselves that cases are too trivial to need full protection or that the penal effects will be fairly inconsequential;²⁸ adopting a presumption of guilt and contempt for defendants.²⁹

²⁶ Mather, *Plea Bargaining Or Trial?: The Process of Criminal-Case Disposition*; Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform," *Crim. LQ* 50 (2005): 67; Gormley and Tata, "To Plead? Or Not to Plead? 'Guilty' Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries."

²⁷ Jacqueline Tombs and Elizabeth Jagger, "Denying Responsibility," *The British Journal of Criminology*, 2006, <https://doi.org/10.1093/bjc/azl002>.. See also Susan Bandes, "Repression and Denial in Criminal Lawyering," *Buffalo Criminal Law Review*, 2006, <https://doi.org/10.1525/nclr.2006.9.2.339>..

²⁸ E.g. Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (Springer, 1983).; Malcolm M Feeley, "Plea Bargaining and the Structure of the Criminal Process," *The Justice System Journal*, 1982, 338–54.

²⁹ For example: Michael McConville et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford University Press, 1994); Mike McConville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain*, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar Publishing, 2014), <https://doi.org/10.4337/9781782548928>; Aogán Mulcahy, "The Justifications of 'Justice': Legal Practitioners' Accounts of Negotiated Case Settlements in Magistrates' Courts," *British Journal of Criminology*, 1994, <https://doi.org/10.1093/oxfordjournals.bjc.a048444>; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Bloomsbury Publishing, 2013)..

To a greater or lesser extent, scholarship has been critical of the apparent failure of judges and lawyers to do their duty. This tends to be seen as a failure on the part of the individual professional. Impelled as it is by the pervasive cultural 'trope of the heroic individual professional'³⁰ this critique censures professional lawyers and judges for failing to live up to their duties to their clients, the public and to justice. This is variously portrayed as a failure of: will, diligence, impartiality, social awareness, professional ethicality, and moral integrity. Legal professionals, it is alleged, work: in bad faith; selfishly or lazily; under ignorance or subtle prejudices; or, at least practice some sort of subtle internal self-deception. In other words, the perceived contradiction between 'the ought' and 'the is' of criminal justice is imagined to be reconciled through internal dialogue *within the individual*.

Without refuting that individual internal dialogue matters, we propose that collaborative practices enable the ability of professionals to execute the rapid disposal of cases in a way which does not necessarily appear to them to contradict cherished legal principles (such as the presumption of innocence and voluntary choice as to how to plead). To regard punishment as legitimate, the processes which lawyers and judges constitute must be *shown to themselves* to be fair by the visible results of collaborative practices. We argue that lawyers and judges as the professionals self-consciously responsible for 'justice' need to regard their work as far more than mere violence – rather as morally deserved and legitimate punishment. If it is to be seen as more than the infliction of unjustified violence,³¹ sentencing must be shown to be legitimate, justified and deserved. Justice must not only be done, but more importantly, *be seen by court professionals* to be done.³²

Sentencing, devoid of legitimacy, is indistinguishable from naked coercion – sheer brute force, violence. For court professionals to believe in what they do as just (or at least not as palpably unjust violence), they need to regard their work as justifiable. Judges and lawyers, in particular, cannot afford to view

³⁰ Cyrus Tata, *Sentencing: A Social Process Re-Thinking Research and Policy* (Cham: Springer International Publishing, 2020), chaps. 3–4, <https://doi.org/10.1007/978-3-030-01060-7>.

³¹ Robert Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601.

³² Tata, "'Ritual Individualization': Creative Genius at Sentencing, Mitigation, and Conviction."

the court process they are responsible for as nakedly coercive, even if, as we shall see, that may be how some defendants experience it. Ultimately, sentencing is the infliction of coercion and control which is often harmful – even if that coercion and control is (as in rehabilitative theory) also imposed with the intention to help the person. Without the consent of the person to the legitimacy of the court to impose punishment, that coercion, control and harm would be regarded as naked violence.

So how is the violence of the court shown to court professionals to be more than that? How is it manifested to them as deserved and legitimate punishment? Certainly, in the research reported here, court professionals drew on several familiar tropes including: the inevitability of plea bargaining; the likelihood of guilt; abstract philosophical principles as opposed to practical reality; public interests; established practices; that clients (passively) accept³³ their inevitable fate, etc. Far more persuasive than self-justifying internal dialogue, is, we argue, the demonstration by the very person who is to suffer the violence of sentencing that she, in fact, voluntarily accepts that suffering as justified punishment. The manifestation of genuine remorse is 'the best exemplar that the court not only has the right to punish, but *is* right, to punish.'³⁴

The showing of 'genuine' remorse is experienced as more potent, direct and moving than cerebral argumentation. Judges and lawyers recall witnessing remarkable instances of 'real' remorse as vivid sensory experiences, reporting that they not only see and hear but feel, taste, and smell remorse.³⁵ The appropriate expression of remorse (and approximating feelings), shown as sincere and voluntary, manifests a confirmation of the fairness of the process from the very person who would be thought most likely to refute it.

³³ Jessica Jacobson, Gillian Hunter, and Amy Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy*, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press, 2015).

³⁴ Tata, *Sentencing: A Social Process Re-Thinking Research and Policy*, 107..

³⁵ Rossmanith's research reveals how judicial assessment of remorse operates in experiential terms as a feeling. See Kate Rossmanith, "Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse," *Body & Society* 21, no. 2 (2015): 167–93.

Indeed, that court communities search for signs of acceptance by the person subject to punishment can be seen in a range of routine practices. Even if (and perhaps especially) engaged in denunciatory sentencing, court professionals are interested in how defendants³⁶ react before, during, and after sentencing.³⁷ For example, from judges to lawyers, to clerks, to ushers, all court workers (and members of the public) invariably observe the person at the moment of sentencing and immediately afterwards as she leaves the courtroom, checking for signs of defiance or acceptance. Judges tend to recall with pride how a person they sentenced acknowledged their fairness.³⁸ Nothing confirms the fairness of sentencing to court professionals as potently as the demonstrable and spontaneous signs of acceptance of its legitimacy by the very person least likely to do so. This is key to understanding why signs of genuine remorse are sought and so prized by all involved in sentencing work.³⁹

It is not enough that the person subject to sentencing may feel remorse internally. They must externalize it. Defendants must *show* remorse to the court so that the court can *feel* it.⁴⁰ By direct and voluntary display in front of the live audience of the courtroom, the person's genuine remorse exemplifies the process as legitimate far more powerfully than any internal process of professional self-justification ever could. In other words, the resolution of the

³⁶ In this paper we use the term 'defendant' to cover the range of statuses of a person who is subject to criminal proceedings by the state. These may include: 'suspect', 'accused', 'sentenced person', 'offender', etc. We have deliberately chosen not to differentiate these legal statuses precisely because a key issue the paper grapples with is the subjective fluidity of these statuses and the dilemmas presented to the person proceeded against by the state.

³⁷ Roach Anleu and Mack, *Performing Judicial Authority in the Lower Courts.*; Maryann Stone et al., "Rush-Hour Traffic: Self-Presentation of Defendants in Speedy Traffic Court Cases," *Criminal Justice Studies* 27, no. 4 (October 2, 2014): 439–56, <https://doi.org/10.1080/1478601X.2014.904145>.

³⁸ Stina Bergman Blix and Åsa Wettergren, "A Sociological Perspective on Emotions in the Judiciary," *Emotion Review* 8, no. 1 (January 23, 2016): 32–37, <https://doi.org/10.1177/1754073915601226>.; Fiona Jamieson, "Judicial Independence: The Master Narrative in Sentencing Practice," *Criminology & Criminal Justice*, April 9, 2019, 174889581984294, <https://doi.org/10.1177/1748895819842940>.; Roach Anleu and Mack, *Performing Judicial Authority in the Lower Courts.*; Cyrus Tata, "Humanising Punishment? Mitigation and 'Case-Cleansing' Prior to Sentencing," *Oñati Socio-Legal Series* 9, no. 5 (December 1, 2019): 659–83, <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1098>.

³⁹ Tellingly, perhaps, when discussing defendant attitudes, lawyers and judges tend to talk about what they are 'looking for', 'expect', or, what they 'would like to see' from the defendant.

⁴⁰ See Rossmannith, "Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse."

perceived contradiction between normative standards of fairness and the reality of a perfunctory process is performed by the defendant who shows full, free, sincere and spontaneous acceptance of culpability – epitomized in ideal form by what is seen to be 'genuine remorse'.

How is this manifestation of remorse generated, and why do court professionals feel so ambivalent about its authenticity? We argue that the ability to believe in the authenticity of remorse (as well as regret, contrition, acceptance, etc) is undermined by the very practices intended to solicit admissions of guilt at speed.

Through various practices resulting in 'process costs'⁴¹ to the defendant who maintains a denial of guilt, the person is encouraged to admit guilt as soon as possible. Ironically, court professionals are condemned to potential uncertainty about the authenticity of the remorse they look for precisely because they also know that defendants make their decisions in the shadow of the court's violence which hovers over them. We will examine these dynamics by drawing on recent research from Scotland⁴² into plea negotiation/bargaining and sentencing processes. The research observed non-jury triable ('summary') court cases in two neighbouring intermediate-level courts⁴³ and interviewed 17 sentencing judges, defence lawyers and

⁴¹ Here the term 'process costs' denotes the various ways in which denial of guilt results in additional costs to the defendant including: additional waiting time (whether or not held in pre-trial detention/remand); stress and uncertainty; social stigma; financial costs arising from reduced ability to work; the higher sentence if convicted after trial as opposed to a guilty plea; the potential greater difficulty in being considered suitable for rehabilitation in the community or prison (or subsequently parole) if denying guilt. See: Cheng, "Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts"; Feeley, "The Process Is the Punishment"; Gormley and Tata, "To Plead? Or Not to Plead? 'Guilty' Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries."

⁴² Although a constituent part of the United Kingdom of Great Britain and Northern Ireland, Scotland is a country with its own legal system (and other institutions). Unusually in the world, the UK is not a federation but a 'union state' of different countries. Criminal appeals are heard in Scotland's capital (Edinburgh) not by the UK Supreme Court in London. (The latter though does have jurisdiction over constitutional matters which can deal indirectly with criminal matters).

⁴³ In Scotland these intermediate courts are known as Sheriff Courts. Sheriff Courts conduct the vast majority of criminal court cases. They are presided over by 'sheriffs.' Not to be confused with American law enforcement officers, in Scotland 'sheriffs' are judges by another name. In contrast to England and Wales where more than nine tenths of cases are dealt with in the Magistrates Courts presided by lay magistrates, sheriffs are experienced lawyers by background. Scotland does have lay justices (in the Justice of the Peace Courts) but these deal with a much smaller number of cases. To avoid potential confusion, in this paper we

Jay Gormley and Cyrus Tata (2021) 'Remorse and Sentencing in a World of Plea Bargaining' subsequent version published in S Tudor, R Weisman, M Proeve, K Rossmannith (Eds) *Remorse & Criminal Justice: multi-disciplinary perspectives* (Routledge, Taylor and Francis Group, 2020) Pre-publication Draft. Peer Reviewed. Not proof-corrected.

prosecutors, and 12 defendants about the relationship between guilty pleas and sentencing.⁴⁴

A – LEGITIMACY AND THE PROBLEM OF PLEA BARGAINING.

The Scottish study found that judges and lawyers defend policies and practices which encourage guilty pleas (or at least earlier guilty pleas) on pragmatic rather than principled grounds. This finding is corroborated by previous research.⁴⁵ Typically, the logic of professionals is as follows: the evidentially-contested trial is, in principle, best, but if every case went to trial it would place too much burden on the system, so ways of encouraging guilty pleas are a necessary expedient. Consequently, plea negotiation/bargaining tends to be regarded with little principled or moral enthusiasm by its practitioners. Instead, it is portrayed as an inevitable real-world compromise between the ideals of justice and the disappointing reality of an imperfect world.⁴⁶ Moreover, practices soliciting guilty pleas are seen not only to induce guilty pleas from those who could be innocent but also to offer 'rewards' to those who may be guilty.

In its various forms, plea negotiation/bargaining exemplifies the problem. Whether in the form of charge negotiation/bargaining, or 'discounts' for guilty pleas, plea bargaining/negotiation is about some notion of trade, deal or transaction. In particular, it is about exchanging the right to trial by pleading

have used the internationally recognised term 'judge.' Sheriff Court jurisdiction deals with jury and non-jury triable cases. This research focused on more serious non-jury triable cases in which there was the distinct possibility of a sentence of imprisonment (up to 12 months). In such cases, and unlike countries such as the USA, the defendant (known as 'the accused') is almost always represented by a defence lawyer for whose services the client does not require to pay because the defence lawyer is funded through public expenditure.⁴⁴ The empirical research involved court observations over twelve months in two sheriff summary courts and in-depth interviews. The cases observed were varied and included driving offences, drug offences, crimes of dishonesty, and crimes of violence.

⁴⁵ For example: Feeley, "The Process Is the Punishment"; Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys* (University of Chicago Press, 1981); Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work."

⁴⁶ See, for example, the accounts in Asher Flynn and Arie Freiberg, *Plea Negotiations Pragmatic Justice in an Imperfect World, Plea Negotiations* (Springer International Publishing, 2018), https://doi.org/10.1007/978-3-319-92630-8_1.

guilty in return for some (real or perceived) benefit. All judges and lawyers are anxious to defend their personal practices, even if it occasionally means repudiating those of others.⁴⁷ For some, terms like 'sentence discount' are just euphemisms for 'trial tax' and 'a resolution' for 'a deal'. Some are repelled by a term like 'plea bargaining' because of what they take to be its implied vulgarity: a grubby, 'underhand' or 'seedy' deal.⁴⁸ For example, an experienced judge remarked: "There's nothing noble about this. It's just a seedy little bargain that we enter into with criminals...It's just not an ethically justifiable stance."⁴⁹ Most judges, however, are anxious to "put a more positive shine' on the process" and "using the word bargaining or deal implies that it's almost a bit underhanded, or that it's not a fair process or a fair outcome."⁵⁰ After all, judges are responsible for fairness. Likewise, in the research discussed here, some members of the Scottish judiciary were uncomfortable with terms like 'plea bargaining' and 'sentence discounting,' preferring politer talk of 'plea negotiation,' 'sentence adjustment,' etc. Whatever the correct nomenclature, the very intensity with which individual professionals justify their personal practices underscores how they can regard plea bargaining/negotiation as threatening the precious idea of freedom of choice – and thus undermine professional self-image as the guardians of fair process. For instance, of the way guilty pleas are encouraged, one judge noted:

There are a lot of philosophical issues that I am no better qualified to answer than anyone else... I appreciate that there are counter-arguments, but you don't hear them very often now... Maybe it is a philosophical argument more than it is a real-world issue.

People in the past have argued about the sort of blackmail thing. About the danger of pleading to get the discount rather than gambling, if you

⁴⁷ Tata 2007

⁴⁸ Flynn and Freiberg, *Plea Negotiations Pragmatic Justice in an Imperfect World*, 19–21.

⁴⁹ Graeme Brown, *Criminal Sentencing as Practical Wisdom* (Bloomsbury Publishing, 2017), 223.

⁵⁰ Defence lawyer, Flynn and Freiberg, *Plea Negotiations Pragmatic Justice in an Imperfect World*, 21.

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like, with a higher sentence and whether that goes against basic moral principles.

That is not for me to answer, but as you know ... that was an active academic discussion [in the past], and I don't have the answer to it. [Interview, Judge 1]

Similarly, defence lawyers likened the practices used to induce guilty pleas to unscrupulous tactics used by stores to generate sales, while a judge complained they are "not selling sweeties." Moreover, in summing up the reality of the justice process, one defence lawyer noted that:

[The prosecution's] job [is] to use what tricks they can and our job [is] to counter those tricks. [Interview, Defence Lawyer 6]

As we will see, 'tricks' and metaphors of 'game-playing' are central to how professionals conceive of the process of plea bargaining/negotiation. Paradoxically, this perception that gamesmanship pervades the process undermines the ability of professionals to differentiate between genuine and confected expressions of remorse.

B – REMORSE AND THE GAMESMANSHIP OF PLEA BARGAINING

On the one hand, displays of remorse, (and approximating feelings of shame, guilt, contrition, regret, etc), are an expected outcome of most criminal cases. However, soliciting guilty pleas through plea bargaining (and other systemic drivers such as being held on remand) thwarts the ability of court professionals to distinguish inauthentic remorse from genuine remorse. The adversarial model of adjudication is largely incompatible with the appearance of genuine performances of remorse. Such expressions require their audience to see that they are made for non-strategic reasons – for example, where extrinsic gain cannot be made.

Several interviewees described the criminal process using the analogy of game-playing. For example, of plea bargaining, one defendant bemoaned,

"it's a game of cards. It's a game of cards, but they're playing with people's liberty. And that's what they forget!" Another defendant described the process as one where "he who dares wins" – equating it to a game of chance. Legal professionals also drew on themes of gamesmanship, albeit in subtler terms, (e.g. speaking of "tactics," etc). Consequently, we propose the term 'zero-sum gamesmanship' to denote the way of thinking about plea decision-making and sentencing as akin to playing a 'game' in which each party is expected to try, through any tactics and ruses technically within the rules of the game, to gain an advantage for themselves.

Gamesmanship privileges qualities of instrumental calculation, risk-taking, and sometimes gambling to reach selfish ends. The zero-sum assumption is that for anyone to win the game, there must, therefore, be losers. If one party gains an advantage, the other party must necessarily and correspondingly be disadvantaged. In this way, the pretence and ploys of gamesmanship contrast with the wholehearted sincerity which professionals look for in genuine and sincere expressions of remorse.

This mentality of gamesmanship is perceived to impede the expression of genuine remorse in three ways. Firstly, in anticipation of plea bargaining, it is strategically rational for the defence to take a tough, remorseless stance in the expectation of gaining concessions or the case even collapsing later.

Secondly, an expression of remorse can be thought to weaken the defence's bargaining hand. Instead, when plea bargaining, one might be well advised to adopt a different posture— that of the tough negotiator or (to recall the card game analogy) to keep one's hand close to one's chest. For example, it was observed by court professionals that prosecutors routinely listed more (or more serious) charges than they realistically expect to prove at trial.⁵¹ Indeed, prosecutors noted that "taking charges out and things like that" is an intrinsic part of the process and, for various reasons, the starting point is high. One key effect of this 'overcharging' is a tactical advantage in the social process

⁵¹ This is common to adversarial systems. See Albert W Alschuler, "The Prosecutor's Role in Plea Bargaining," *The University of Chicago Law Review* 36, no. 1 (1968): 50–112; Jacqueline Hodgson, "Plea Bargaining: A Comparative Analysis," 2013.; Tata, "In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and 'Ethical Indeterminacy' in Criminal Defence Work."

through which cases are resolved: charges can be useful bargaining chips to trade with the defence in exchange for an overall guilty plea.

This research also encountered professional unease in the ways that defence lawyers and prosecutors sometimes make plea bargains in cases where there are two or more co-accused. For example:

Especially if there are two or three charges, or there are two or three accused. It is almost automatic that the lawyers involved will say [to the client], "look, there is something here that can be done." And, quite often, depending again on the nature of the charge, you will find... Well, quite often they charge like a husband and wife with a drugs charge or something. If they are in the house, they will charge both of them. Quite often, the husband, usually the husband, will plead guilty so they drop the charge against the wife.

That's a tactic I think, they [the prosecution] use. They just charge anyone in the house with a view to someone pleading guilty to it [the charge] and then dropping it [the charge against someone else]. [Interview, Defence Lawyer 5]

Likewise, prosecutors noted the tactic of overcharging might be used where a defendant's partner is believed by the prosecution to have played a minor role in an offence. For example, one prosecutor noted this might arise where drugs are being grown by the male partner and the female partner "maybe watered the plant or something" [Interview, Prosecutor 1]. In other cases of multiple accused persons, the prosecutor may accept a conviction on one defendant:

Quite often, if you have two or three accused, they will let the accused out. And, then I see them go in the corridor, and I see the three of them toss a coin to see who is going to plead guilty... or they look at their [previous] record, "he's got less than me so he should plead guilty." [Interview, Defence Lawyer 5]

Thirdly, it might be supposed that defendants gain from a reduced sentence ('discount') as a result of a guilty plea. Yet the grounds to support this thesis are more limited than widely supposed, especially when compared with the chances of non-conviction through acquittal or the prosecution withdrawing its case.⁵² Moreover, a sentence 'discount' is usually only a *stated* discount rather than one that is empirically verifiable - because the counter-factual sentence following a conviction without a guilty plea cannot normally be proven. In other words, a judicial sentencer may choose (for example in seeking to arrive at what they consider to be a substantively just sentence), to inflate the starting point sentence in order to negate the effect of any 'discount' they may subsequently apply.⁵³ However, what a guilty plea *does* systematically for defendants is to reduce the 'process costs'⁵⁴ associated with the State pursuing criminal proceedings against her/him.

These three practices illustrate that plea bargaining generates its own self-reproducing drivers of gamesmanship, which thus undermine the ability of court professionals to believe in the displayed remorse as genuine.

3 – THE SEARCH FOR REMORSE IN A WORLD OF PLEA BARGAINING

We suggest that the professional desire to 'look for signs of remorse' (and approximating feelings) is part and parcel of a professional need to regard defendants as validating the legitimacy of the sentencing process. Although in terms of articulated jurisprudential principles it is difficult to justify, the search for remorse by professionals is comprehensible as part of a wider quest to see and represent the defendant as voluntarily and sincerely accepting her culpability and thereby affirming to the court the legitimacy of

⁵² Tata and Gormley, "Sentencing and Plea Bargaining: Guilty Pleas versus Trial Verdicts in M Tonry (Ed) *Criminal Courts and Prosecutors* (Criminology & Criminal Justice, Oxford University Press) DOI: 10.1093/Oxfordhb/9780199935383.013.40."

⁵³ Gormley and Tata, "To Plead? Or Not to Plead? 'Guilty' Is the Question. Re-Thinking Plea Decision-Making in Anglo-American Countries"; Brown, *Criminal Sentencing as Practical Wisdom*, 226.

⁵⁴ Cheng, "Pressures to Plead Guilty: Factors Affecting Plea Decisions in Hong Kong's Magistrates' Courts"; Feeley, "The Process Is the Punishment."

the court's violence. Remorse is the ultimate exemplar that the person freely and spontaneously regards herself as individually punishable. In contrast to its absence, which is read as defying the authority of the court,⁵⁵ remorse is prized because it demonstrates in graphic and sensory terms validation of the fairness of the proceedings and those with responsibility for them.⁵⁶

So far, we have explained how the person to be sentenced is expected to display remorse. However, *any* display is not enough: remorse must be *appropriately* expressed. It must be performed in ways the court finds appropriate. In other words, for remorse to be shown to the court, it must be performed in ways its audience regards as credible. Although we refer to the term 'performance,' it is important to note that this does not mean that all performance is somehow fake. In the micro-interactions of everyday life, to a large extent, we perform our culturally expected roles. Social relations would be impossible without that performance. This performance is neither inherently morally good nor bad. It is simply the basis of sociality.

However, such performances are never devoid of power relations. In the courtroom, performances are enacted in the maw of the State's power. The expression of remorse is displayed in the shadow of the court's violence - most especially the court's power to sentence. That acute and explicit power differential means that it is impossible for the court to know for sure whether the person's expression of remorse is genuine or not. So, the following sorts of nagging questions become central to professionals responsible for that violence. Is the defendant sorry or only sorry she got caught? Is her remorse prepped and contrived or spontaneous and heartfelt? Does she accept the court's authority to punish her, or is she just saying so to get a reduced sentence? Does she wholeheartedly see the wrong she has done or is she only saying she does because she wants to be released from the pains of detention on remand? Is her admission of guilt genuine, or is she trying to

⁵⁵ Weisman, "Being and Doing: The Judicial Use of Remorse to Construct Character and Community"; van Oorschot, Mascini, and Weenink, "Remorse in Context(S)"; Joane Martel, "Remorse and the Production of Truth," *Punishment and Society*, 2010, <https://doi.org/10.1177/1462474510376139>.

⁵⁶ Rossmanith, "Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse."

play the system? These questions are central to the court in showing it that she accepts its authority. Yet at the same time, because of the very practices which solicit guilty pleas and compliant postures, their answers are, in objective terms, ultimately unknowable.

Rossmanith's research shows that some judges may believe that they can sense genuine remorse through bodily postures, voice, etc but ultimately, as judges also tend to recognize, one can never be absolutely sure.⁵⁷ As Weisman, observes, "there is always the possibility that expressions of self-condemnation will be more strategic than authentic, more calculated and ulterior than spontaneous."⁵⁸ The degree of violence suspended over the head of the defendant renders the definitive identification of 'genuine' remorse is, close to impossible. To varying extents, it is difficult for court professionals to ignore that the very power of the court is bound to produce inauthentic expressions of remorse.

In the research reported here, court professionals expected defendants, at the very least, to show a willingness to adopt the appropriate posture. The perceived credibility of these performances varied. Even a display of acceptance, which appears to be skin deep yet somewhat sincere, (or at least not palpably insincere), was expected and, if not forthcoming, should be solicited by the defence lawyer. For example, as one judge explained this expectation:

Remorse should [always] be there. One would be surprised if one pled guilty but said, *'I'm pleading guilty, [in a loud booming voice] but I don't regret what I did for a moment!'* That's not a realistic presentation of a guilty plea. So, most [defence lawyers] will say, [in an unenthused tone denoting triteness] *'oh my client feels very sorry'*, or *'he is remorseful.'*

In that sense, court professionals detected what we term here 'thin' and 'thick' performances of remorse. Those which are regarded as 'thin' may appear to

⁵⁷ Rossmanith, "Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse."

⁵⁸ Weisman, "Being and Doing: The Judicial Use of Remorse to Construct Character and Community."

do little more than hint at remorse or their claims to genuine remorse may be regarded with scepticism. Those performances were regarded as 'thick' appear relatively convincing to the court bearing the hallmarks of spontaneity, bodily postures and the outpouring of internal feelings which are sensed and felt by professionals.⁵⁹ Although much of the time in the lower courts performances appear to be 'thin', judges and others recall occasions when they were moved by a 'spectacular' display of remorse.⁶⁰

A – THE PROBLEM OF DEFENDANT AMBIVALENCE

In the majority of cases in the research reported here, where a defendant pled guilty, there was deemed to be a 'thin' performance of remorse. Most notably, in the plea in mitigation, the offender's lawyer would usually argue that remorse motivated the guilty plea. Even if they may not fully believe it, judges expected that a guilty plea should be said to be motivated by remorse. But, given the aforementioned multiplicity of reasons why a person may plead guilty, how can judges be sure of the role (if any) remorse plays in a guilty plea?

Bodily deportment is one key way in which the person to be sentenced is expected to signal (ideally) 'thick' remorse.

Bodily posture conveys more than a physical state. It combines judges' descriptions of defendants and behaviour, descriptions that indicate specific ways of expressing seriousness or disrespect simply through [for example] defendants' posture on a chair.⁶¹

Little is more irritating than the person who fails to show the appropriate bodily posture. Van Oorschot et al. note how the failure of the person to appear to engage in the courtroom is taken to be oppositional. For example, judges tend

⁵⁹ Rossmanith, "Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse."

⁶⁰ Rossmanith, Tudor, and Proeve, "Courtroom Contrition: How Do Judges Know?"

⁶¹ Johansen, "'Impressed' by Feelings-How Judges Perceive Defendants' Emotional Expressions in Danish Courtrooms," 264.

to be singularly unimpressed if ““he was just sitting there””⁶² seeming to convey indifference, listlessness, failing to *show* respect to the court and interest in the consequences. This may not be taken to impede the immediate practical requirement to dispose of the case, but it is taken to deny the court’s validity. Even a performance of remorse which is regarded as thin enables the court to perform legitimate disposal of the case at speed.

However, one problem found in this research is that defendants tended to be equivocal. They tended neither *fully* to agree nor disagree with the charges and facts presented by the State in its prosecution. Even in cases, where the *facts* listed were broadly correct, there could still be disagreement where defendants believed that the prosecution’s presentation of the facts distorted reality. Indeed, several defendants complained that the prosecution portrayed them in an unfairly negative light and some, having difficulty with the adversarial process, even felt the prosecution took personal pleasure in demeaning them.

For example, ‘Sam’⁶³ was accused of assault. Sam’s lawyer strongly recommended that Sam plead guilty. Yet, he (somewhat unusually) rejected his lawyer’s stern advice. While Sam accepted the fact that he struck the other party, he was of the view that this was justified on the basis of self-defence. Sam’s understanding of self-defence was a lay notion grounded on the basis that the other party started the affray. Sam’s lawyer noted that the legal issue was one of proportionality: Sam went too far in kicking the other party when they were on the ground. Thus, in Sam’s case, the prosecution facts were not ‘wrong’ (Sam did strike the other party), but Sam felt there was more to the case than the legal charges indicated. As such, Sam wanted to plead not guilty and turned to self-defence as the quasi-legal basis to justify this. By contrast, Sam’s lawyer was strongly inclined to plead guilty and raise the fuller story in mitigation – so avoiding undermining the guilty plea but seeking to minimize Sam’s subsequent sentence.

⁶² van Oorschot, Mascini, and Weenink, “Remorse in Context(S).”

⁶³ All participant names of research participants were pseudo-anonymised.

In a case like Sam's, it is not necessarily always true that the defendant/offender exhibits no retractive emotions like remorse. Rather, the defendant may agree they went too far but that their fault is offset in some way: such as by the perceived wrongfulness on the part of the other party or an intervening factor. Indeed, the research found that there were both strong emotions pertaining to remorse (inclining the defendant towards a guilty plea) that were mixed with competing emotions that disincline even a 'thin' performance of remorse – though the latter would risk being seen as minimizing one's responsibility or as being 'in denial'.

Defence lawyers and judges expressed some degree of frustration when clients 'nit-picked' - in their eyes failing fully to accept the terms of the guilty plea. Defence lawyers were vigilant in managing the potential inconsistency between the formal guilty plea and a client's account – most notably at interview with a pre-sentence report writer whose subsequent report would appear before the court. For example, once a guilty plea had been established formally, it was considered critical that the court should not then be presented with any account ('allocution' in American terms) (e.g. through a pre-sentence report) which appeared to contradict that formal plea. As one defence lawyer noted, such a contradiction is not only embarrassing but professionally painful:

It puts you in an awkward position as well because you've tendered a plea, you've taken instructions, and you've done that [guilty] plea. *And say you've then got a report that's very contradictory to the terms of what you've pleaded to. You then have to clarify from your client whether or not that is his actual position or was it what he told you when the plea was tendered.*

If it is then, at a later stage, "no, it's what's in my report." Then I have to withdraw from acting. [Interview, Defence Lawyer 1]

Indeed, it is because of the fragility of the guilty plea as a thin indicator of remorse that demand to curate and manage performances of remorse (and similar feelings) is so high. The failure to maintain such performances would embarrass the judge – and thereby, the defence lawyer who is deemed

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responsible for managing the client. Indeed, longitudinal research shows how pre-sentence report writers tend, (sometimes knowingly sometimes not), to smooth out the discordant edges of a client's account of the incident so that it could be read by the court as congruent with what she had pled guilty to.⁶⁴ Tata suggests that Anglo-American countries have developed a means of delegating responsibility for 'cleansing cases' of the 'dirt' of potential misalignment between the person's formal account (guilty plea) and their informal account of their culpability. Increasingly, and especially in higher-status courts, this task of explaining the person's position is re-presented by and through work delegated to a lower-status third party.⁶⁵ This delegated 'dirty work' sterilizes the noxious ambiguities of the person's account to present a 'cleaner' version in which the defendant is exhibited more or less accepting the legitimacy of the court's imminent violence.⁶⁶

B – CURATING PERFORMANCES OF REMORSE

Despite defendant ambivalence, justice systems solicit the formal submission of defendants to certain categories and ways of conceptualizing facts.⁶⁷ Nominally adversarial systems drive guilty pleas where defendants are expected to display, *at least*, a 'thin' performance of remorse and, in doing so, to affirm the legitimacy of the process.⁶⁸ But how do court professionals curate these displays from defendants?

⁶⁴ Tata, "'Ritual Individualization': Creative Genius at Sentencing, Mitigation, and Conviction."

⁶⁵ Tata, "Humanising Punishment? Mitigation and 'Case-Cleansing' Prior to Sentencing."

⁶⁶ Over time, and in different ways in different jurisdictions, this work has been delegated from judges, to lawyers, to social workers and probation officers to non-professional officials and now to third/voluntary sector and private organisations (Tata, "Humanising Punishment? Mitigation and 'Case-Cleansing' Prior to Sentencing.")

⁶⁷ For example, Maggie Hall and Kate Rossmannith, "Imposed Stories: Prisoner Self-Narratives in the Criminal Justice System in New South Wales, Australia," *International Journal for Crime, Justice and Social Democracy* 5, no. 1 (2016): 38–51, <https://doi.org/10.5204/ijcjsd.v5i1.284>; Tata, *Sentencing: A Social Process Re-Thinking Research and Policy*, chap. 4.

⁶⁸ The most notable exception to the 'guilty pleas perform remorse' argument is the USA's 'Nolo Contendere' and 'Alford pleas.' However, it can be argued that these are not proper guilty pleas and are rare. Yet, where they do occur, they are highly contentious (in part) because they undercut the performance of remorse that is expected.

Court professionals tend to curate performances of remorse in a collegial manner. For instance, formally-speaking, the choice of how to plead is the defendant's: the defence lawyer primarily takes 'instruction' and acts 'in the best interests of the client'. Yet, in practice, there is a self-fulfilling expectation among court professionals that a defendant should display at least an approximation of remorse. This expectation is so powerful that it can become the overriding trait of the (notionally) adversarial processes. As one judge noted:

[A defence lawyer's] first duty is to the court [not the defendant]. And that is all there is to it... If you have got a client who is leading you [as the defence lawyer] by the nose, then it is the wrong way around. [Interview, Judge 6]

Consequently, there is a professional-social demand for performances of remorse in open court. Court professionals feel compelled to meet this demand to various extents and in various ways but, in some manifestation, the demand is always there.⁶⁹ In this research, where a defendant did not provide the minimum expected thin performance of remorse (e.g. by asserting legal or moral innocence after conviction), the weight of the court could be brought to bear to impress upon the person the need to adopt an appropriate position (if not an early guilty plea then a late guilty, and failing that at least a thin performance of remorse upon conviction).

While all court professionals play a role in curating performances of remorse, defence lawyers are aware of how pivotal their role is. Defence lawyers made defendants aware that if they maintained innocence and were found guilty at trial, there could be adverse consequences. For example, the research found it is common for defendants (speaking outside the courtroom) to attribute

⁶⁹ This research confirms that different courts and different individual defence lawyers vary in their preferences about earlier or later pleas of guilty or indeed willingness to maintain a not guilty plea. Yet regardless of whether defence lawyers advise early pleas of guilty or fighting to the bitter end (or anywhere in between), there was the demand for *at least* a thin performance of remorse.

guilty pleas to some kind of obligation or pressure rather than remorse. For example:

*So, I just plead guilty otherwise I would've got more of a sentence.
[Interview, Defendant 4]*

The most common way a defendant may fail to display the proper attitude is by pleading guilty 'too late'. Indeed, it was not unusual for judges to rebuke a defendant for wasting time by not pleading guilty (earlier). For instance, one defence lawyer noted of a client who pled guilty later than the defence lawyer, prosecutor, or judge thought was appropriate:

[The judge] went off on one about the whole question of pleading at an early stage – "you knew you were guilty; you've taken it this far, witnesses have been cited!" [Interview, Defence Lawyer 3]

Further, therapeutic services (probation, criminal justice social work, prison rehabilitation programmes, etc) may regard her as showing 'no insight', declaring that there is little or nothing 'to work with' in terms of a community-based sentence. Worse still, the defendant risks being cast as 'remorseless' in the eyes of judges – someone outside the normal moral compass of society inviting heavy condemnation.⁷⁰ Moreover, where a person is charged with very serious offences, they may be invited by their defence lawyer to consider, if convicted, the impact of their plea on their prospects of gaining access to prison rehabilitation programmes which can be critical to securing subsequent parole.⁷¹

Thus, the expectation that there will be a performance of remorse helps induce guilty pleas from those who desire to meet the social expectations of the court or minimize their sentence following conviction. By presaging this

⁷⁰ Richard Weisman, *Showing Remorse: Law and the Social Control of Emotion*, *Showing Remorse: Law and the Social Control of Emotion* (Routledge, 2014), <https://doi.org/10.1177/0094306116664524ddd>.

⁷¹ Maggie Hall, *The Lived Sentence Rethinking Sentencing, Risk and Rehabilitation*, *The Lived Sentence* (Springer International Publishing, 2016), https://doi.org/10.1007/978-3-319-45038-4_1; Marguerite Schinkel, *Being Imprisoned: Punishment, Adaptation and Desistance* (Springer, 2014); Tata, *Sentencing: A Social Process Re-Thinking Research and Policy*; Weisman, *Showing Remorse: Law and the Social Control of Emotion*.

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dilemma to defendants, court professionals tend to invite defendants to conclude that a guilty plea is the only safe course of action.

C – BARGAINING AWAY LEGITIMACY?

For remorse (or its approximation) to have any impact, it must be at least tenuously credible and show respect for the court. It is not enough, and could even be seen as contemptuous of the authority of the court, simply to provide a formal admission of guilt while refusing to explain one's actions.⁷² As Foucault points out, some form of explanation demonstrates to the court that the person recognizes its legitimacy to judge her or him:

*Judges more and more need to believe that they are judging a man as he is and according to what he is... When a man comes before his judges with nothing but his crimes, when he has nothing else to say but "this is what I have done," when he has nothing to say about himself, when he does not do the tribunal the favor of confiding to them something like the secret of his own being, then the judicial machine ceases to function.*⁷³

For the court to believe in its own legitimacy to pronounce the violence of sentencing, it, in turn, requires and relies on the defendant *showing to the court that she believes in the legitimacy of the court to judge and punish her*. The defendant's curated performance of remorse (her account) is required by the court to validate its legitimacy. Duff explains the inter-relational basis of court legitimacy:

But we must also ask by, and to whom, [defendants] are called to account. For accounting is a two-way relationship: A is called to answer by and to B, who claims the right thus to hold A to account...

⁷² Martel, "Remorse and the Production of Truth."

⁷³ Michel Foucault, "About the Concept of the 'Dangerous Individual' in 19th-Century Legal Psychiatry," in *Power: The Essential Works of Michel Foucault 1954-1984: Essential Works of Michel Foucault 1954-1984*, ed. James Faubion and Paul Rabinow, vol. 3 (Penguin, 2002), 200..

There must be some relationship between B who calls and A who is called that gives B the right or the standing thus to call A: some relationship that makes A's alleged wrongdoing B's business, and that entitles B to make this demand...

To show that A is being legitimately called to account, we must show not just that there is something for which he should have to answer, but that those who call him have the standing to do so.⁷⁴

In subtle ways, judges also promote performances of remorse. For instance, judges can reinforce certain expectations and practices through their demeanour.⁷⁵ Thus, when a judge (as a defence lawyer put it) "goes off on one" about a late guilty plea, this performance can cement the demand that defendants display appropriate (i.e. at least suitably thin) remorse. Likewise, when judges convey the court's views regarding how proceedings ought to operate (e.g. that defence lawyers should 'lead' their clients, agree 'non-controversial evidence,' etc) this also supports the norm of guilty pleas and performances of remorse. Indeed, these judicial performances appeared to be successful in that a common perception was that judges do not look fondly on 'timewasters' or 'chancers.'

As a result of their perception of 'games' and 'tactics', defendants may not see the courts as operating less illegitimately than other encounters with the State in daily life.⁷⁶ Let us take the case of 'Alex' as an example. The prosecution charged Alex with an offence allegedly committed while inebriated. As such, Alex claimed he had no recollection of the incident. However, in the interview, Alex noted that some event probably occurred and that he would like to apologize to the victim (and that he would do so if he ever saw the victim again and recognized him). Yet, Alex felt unable to act on

⁷⁴ R A Duff, "Responsibility, Citizenship, and Criminal Law," in *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 131–32, <https://doi.org/10.1093/acprof:oso/9780199559152.003.0007>.

⁷⁵ Roach Anleu and Mack, *Performing Judicial Authority in the Lower Courts*.

⁷⁶ See Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998).

his remorse (with a genuine apology) because of the court practices often associated with inducing guilty pleas:

I might have [committed the offence]. I don't remember. And if they hadn't embellished and it sounded reasonable, I would have held my hands up [i.e. pled guilty] and apologized to the guy. In fact, I will apologize if I ever see him again, though not that I would recognize him...

But [in the narration of the alleged offence] that's just not how I talk - drunk or not.

Ironically, Alex's perception of the gamesmanship of plea bargaining practices worked to hinder a genuine expression of remorse. For Alex, this true expression of remorse could only occur outside the setting of the courts and its games. Several other accused persons interviewed also expressed some degree of remorse but felt that they could not act on this. All this creates a paradox. In a world of plea bargaining and gamesmanship, the very means of soliciting performances of remorse can themselves rob those performances of credibility in the eyes of professionals and defendants.

CONCLUSION

It is well established that, for good or ill, remorse (and the attitude of the defendant more generally) plays a central role in sentencing. Much of the sentencing and remorse literature is preoccupied with normative questions, exposing, in particular, the inability of decision-makers to identify 'genuine' as opposed to inauthentic expressions of remorse. Despite this inability, professionals appear to be compelled to search for signs of authentic remorse. Rather than dismissing this professional search as more or less futile and irrational, this chapter has sought to unearth the reasons for this search for signs of 'genuine' remorse.

Legal professional communities are caught in a dilemma of their own making. The demand for expeditious case disposal, and its inducements and threats,

means it is impossible to know for sure whether a person's guilty plea is sincere and voluntary, or whether it has been induced by perceived incentives and threats. The attitude of the person towards the offence for which they have pled guilty is thus critical – not least because it is a way of ascertaining whether or not the defendant's posture signals acceptance of the legitimacy of the court and its processes, or, whether it signals explicit (or more commonly) implicit resistance. Through non-verbal and verbal communication, defendants may be taken to exhibit various stances which fall short of showing the court that they wholeheartedly accept the legitimacy of the ensuing violence (the sentence) to be inflicted on them by the court. These problematic stances include passive, insincere, exculpatory, and minimizing or equivocating accounts of culpability. All of these positions may be taken by the court to query the legitimacy of its impending violence. This potential problem undermines professional belief in the fairness of the court process – most especially the presumption of innocence and free and fair participation, including free choice in how to plead. The idea that the person feels, in some way, pressured into pleading guilty cannot simply be ignored or dismissed. For legal professionals (especially judges) to do so would be to deny interest in a fair process and so the very basis of their social/professional status.

Performances of remorse are produced in the shadow of the court's violence. This means that court professionals are condemned to a quest for signs of 'genuine' remorse (and its near neighbours of shame, regret, guilt etc) so as to show to themselves that the violence they are about to inflict is legitimate and deserved. It is a quest by the court community to reassure and confirm to itself that the court's coercion is warranted. Yet, ironically, the need for that quest is heightened by the court's own practices (e.g. the extreme power differentials prior to sentencing, the threats of process costs, penal costs and promises of mitigation, etc). This need is intensified by the gamesmanship of plea bargaining practices which appear to all to reward and encourage strategizing and transacting, rather than spontaneous and straightforward communication. By setting up the process as a matter of tactics and

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transaction, is it any wonder that defendant postures often appear to judges and lawyers to be insincere?

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