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Punishment and the 'Blind Symbiosis' of Legal and Rehabilitation Work in the Making of the 'Ideal' Defendant

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Judges, lawyers, probation and other professionals have to see themselves delivering legitimate punishment and control, rather than imposing unjustified coercion. Yet these professionals know they are also obliged to dispose of cases expeditiously. Most scholarly work on this apparent contradiction between 'justice' and 'efficiency' has been limited to a focus on the moral intentions of individual professionals. In contrast to this prevailing approach, and illustrated with examples from empirical research, I argue that the appearance of the contradiction is managed and often resolved in adversarial jurisdictions by the effects of unobtrusive inter-professional casework. Though they are officially separate professional and temporal activities, I show how the guilt-determination casework of judges and lawyers on the one hand and, on the other hand, the rehabilitation practices of probation, social work and other therapeutic professionals tacitly work together symbiotically. This symbiotic case-working realigns with and approximates the person's account and posture to that of the 'ideal' defendant (or penal subject), who is seen voluntarily to accept responsibility and show remorse. This realignment of the person eases for professionals the apparent dilemma of balancing justice with efficiency. However, this symbiosis is not, and could not be, achieved by a planned conspiracy. Instead, it is enabled by the mutual blindness of one profession to the detailed, substantive work of the other. This mutual blindness is based on the depiction of criminal justice in the adversarial tradition as a step-by-step sequence of autonomous

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decision moments, each under the dominion of separate professions. Finally, I explore the implications for future research agendas.

I. MAP OF THE CHAPTER

Section II sets out the perennial dilemma confronting criminal justice professionals: between doing 'justice' by attending to the unique individual on the one hand, and, delivering 'efficiency' on the other. This is why signs of acceptance of responsibility, and ideally remorse, are so sought after: they demonstrate to professionals that their work is legitimate because it is voluntarily shown to be accepted by the person herself. In section III, I will explain how the seemingly autonomous labour by different elements of criminal justice work tacitly together to generate the realignment of the person closer to the 'ideal' defendant (or penal subject).[1] Illustrated by examples from empirical research, I will show how giving the person a voice to tell her story entails its revision and the remodulation of her tone (ie her displayed attitude) towards the legitimacy and authority of the criminal justice process. This, together with the implied promise of future rehabilitation/humane treatment, also enables a symbiosis between apparently autonomous 'legal' and 'therapeutic' professional work. Section IV explores how it is that this symbiosis remains relatively inconspicuous. This is because the criminal process is represented by professional and academic imageries as a linear sequence of segmented and autonomous decision events, each dominated by professional groups. Concluding, section V proposes new research agendas.

II. JUSTICE PROFESSIONALS AND THE PROBLEM OF COERCION

Whatever its motivation, and no matter how seemingly benign, the state's operation of criminal justice is ultimately dependent on the violence of coercion.[2] This distinctiveness of criminal law and justice from voluntary social arrangements

[1] In the context of this chapter, I use the terms 'defendant' and 'penal subject' interchangably. In official and technical terms, this is, of course, inaccurate. However, in the reality of everyday practices, they are synonymous. Technically and officially, a 'defendant' is someone who is prosecuted through court but has not (yet) been convicted (whether or not by way of a guilty plea or trial). However, in this chapter, I am seeking to explore the changing official status of the person proceeded against by the state and how pre- and post-conviction work combine. So, as with other chapters in this book, the term 'defendant' is used expansively to include people pre- and post-conviction. I use the term interchangeably with 'penal subject' because, as I will show here, people proceeded against by the state are, in reality, overwhelmingly expected to be subject to punishment. Because of the overwhelming expectations of guilty pleas and admissions of guilt, the criminal justice court process prior to sentencing is, in reality, geared towards sentencing: the criminal justice process is in that sense also a penal process.

[2] R Cover, 'Violence and the Word' (1986) *Yale Law Journal* 95:1601.

has long demanded the attention of scholars ruminating on the question of how to justify that violence as legitimate punishment. The demand for justification is, however, an immediate question confronting those responsible for inflicting that coercive violence: judges and lawyers in the court sentencing process, and therapeutic professionals (eg probation officers, social workers). I will refer to these two sets of professionals as 'justice professionals' because they are both tasked with responsibility for determining and implementing the coercive acts of the state as matters not of violence, but of 'justice'. Not to regard their own, ultimately coercive actions, as justified would not only be an affront in terms of self-image, but would also negate their own social capital.[3] Justification of that coercion is not, and cannot be, ignored by justice professionals.[4] Devoid of justification, their acts of coercion would be unwarranted violence, morally indistinguishable from those whose conduct they judge. To deny or ignore the need to justify their coercive activities would be tantamount to denying the validity of their role and status.

Uniquely, justice professionals are obliged to regard themselves as discharging a triple weight of duty:[5] first, as human beings aware of their immediate and direct ability to alleviate the palpable distress of those they are faced with every day;[6] second, as professionals ethically and dutifully serving their client and/or the public. Even if research shows a more complex picture of professional behaviour and ethics in which self-interest and altruism are entangled, it is simply unthinkable for a doctor, lawyer, judge, psychiatrist or probation officer to declare publicly that he or she does not care about the person or the wider public good. In other words, the professional has (albeit in varying ways) to be able to see the virtue of her own actions; and third, as, above all (and in contrast to other professionals, like teachers or doctors), the practical custodians of 'justice'. Accordingly, in doing sentencing and penal work, justice professionals have (quite literally) to see (ie observe) themselves enacting justified punishment.

[3] R Lenoir, 'A Living Reproach' in P. Bourdieu et al (eds), *The Weight of the World: Social Suffering in Contemporary Society* (Stanford, Stanford University Press, 1999) 239.

[4] For example, lawyers and especially judges are acutely sensitive to criticism of the practices they constitute, often seeming to take it personally, anxious to justify their personal practices. Defence lawyers express a sense of awkwardness and a degree of embarrassment about the impact of extrinsic (eg legal aid) changes on their ability to spend time with the individual client. Research suggests that most lawyers are willing to observe the deleterious impact of changes to payment structures on the work of *other* lawyers, but refuse to countenance that these same changes have any negative impact on their *own* personal professional practice and find creative ways to justify their practices as ethical. C Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work' (2007) 34 *Journal of Law & Society* 489.

[5] C Tata, '"Ritual Individualisation": Creative Genius at Sentencing, Mitigation and Conviction' (2019) 46 *Journal of Law & Society* 112.

[6] S Roach Anleu and K Mack, *Performing Judicial Authority in the Lower Courts* (London, Palgrave Macmillan, 2017).

A. Professionals' Justice versus Efficiency Dilemma

For these reasons, seeing (ie observing) themselves permitting the defendant fair opportunity to participate in her own case is of particular sensitivity to justice professionals. This includes: allowing the defendant a voice to present her story; treating each case with dignity; and assessing each defendant as a unique individual. These values and principles have to be respected, and be seen to be respected, if the justice professional can believe in her own identity.

Yet there is another discourse at play: efficiency. Justice professionals also feel obliged to dispose of cases expeditiously: with as little time, effort, cost and conflict as possible.[7] These two felt imperatives ('justice' and 'efficiency') are a (perhaps *the*) perennial source of tension and concern preoccupying justice professionals.[8] How is that tension addressed so that professionals can continue to dispose of cases 'efficiently' while also believing that they have not participated in an unjust process?

Taking the professional self-imagery of autonomous individualism[9] at face value, academic work until now has tended to locate the responsibility for addressing this 'justice versus efficiency' conflict at the level of the individual professional. Fuelled by a belief in the pervasive 'cultural trope of the heroic individual professional' (who can save people by ensuring justice despite 'the system' and wider social inequities),[10] much legal and criminological work is more or less critical of the apparent failure of professionals to do their duty by instead preferring to dispose of cases with as little fuss as possible. Explanations for this apparent failure tend to be located at the level of the individual. These explanations are conceived variously as failures of: will; diligence; impartiality; social awareness; and/or ethicality. Justice professionals have been chided by scholars for operating: in bad faith; lazily; selfishly; out of ignorance, prejudice; or self-deception.[11] Governmental policy literature (supported by some scholars)

[7] K Mack and S Roach Anleu, 'Getting through the List: Judgecraft and Legitimacy in the Lower Courts' (2007) 16 *Social & Legal Studies* 341; Roach Anleu and Mack (n 6).

[8] See, eg C Heimer, 'Cases and Biographies: An Essay on Routinization and the Nature of Comparison' (2001) 27 *Annual Review of Sociology* 47.

[9] Here I am referring to the self-image of professionals regulated by autonomous occupational professional groups (independent, self-regulated, etc), but within that composed of individual, autonomous professionals who are expected, and expect themselves, to be independent, self-directed and enjoying a high degree of individual discretion: C Tata, *Sentencing: A Social Process – Re-thinking Research and Policy* (Cham, Springer, 2020). See also TH Marshall, 'The Recent History of Professionalism in Relation to Social Structure and Social Policy' (1939) 5 *Canadian Journal of Economics and Political Science* 325.

[10] Tata, *Sentencing* (n 9) chs 4–5.

[11] eg M McConville and L Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Cheltenham, Edward Elgar, 2014); A Mulcahy, 'The Justifications of "Justice"' (1994) 34 *British Journal of Criminology* 411; D Newman, 'Still Standing Accused: Addressing the Gap between Work and Talk in Firms of Criminal Defence Lawyers' (2012) 19 *International Journal of the Legal Profession* 3; J Tombs and E Jagger, 'Denying Responsibility: Sentencers' Accounts of Their Decisions to Imprison' (2006) 46 *British Journal of Criminology* 803.

tends, on the other hand, to prefer to see 'the balance' tilted towards 'efficiency'. Yet, while the two sides appear to be engaged in passionate disagreement, they in fact share the same implicit assumptions. They both assume that the two values of justice and efficiency are ultimately irreconcilable. In other words, 'justice' and 'efficiency' are regarded as opposing forces, locked in a zero-sum conflict: more of one necessitates less of the other. So it is seen as a matter of striking the correct 'balance' between justice and efficiency. This view, however, rests on an assumption by both sides of the debate that what happens in criminal justice is the result of the aggregate of individual actions by autonomous individual professionals.

By contrast, in this chapter I present a different explanation. Rather than the prevailing individualistic conceptualisation, I argue that to explain adequately how justice professionals confront every day the felt 'justice versus efficiency' contradiction, we need to look beyond a focus on the actions of individual professionals. I will explain how the two competing values of 'justice' and 'efficiency' are shown on a daily basis to professional communities to be reconciled by the displayed presentations of defendants. I propose that we need to study how the seemingly autonomous work of legal and therapeutic professions combine symbiotically (but without any planned deliberation) to accomplish mutually desirable results.

Rather than pointing the finger at professionals for their apparent failures as individuals, I will show how the symbiosis of subtle, inter-professional work enables the management of the apparent contradiction between efficiency and justice. By using the term 'symbiosis', I aim to apprehend the way in which the work of two autonomous professional groups, in the reality of their daily practices, depend on and sustain each other's work, self-belief and goals. I will seek to explain how neither professional group could achieve the making of more or less 'ideal' penal subjects without the work of the other. Within the adversarial tradition, legal and therapeutic work is officially done at distinct, separate stages of the criminal justice process. However, and although carried out at different times by different professional bodies with their different values and practices, legal and therapeutic work is, in reality, mutually sustaining. Without the work of the other, neither legal nor therapeutic work could alone move defendants closer to the characteristics of the ideal penal subject. By 'the ideal penal subject' (also known as 'the ideal defendant'), I mean the image of a person who shows she wholeheartedly and unequivocally accepts full individual responsibility and demonstrates sincere regret, and ideally genuine remorse, for her actions.

At first glance, the proposition that these two professional sets of activities (guilt determination and rehabilitation) operate symbiotically might be met with surprise, even incredulity. After all, the two professional worlds are quite different: different values, different terminologies, etc. In the adversarial tradition especially found in the English-speaking world, a strong emphasis is placed on the importance of the separation of what are regarded as distinct functions

of the criminal justice process.[12] Adversarial guilt determination is accepted as the province of law and the courts, while the work of rehabilitation (known in the USA as 'corrections') is the province of the therapeutic professions. These two sets of professional groups (the legal and therapeutic professions) are educated, trained and socialised in distinct values. They see themselves as having distinct functions. For example, lawyers/judges are required and require themselves to uphold due process values, especially the paramount principle of the presumption of innocence. Meanwhile, therapeutic professions emphasise the importance of encouraging and supporting rehabilitation, personal growth and change by helping the person to gain greater self-awareness and insight into the causes of their offending. Yet, as I will argue, in their casework practices, the seemingly separate work of the legal and therapeutic professions is in fact symbiotic: they are mutually assisting and sustaining. One could not successfully conduct its work without the work of the other. They each rely on the other in an unobtrusive, implicit dialogue. In their work, they feed each other with helpful current and anticipated questions, expectations, hints and nudges encouraging the reconstruction of the person's displayed attitude to authority. To the extent it is successful in reconstructing the person's apparent posture, these symbiotic casework practices eventuate in the display of sincere and voluntary admissions of guilt by people who are shown more or less to accept their individual responsibility and the legitimacy of the sentence.

Simply put, the legal achievement of efficient guilt determination (eg through credible admissions of guilt) depends in significant part on the practices of therapeutic professionals. Likewise, rehabilitative achievements (eg the person showing 'self-awareness' and 'insight' and accepting the wrongness of their earlier conduct, which are the seeds of self-change) are contingent on practices securing guilty pleas (the seemingly autonomous province of lawyers and judges).

B. Mutual Professional Blindness

However, this symbiosis is no thought-out conspiracy by a controlling mind. Bearing in mind the importance of professional identity and status,

[12] For further discussion on this comparative point, see S Field, 'The Enactment of Political Cultures in Criminal Court Process: Remorse, Responsibility and the Unique Individual Before the French *cours d'assises*' in S Field and C Tata (eds), *Criminal Justice and the Ideal Defendant in the Making of Remorse and Responsibility* (Oxford, Hart Publishing, 2023) ch 10. Field shows how work examining the person's character is done openly in the higher French courts and is often led by judges rather than being delegated, as tends to be the practices of countries espousing the adversarial tradition. This work examining the individual's moral character 'is not work delegated to defence lawyers and probation officers, hidden away in a private pre-trial process; it is on display centre stage, as a dominant theme of a public hearing'. See also S Field, 'State, Citizen and Character in the French Criminal Process' (2006) 33 *Journal of Law & Society* 522.

inter-professional symbiosis would be unachievable through planned, deliberate intent or malevolence. It is precisely because of the absence of conspiracy or any deliberate plan that this inter-professional symbiotic caseworking operates so subtly and unobtrusively. Legal professionals who are deemed to be exclusively responsible for questions about the determination of guilt must (at least formally and publicly) be seen to be blind to the promises and threats of sentencing and the character of its implementation (eg the prospects for rehabilitation). Similarly, therapeutic professionals deemed responsible for rehabilitation must be seen to disregard the contingencies of guilt determination, including the possibility of false admissions of guilt.

This blindness to the detail of the substantive work of the other profession is crucial in enabling symbiosis to take place. Professions and professional communities are constituted by the self-image of ensuring and protecting certain cherished principles and values (eg for lawyers and judges 'the presumption of innocence' and the free choice of each individual as to how to plead). The purity of these principles and values has to be protected and seen by professionals to be 'uncontaminated' by improper, external pressures. The decision as to how to plead, for example, is expected to be made freely as an autonomous decision in itself. For members of one profession to be very aware of the detailed, substantive work of the other profession would be to witness the contamination of the purity of cherished ideas. I will refer to 'contamination' to indicate the ways in which certain revered values and principles have to be seen to be maintained and untainted by the sullying influence of extraneous pressures.

The symbiotic work by the professions, to which each must be seen to be blind, re-manifests the person subject to punishment so as to seem closer to the ideal penal subject (or defendant). Ideally, the person should be seen to accept her culpability fully and sincerely, and show genuine remorse. For, in doing so, she validates (and so expedites) the work of justice professionals. Nothing legitimates the violence of sentencing and punishment to justice professionals as potently as the voluntary 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 by justice professionals. It is not enough that remorse is an internal state of feeling: the feeling must be externalised. Justice professionals look for whether the person 'shows' remorse:[13] it must be displayed appropriately to justice professionals.[14] This display reaffirms to the court and therapeutic professionals that they not only have the right, but *are* right, to impose and carry out punishment. In other words, the posture (ie displayed attitude) of the person towards the authority of justice professionals and their work is *the* central issue in legitimating what they do. A posture that is shown to approximate that of the

[13] R Weisman, *Showing Remorse: Law and the Social Control of Emotion* (London, Routledge, 2014).

[14] K Rossmanith, 'Affect and the Judicial Assessment of Offenders' (2015) 21 *Body & Society* 167.

ideal penal subject (or ideal defendant) is observed by justice professionals. That observation enables them to convert their work from questionable violence to legitimate and necessary action *because* the subject of it (the very person most likely to object) has been shown to have voluntarily consented to it.

III. THE SYMBIOSIS OF LEGAL AND REHABILITATIVE WORK

Officially, and in conventional academic thought, there are separate stages of the criminal process. Exemplified by the imagery of the criminal justice flow chart, the process is depicted as a linear, temporal trajectory beginning with the commission of an alleged crime as the entry point and (where there has been conviction) ending with the exit point of the completion of the sentence.

A. What Flow Charts Claim

Overviews of criminal justice decision-making in adversarial countries are dominated by images and metaphors emphasising linear travel and segmentation. This is exemplified by the imagery of the criminal justice flow chart. Despite jurisdictional variations, the experience of the person proceeded against is conceived and represented as akin to a logical, linear, sequential journey. Arrows point from one individual decision-moment box to the next.

Flow charts are visual representations of the journey of a case. Individual boxes are used to depict that journey as a series of distinct, individual steps. Typically, these individual boxes are shown to reside within distinct wider phases (eg pre-trial investigation, adjudication, sentencing, implementation of the sentence/corrections).

So commonplace, so authoritative and so seemingly obvious are these visual images of the flow chart that it is easy to take for granted what ideas they represent:

- While following on from the prior one, individual decision moments *exist autonomously*.
- *Each of these decision moments is the province of autonomous professional work*, eg arrest (police), pre-trial (police and prosecution), guilt determination (legal professionals – lawyers/judiciary), sentencing (judiciary), implementation of sentence ('corrections', prisons, social work, probation/therapeutic agencies).
- Decision making is a *logical, sequential, unidirectional, linear journey*.

My argument in this chapter inverts these assumptions. It is through the reality of oblique, symbiotic work that the display of ideal penal subjects (defendants) is curated. The person has to traverse stages in the process which are ostensibly

distinct and autonomous, each the province of different professions whose casework is in reality subtly mutually facilitating of the work of the other profession. Nudged by professionals such as defence lawyers, the defendant has to *anticipate* how her self-presentation may impact on subsequent decisions.

This requirement to anticipate the likely effects of one decision on another and across different realms of professional work contrasts with the characteristics of criminal justice flow charts:

> [T]he conventional view is shown as a flow chart, showing a flow from left to right, suggesting that there is a clear direction of flow, rather than a turbulent, jammed-up, multi-level and multi-directional flow. [In the flow chart] it appears that each decision point is one of a series of logical and punctuated series of decisions within this system and its composite various subsystems. *It is organized from the perspective of the institution, not of the citizens who are subject to these processes*. (emphasis added)[15]

Because the representation of criminal justice is organised from the perspectives of the institutions (and the professionals who constitute them) rather than from those of the citizens taken through it, scholarship has tended to suffer from a blind spot. Criminal justice scholarship is dominated by a preoccupation with scrutinising the motives of individual professionals rather than the effects on citizens and their subjective experiences. Enthralled with the 'trope of the heroic individual professional',[16] effects which may occur in the absence of deliberate intent are harder to see, or even recognise.

At first blush, it may seem puzzling that the realignment of the person is achieved in the absence of work by an individual legal or therapeutic professional, but is rather the result of the symbiosis of *formally* separate professional casework practices. While individual legal and therapeutic professionals may each wish to encourage defendants to 'take responsibility' and 'show remorse', doing so alone without the substantive work of the other profession could barely achieve this realignment of their posture (ie displayed attitude to the authority of the process). It is the mutually sustaining casework of one professional group for the casework of the other that secures the realignment of defendants. Members of one professional group being largely unaware of the detailed, substantive work of the other profession enables the symbiosis of legal and therapeutic work. The potential cross-contamination of seemingly autonomous work cannot be too evident without imperilling the conceptual basis (and so the practices) of that professional work. Here, the concept of professions as autonomous occupational groups[17] propels notions and practices of the individuation,

[15] P Manning, 'The Legal Institution' in L Reynolds and N Herman-Kinney (eds), *Handbook of Symbolic Interactionism* (Lanham, MD, AltaMira Press, 2003) 608.

[16] Tata, *Sentencing* (n 9).

[17] A Abbott, *The System of Professions* (Chicago, Chicago University Press, 1998); see also TH Marshall, 'The Recent History of Professionalism in Relation to Social Structure and Social Policy' (1939) 5 *Canadian Journal of Economics and Political Science* 325.

segmentation and dominion of criminal justice work that allow what might otherwise be seen as 'cross-contamination' to be relatively unobtrusive.

In the following section, I highlight the symbiotic practices of the two seemingly autonomous spheres of work by drawing on examples from earlier research into the use of pre-sentence investigations and reports in the process of mitigation of sentence. The aim of the four-year study[18] was to conduct a direct comparison between how sentencing judges interpret and use pre-sentence reports in intermediate court cases and what the writer of those same reports intended to convey. It had four elements: (i) an ethnographic study of the construction of pre-sentence reports deploying 'shadow' (mock) report writing so as to elicit the report writer's intentions; (ii) 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; (iii) a series of focus group discussions with intermediate court judges, including those already observed; and (iv) a series of moot sentencing hearings, with pre- and post-interviews with intermediate court judges and defence lawyers using anonymised case papers whose production and sentencing had already been observed.

B. Separation, Segmentation and Symbiosis: Soliciting Formal Guilty Pleas

In countries following adversarial traditions, officially, choice as to how formally to plead ('guilty' or 'not guilty') must be free and *be seen to be free*. Formally, in adversarial systems (unlike unitary inquisitorial systems),[19] the decision whether to plead guilty or not guilty to alleged criminal conduct is supposed to be made independently, uncontaminated by what are deemed extraneous considerations of the defendant's moral character. Fundamentally, questions of moral character are thought irrelevant to the question of criminal conduct (guilt) as labelled by the prosecution.[20] Questions about sentencing are meant to be a separate second stage to be addressed *only if and after* guilt is established. Yet, in subtle and largely oblique ways, the defendant is encouraged to anticipate the negative

[18] ESRC Award No RB000239939.

[19] See Field, 'The Enactment of Political Cultures' (n 12); J Hodgson, 'The Construction of the Ideal Defendant: Comparative Understandings of the Normalisation of Guilt' in Field and Tata (n 12) ch 8. On Denmark's hybrid system, see LV Johansen, 'Constructing Ideal Defendants in the Pre-sentence Phase: The Connection between Responsibility and Potential Remorse' in Field and Tata (n 12) ch 4.

[20] This preoccupation with separating questions of guilt (conduct) from character is illustrated by the hotly debated and perennial question of whether or not, and the limits to which, evidence about the (alleged) 'bad character' of the defendant should be admissible during the guilt-determination phase. This contrasts markedly with practices in jurisdictions influenced by the inquisitorial tradition, where the trial may begin with questions about the defendant's life and character before proceeding to the alleged offending. J Hodgson, 'Conceptions of the Trial in Inquisitorial and Adversarial Procedure' in A Duff, L Farmer, S Marshall and V Tadros (eds), *The Trial on Trial, vol 2. Calling to Account* (Oxford, Hart Publishing, 2006) 223–42. See also, eg Field, 'The Enactment of Political Cultures' (n 12); Hodgson (n 19).

consequences of a formal denial (not guilty plea) if she is then found guilty at trial. This goes far beyond the well-documented controversy about the potential plea-dependent effect on the sentence itself (trial tax/sentence discount).[21] It bleeds into the formally discrete work done by therapeutic professionals advising on and implementing the sentence. In making her plea decision, the defendant also has to consider the presentation of her moral character.

The defendant is 'presented with a dilemma if she continues to maintain complete factual denial following conviction at an evidentially-contested trial'.[22] If, after a guilty verdict has been returned, the defendant continues to deny guilt, she can expect to be regarded as being 'in denial'. She may be advised to expect a more severe penalty for that reason alone (and aside from the not guilty plea).[23] Furthermore, she can expect that therapeutic professionals (probation, social work, psychologists, etc) are likely to advise the sentencing judge that her continued failure to admit criminal conduct shows a complete lack of 'insight', 'self-awareness' and 'a failure to take responsibility', let alone any 'genuine remorse'. She will therefore be deemed 'not suitable' for therapeutic work during the implementation of the sentence because she has shown 'nothing to work with'. All of this presents the defendant with an expected doubling of negative consequences. It can be predicted that the type and quantum of her sentence will be impacted by her not guilty plea and the likely adverse inferences about her disingenuous moral character if she is convicted. Furthermore, she can expect that her experience of the implementation of that sentence (eg subsequent possible parole decisions,[24] conditional requirements in a community-based sentence) will be adversely affected too. If, on the other hand, having maintained a plea of 'not guilty', she then admits her guilt after the court's guilty verdict, she can expect to be seen as a disingenuous individual trying to 'play' or 'game' the system,[25] or at best as wasting the court's valuable time. As one judge explained:

> what's even worse is if you've actually been to trial and the person says they didn't do it and then you get a [pre-sentence report] saying he's very sorry for all of this and he really feels sorry for the victim and wishes he had never done it. I mean that's actually even worse from our point of view because the [judges] just think: 'what was he playing at?'

[21] JM Gormley and C Tata, 'To Plead? Or Not to Plead? "Guilty" Is the Question. Re-thinking Plea Decision-Making in Anglo-American Countries' in C Spohn and PK Brennan (eds), *Handbook on Sentencing Policies and Practices in the 21st Century* (New York, Routledge, 2019) 208–34.

[22] C Tata, 'Humanising Punishment? Mitigation and "Case-Cleansing" Prior to Sentencing' (2019) 9 *Onati Socio-Legal Series* 659.

[23] ibid.

[24] See R Weisman, '"Remorse Is Not Enough": Disentangling the Roles of Remorse and Insight in the Construction of the Ideal Defendant' in Field and Tata (n 12) ch 7; N Padfield, 'Looking for the Ideal Parole Applicant?' in Field and Tata (n 12) ch 9.

[25] J Gormley and C Tata, 'Remorse in a World of Plea Bargaining' in S Tudor, R Weisman, M Proeve and K Rossmanith (eds), *Remorse and Criminal Justice: Multi-disciplinary Perspectives* (London, Taylor & Francis, 2022).

If she is to gain perceived benefits in the immediate or longer-term future (eg liberation from pre-trial/sentence detention, the defence's plea in mitigation, sentence reductions for a guilty plea, more relaxed terms of community supervision or prison regime, parole prospects), the defendant's attitude to the alleged crime and her posture towards the court have to be re-presented. This entails revising her account and modulating her tone, and/or professionals doing so on her behalf.

Likewise, the work of sentence-implementation in rehabilitative community penalties or rehabilitation/therapeutic work, which may be promised during a prison sentence, does not seek to unearth the specific dynamics leading to the decision to plead guilty. It must take guilt as a given and indisputable fact, which has already been established by the separate legal phase.

C. The Person is Given a Voice to then Revise Her Story and Modulate Her Tone

The low-risk option is to change to a guilty plea.[26]

(i) Modulating the Person's Tone

While it is well known that the lower and intermediate courts around the world rely on admissions of guilt, an unambiguous denial of guilt does not, in itself, raise troubling questions of legitimacy. What is more awkward and potentially troubling to justice professionals is the non-ideal defendant who formally pleads guilty but whose account is not compatible with her freely given guilty plea.[27] Her position appears to the court to query (explicitly or implicitly) the legitimacy of the process, therefore disrupting the smooth flow of case disposal. For example, her account to the court may be ambiguous or at odds with the formal plea; appear confused; explicitly or implicitly defiant;[28] exculpatory; or tactical in some way.[29] This includes the person: who offers an admission of guilt that seems insincere or contradictory (eg exculpatory), or an equivocal guilty plea; who demonstrates obvious disengagement, cynicism, reluctant conformity or 'passive acceptance';[30] or is palpably not an informed, rational decision-maker (eg struggling with addiction, mental health or other problems). For the admission to be consistent with the inviolable idea of a freely participating defendant

[26] This encouragement to anticipate and forecast the future consequences parallels that reported by Johansen (n 19) about the Danish 'hybrid' adversarial-inquisitorial system. She shows how the person who has pled not guilty is confronted by the therapeutic worker with a future self 'as if' she had been convicted.

[27] See also S Tudor, 'Reflections on the Grey Zone: "Sort of Remorseful" Offenders' in Tudor et al (n 25) 97–113.

[28] Weisman, *Showing Remorse* (n 13).

[29] eg J Jacobson, G Hunter and A Kirby, *Inside Crown Court* (London, Palgrave Macmillan, 2015).

[30] ibid 31; Gormley and Tata, 'Remorse' (n 25).

who willingly admits guilt, the admission has to be seen by the court as free and sincere, or at least not unfree and blatantly insincere.

Defendants who appear to be less than wholehearted in the formal admission of guilt pose important challenges to the legitimacy of the process. They represent threats to the inviolable legal principles of the free participation of the defendant, the presumption of innocence and conviction beyond reasonable doubt. These contradictions cannot be ignored.[31]

Offering the person the opportunity to tell her story about the (alleged) offending within the context of her individual life is a, and often *the*, principal way in which she is seen to be given a chance to participate substantively in her own case. She is shown to be offered a voice: an opportunity to explain in her own words what happened and why. Yet, in being offered this opportunity to tell her story, the defendant whose admission of guilt could be seen as caveated or less than complete is confronted with a dilemma[32] – one which defence lawyers know they are obliged to invigilate and manage. Here, a defence lawyer explains the obligation to manage clients' accounts:

> Sometimes [the client's account of the incident to the report writer] can present a problem … The reason I'd be focusing on that is the judge might say to me, 'well, [title and surname of lawyer], you've a wee bit explaining here to do …' So you want to be, you want to avoid that … inconsistency between what I've already told the [judge] and what the guy's now telling the [the report writer] because that, that does kind of present me with a bit of a problem. So I want to see that that's consistent.[33]

Defence lawyers are careful to check pre-sentence reports for signs distancing the defendant from the ideal penal subject who wholeheartedly accepts responsibility and shows remorse. For that reason, defence lawyers tend to remind the client of the need to ensure that their account to the pre-sentence report writer does not conflict with the formal plea. 'I would say to them, I'd say look, you know, if you deny this offence when you speak to a social worker [writing the report], it's not going to help you.'[34] Indeed, it is also an opportunity to remind the client to 'sell yourself', which means accepting individual responsibility and willingness to change.

However, reducing the appearance of conflict between the formal admission of guilt and the person's account often may already have been addressed by the work of the therapeutic professional, which reconstructs the person's account so as to be less obviously at odds with their formal plea. Where, as is commonly the

[31] Weisman, *Showing Remorse* (n 13); J Martel, 'Remorse and the Production of Truth' (2010) 12 *Punishment and Society* 414; S Bandes, 'Remorse and Criminal Justice' (2015) 8(1) *Emotion Review* 14; I van Oorschot, P Mascini and D Weenink, 'Remorse in Context(s)' (2017) 26 *Social & Legal Studies* 359; I van Oorschot, *The Law Multiple: Judgment and Knowledge in Practice* (Cambridge, Cambridge University Press, 2020); Tata, 'Humanising Punishment?' (n 22).

[32] Van Oorschot et al (n 31).

[33] Tata, 'Humanising Punishment?' (n 22); Interview, defence lawyer 7.

[34] Interview, defence lawyer 10.

case, the person does not have a clear recollection of the incident and disputes some of the prosecution facts, reports tend to smooth over the points of contention. And where the person does not think they will be believed, reports tend to convert cynical resignation into an uncomplicated acceptance, reporting that the person 'accepts the situation'.

Almost without exception, lawyers and judges were unaware of the ways in which pre-sentence report writers remodulated the person's tone, and revised her account so as to move it closer to the qualities of 'the ideal defendant'. Instead, they typically saw reports as reporting the unmediated voice of the defendant. Indeed, a common judicial complaint is that report writers naively accept defendants' minimisation of their culpability. For example:

> The report in my view is to give me background – it is an enquiry report – to identify matters, for example attitude to offence. That's where the problem creeps in because some of those who prepare the reports perhaps empathise too closely … tend to be swayed by what the accused said.[35]

However, it is also this imputed gullibility and seemingly simple, unmediated reporting of the person's story that make reports so valuable. They are imagined to provide the more or less direct and unfiltered voice of the person. In that way, the court (and the judge, who after all has overall responsibility for the justice of the process) can observe the justice of what it is doing: its justice is reflected back to it through the person's displayed attitude to the court. In other words, reports are helpful to lawyers and especially judges precisely *because of* the report writer's perceived naivety in simply accepting and reporting the person's story. As we shall now see, this is in fact far from the reality of what report writers do. Report writers tend to ameliorate, massage and smooth down the rough edges of the person's account in ways that render the account less confrontational to the court and less obviously at odds with the person's formal guilty plea.

(ii) Massaging the Defendant's Denial

Humanising work by therapeutic professionals creating pre-sentence reports has a dual function. It is a report to the court to inform sentencing, but it is also a means of beginning the enquiry about the person's suitability for future rehabilitation. Albeit in different ways, the legal work of imposing punishment and the therapeutic implementation of that punishment necessitate a penal subject who at least begins to accept *individual* responsibility for the wrongness of her actions.

She is expected to take individual responsibility and wholeheartedly acknowledge her culpability, while at the same time she is expected to show herself to be sincerely engaging with the process of personal examination. This entails some

[35] Interview, 'Southpark' judge 2.

reworking of the person's story so as to align with her formal admission, but also to remodulate her tone so that her voice appears to be that of a culpable offender who fully and sincerely accepts her culpability.

For example, Carrie pled guilty to a public order offence and biting a police officer. At the pre-sentence interview, Jodie (the report writer) explores Carrie's attitude to the offence:

> Regarding the assault, Carrie is unsure what happened [and admits she was under the influence of alcohol], but she looks shocked by the description of her biting the police officer: she 'didn't do that!' … Jodie tells her she should not have pled guilty to something she didn't do. Carrie looks at her: she tells her she 'just wanted to get it out of the way'.[36]

In her report under the section about 'offending behaviour', Jodie omits Carrie's straight denial and instead states that Carrie attributes her offending to being under the influence of alcohol:

> In discussing the matter with Ms Villiers she acknowledges her involvement in the offences … Exploring her attitude, Ms Villiers states that she accepts full responsibility for the Breach of the Peace and attributes her actions to having been under the influence of alcohol.

(iii) Erasing the Person's Straight Denial

Therapeutic professionals are expected to strive to identify a glimmer of rehabilitative potential ('something to work with') and so solicit acceptance of personal responsibility. Occasionally, however, report writers can see no signs of being able to coax the person into conceding voluntary acceptance of individual responsibility and showing at least indications of regret, if not remorse. Rather than arguing for mitigation, this failure 'to engage' can lead the therapeutic professional to adopt a narrative of condemnation.[37] Take, for example, the case of Mr Iqbal Hanif, who pled guilty to breach of peace at home and 'attempting to slap' his wife. During the pre-sentence report interview,

> Mr [Hanif] tells us that he pled guilty because he doesn't have time to go to court. His wife lied: the offence didn't happen. Stephen [the pre-sentence report writer] asks why she would do that? His wife simply 'makes up stories'. Mr [Hanif] says he will pay the fine and will divorce his wife in a couple of years and then get a new wife. Mr [Hanif] blinks and grins at Stephen … Stephen sits up and tells Mr Hanif that this is in fact a serious offence and he doubts very much that Mr Hanif will receive a fine … Stephen continues that the [judge] 'will take a very dim view of your denial [of this] crime'. Stephen continues asking whether Mr Hanif was shouting and swearing in the street, Mr Hanif shakes his head: no he didn't, she lied she 'makes stories up'. Stephen holds up some papers and tells Mr Hanif that he has to reflect his

[36] Diary case 15.
[37] Weisman, *Showing Remorse* (n 13).

> views in the report, 'is that what you want me to write?' he asks him. '[I] did nothing' Mr Hanif insists. 'Do you want me to reflect that in my report?' Stephen persists. Mr Hanif says nothing.
>
> Stephen: 'I guess if you didn't do it [you are] not remorseful or regretful?'
>
> Stephen returns to the offence and again asks 'are you clear you did not do this?' Mr [Hanif] notes that he has pled guilty anyway. Stephen riles at this comment, quickly responding that 'there is a difference'. That it is about Mr Hanif 'taking responsibility for his crime and behaviour displayed'. Stephen reiterates that the [judge] will take a 'dim view' of Mr Hanif, that he is 'making a mockery of the system'.
>
> He then asks Mr Hanif to think carefully.
>
> Mr Hanif: 'No.'[38]

'Angry' and 'infuriated', Stephen feels Mr Hanif's attitude 'shows a blatant disregard for the law and for his wife'.[39] In his report, Stephen wrote:

> [I]t appeared from his body language, manner, tone and responses to questions posed that his attitude to his pattern of offending was extremely poor.
>
> As to the matter before the court Mr [Hanif]] states that although he pled guilty as charged he was insistent that the whole episode had been *blown out of proportion* … Mr. [Hanif] showed no insight, remorse, regret or victim empathy over his actions. (emphasis added)

Note that during the pre-sentence interview Stephen repeatedly presses Mr Hanif to align his account with his formal guilty plea. Stephen does this by importing threats from the legal domain of judicial sentencing, confronting Mr Hanif about what may happen at court, ie that the judge will 'take a dim view' and perceive Mr Hanif's denial to be 'making a mockery of the system', and that a custodial sentence is a real possibility. Nonetheless, Mr Hanif maintains his denial, which openly and unequivocally conflicts with his formal guilty plea.

Despite his condemnation of and earlier warning to Mr Hanif that if he did not change his posture Stephen would have to report Mr Hanif's flat denial, Stephen in fact adjusts Mr Hanif's account so as to be more compatible with his formal guilty plea. Instead of a denial, he re-manifests Mr Hanif's position as the offence 'being blown out of proportion'. Recall that in the pre-sentence report interview Stephen emphasised 'there is a difference' between Mr Hanif's formal guilty plea and his account during the interview. Yet, in his report, it is a difference that Stephen omits, revising Mr Hanif's flat denial to one of having 'no insight, remorse, regret or victim empathy over his actions'. By erasing Mr Hanif's denial that contradicted his formal guilty plea, Stephen moderates Mr Hanif's position, by distancing it from the ultimate antithesis of the ideal penal subject whose account flatly contradicts a formal admission of guilt. Instead, Mr Hanif is re-presented as failing to take responsibility or show

[38] Shadow report writing diary.
[39] ibid.

'insight, remorse, regret or victim empathy' for the actions to which he has formally admitted guilt, but completely denied at interview.

Even where they were attempting to mitigate on behalf of the person, this 'dirty work' to 'cleanse' cases of their noxious, ambiguous or contradictory qualities was a common practice among report writers.[40] Frequently, defendants' recollections of an incident were hazy, but even where they pled guilty, they objected strongly to parts of what they had formally admitted.[41] As we saw earlier, legal professionals (lawyers and especially judges) appear to be largely unaware that report writers cleanse cases in this way by massaging out the sharpest contradictions and the most glaring ambiguities between the person's account to them at interview and their earlier formal admission of guilt. Instead, these legal professionals tend to see report writers as naive and gullible in simply reporting, without evaluation, the person's account. Importantly, and as we will see below, legal professionals being more conscious of this cleansing work by report writers would risk undermining the perceived integrity of cherished professional ideals (such as the free participation of the defendant) in the eyes of those professionals.

D. The Promise of Rehabilitation

The promise of rehabilitative welfare after sentencing is a way of helping and supporting the person to meet their personal and social needs. Yet, by examining the person's 'suitability' for rehabilitative programmes, humanisation work (and its associated processes) invites and encourages the person to take individual, personal responsibility for the alleged offending and, ideally, to show remorse. By doing so, the person is coaxed away from a position which might appear to contradict or query the authenticity of her formal guilty plea.

The person who is seen more or less to accept her personal culpability and whose displayed (or displayable) posture suggests acceptance of the legitimacy of the process is judged as showing signs of remorse, or at least insight or self-awareness. This means they are judged as being potentially suitable for rehabilitative programmes. As we saw from Stephen's reaction to Mr Hanif, where therapeutic professionals are confronted directly with the 'blatant' denial of responsibility, the absence of retractive feelings (regret, remorse, etc) means they may characterise the person as being beyond the possibility of rehabilitation.[42]

The person who shows at least 'signs' of such retractive feelings is deemed able to benefit from rehabilitative programmes – whether in the community, in prison or on parole. As we saw in the case of Mr Hanif, the person who appears unwilling to at least moderate their account is reminded of the consequences.

[40] Tata, 'Humanising Punishment?' (n 22).
[41] See also Gormley and Tata, 'Remorse' (n 25).
[42] Weisman, 'Remorse Is Not Enough' (n 24); Weisman, *Showing Remorse* (n 13).

Long-term prisoners who are thinking of applying for parole have also to show that they are not 'a risk'. They can demonstrate this by accessing programmes evidencing that they have taken responsibility and are in some way more or less remorseful for their crimes.[43] Similarly, to gain access to community-based rehabilitation they must show 'insight' into 'self-awareness' about their offending.[44]

So, while each stage of the criminal justice process appears to be autonomous, and the domain of different and autonomous professional groups (eg legal professionals control court stages and therapeutic professionals control the implementation of rehabilitation services during the sentence), in reality they are interdependent. The defendant is encouraged to consider how her plea and her account of what she has pled to will impact the character of her sentence. Similarly, as we saw earlier, the defendant's displayed attitude – whether she shows evidence of 'insight', 'something to work with' or ideally genuine remorse – influences the supposedly separate question of how she should plead.

Yet, although the defendant is encouraged to make connections between the individual decision stages controlled by autonomous professions, the promise of rehabilitation may not materialise. Indeed, the segmentation of the process obstructs the ability of the system to make good on its implied promise of rehabilitation. For example, information about the reasons for the sentence are not routinely provided to defendants, or even to those expected to implement the intentions of the sentencer.[45] So it is that the promise of an individually tailored rehabilitative sentence is, in reality, disabled by the lack, or poor quality, of information passed onto the agencies (eg probation, prison) that are required to help the person achieve the court's demand that the person achieves change. The personal change required of the offender to show that they have rehabilitated themselves is hampered by this disconnection and lack of information. People tend to be denied a clear understanding of what they have to do to extricate themselves from criminal justice, and so attempts to achieve the kind of personal change which may be demanded of them are thwarted.[46]

IV. HOW IS THE SYMBIOSIS OF LEGAL AND REHABILITATIVE/ THERAPEUTIC PROFESSIONAL WORK BLIND TO CROSS-CONTAMINATION?

How is the interdependent and mutually nourishing (ie symbiotic) character of the work of legal and therapeutic professionals possible? After all, as justice

[43] M Hall and K Rossmanith, 'Long Haul Remorse: The Continuous Performance of Repentance through Prison Sentences' in Tudor et al (n 25); Weisman, *Showing Remorse* (n 13); Padfield (n 24); Weisman, 'Remorse Is Not Enough' (n 24).

[44] See Weisman, 'Remorse Is Not Enough' (n 24); see also, eg Weisman, *Showing Remorse* (n 13); M Hall, *The Lived Sentence* (London, Palgrave Macmillan, 2016); M Schinkel, *Being imprisoned: Punishment, Adaptation and Desistance* (Cham, Springer, 2014); Martel (n 31).

[45] Field, 'The Enactment of Political Cultures' (n 12); Hall (n 44); Schinkel (n 44).

[46] Hall (n 44); Schinkel (n 44); Hall and Rossmanith (n 43).

professionals, neither occupational group can afford to regard the work they do as routinely 'contaminated' by the work of the other. I use the term 'contamination' to refer to the ways in which cherished ideas and categories have to be seen to be pure and untainted by extraneous pressures, which could be viewed as besmirching or debasing the purity of these venerated ideas.[47] The presumption of innocence and the freedom of the individual to participate in her own case (most especially the freedom to choose to plead guilty or not guilty) are prominent examples. The purity of these ideas is fundamental to the felt integrity of criminal justice. The presumption of innocence is supposed to be insulated from extraneous pressures so that the decision as to how to plead is free and genuine.

So it is, for example, that plea bargaining is castigated by so many scholars and remains sensitive among practitioners, especially judges. Indeed, many judges dislike the term 'plea bargaining' since it seems to them to connote something vulgar, grubby, 'underhand' or 'seedy'.[48] It seems to them to pollute or contaminate the purity of the venerated ideals of the presumption of innocence and the free choice of the defendant – values for which lawyers and especially judges hold themselves to be responsible. For a defendant to say openly to the court that she 'only pled guilty for the sentence discount' or so that other charges would be dropped, or so that she would be liberated from pre-trial remand/detention, etc, would be not only confronting, but obnoxious. While plea bargaining is a well-known example of such 'contamination', which came to light in the 1970s, my argument in this chapter is that the 'cross-contamination' of legal and therapeutic work is less obvious but no less important. How is it that justice professionals permit such 'contamination' without seeing themselves as invalidating their cherished values and, indeed, their raison d'être? Rather than castigating the aggregated failures of individuals, I propose we focus on how, in systemic practices, such symbiosis is permitted, without being obvious.

The reader may recall the triple obligations that justice professionals experience as a personal weight of responsibility: being directly and self-consciously responsible for the fate of another; being ethical; and being self-consciously the practical custodians of justice. So, judges and lawyers cannot participate in practices which blatantly and directly violate core legal values and principles.

We saw earlier how certain professionals (eg defence lawyers) are aware that they are obliged to invigilate (ie supervise, examine and check for) the possibility of contamination being shown to other professionals (especially the judge). Professionals know they have an obligation to other (especially higher status) professionals to save them from embarrassment.[49] Defence lawyers save judges

[47] Here I am drawing on my work developing Douglas's classic anthropological study of purity and pollution. Tata, 'Humanising Punishment?' (n 22); M Douglas, *Purity and Danger* (Abingdon, Routledge, 2002 [1966]).

[48] A Flynn and A Freiberg, 'Plea Negotiations: Final Report to the Criminology Research Council' (Canberra, Australian Institute of Criminology, 2018) 19–21.

[49] Tata, 'Humanising Punishment?' (n 22). More generally on the ways in which lower status actors are obliged to save higher status actors from embarrassment, see E Goffman, 'Embarrassment and Social Organization' (1956) 62 *American Journal of Sociology* 264.

(and therefore themselves) embarrassment by invigilating (keeping watch over and supervising) the defendant and her account at pre-sentence interview. They are especially careful to check that the account that appears in the report is not obviously at odds with the formal guilty plea. We also saw how report writers tend to import threats from the legal world to induce a change in the person's displayed attitude and/or massage the person's account so that it is less obviously at odds with the formal guilty plea.

Similarly, we saw that defence lawyers, and especially judges, appear to be unaware of the detailed casework of pre-sentence report writers in ameliorating, massaging and smoothing down the roughest edges of a person's account so that it is less blatantly at odds with the person's formal guilty plea. Thus, the person's voice in the report can be, and is, regarded as the unfiltered and authentic voice of the person. This perceived authenticity yields a double effect in showing to the court that its work is legitimate.

First, it means that defendants can be seen to have had their say. They have been able to put their side of the story, and this can be felt in the weight of the report. The report is seen by the court to tell the defendant's story of the criminal incident not only in her own words, but also in the context of the challenges of her life. She has demonstrably been listened to. This is all set out in what is regarded as exhaustive, 'encyclopaedic' detail. Judges and lawyers frequently remark and complain about how much 'unnecessary' detail about the troubled lives of people to be sentenced is included in pre-sentence reports.[50] Lawyers, and especially judges, take pride in observing (often tinged with humour) how reports are said to present 'excessive' information about the person, such as the name of the primary school she attended, that her hobby is stamp collecting or that as a baby she was delivered by caesarean section. However, there is a sense in which this 'complaint' is also a way of judges and lawyers observing and celebrating how remarkably carefully the process listens to the voice of each defendant as a unique and valued individual. By highlighting such a perceived level of minute, 'biographical' detail, judges and lawyers are able to find in reports a level of participation and 'comprehensive' attention to the unique individual that is otherwise lacking at the front stage of the court, where the person has pled guilty and her 'voice' would otherwise barely be heard.[51]

Second, by perceiving the person's account of the criminal incident in the pre-sentence report to be unmediated, lawyers and especially judges can believe in her reported attitude to the authority of the court and its legitimacy to punish. To be too aware of the casework done by report writers in revising and remodulating

[50] C Tata, 'Reducing Prison Sentencing through Pre-sentence Reports? Why the Quasi-market Logic of "Selling Alternatives to Custody" Fails' (2018) 57 *Howard Journal of Crime & Justice* 472; K Beyens and V Scheirs, 'Encounters of a Different Kind: Social Enquiry and Sentencing in Belgium' (2010) 112 *Punishment & Society: International Journal of Penology* 309.

[51] By contrast, Field, 'The Enactment of Political Cultures' (n 12) shows how in the French *cour d'assises* this 'biographical' work hearing about the person's life and what may have led to them being before the court is not delegated to other professionals and carried out 'backstage'. Rather, it is done publicly in the 'frontstage' of the court and led by the judge.

her account would expose lawyers, and especially judges, to being too aware and too directly confronted with the reality of the 'cross-contamination' of legal and therapeutic casework. This would imperil the perceived integrity of cherished ideas such as free participation.

V. CONCLUSIONS AND NEW RESEARCH AGENDAS

If they are not to deny their own validity, justice professionals are required, by each other and themselves, to concentrate on the casework of their own professional discipline and to pay little or no attention to the detailed, substantive casework of other professions. Thus, legal professionals who are deemed to be exclusively responsible for questions about the determination of guilt must, at least in a formal and public sense, *be seen to be* blind to the promises and threats of sentencing and its implementation (eg the prospects for rehabilitation). Likewise, therapeutic professionals deemed responsible for rehabilitation must be seen to disregard the contingencies and construction of guilty pleas. It is precisely because of this apparent disregard for the detailed, substantive work of the other profession that the intimate symbiotic relationship between the 'legal' work of guilt determination and the 'therapeutic' work of rehabilitation and sentencing implementation can proceed relatively unobtrusively.

The effect of the official segmentation of the criminal justice process into apparently autonomous stages, each dominated by different professions, is that the defendant alone has to traverse the professional borders, and in doing so must *anticipate* the effects of decisions at one stage on how she will be evaluated at other stages. Yet each profession ignores the contingencies of the decision-making of the other – they must take it as settled fact and be blind to the detailed work of the other profession. Without any master plan or controlling mind, this collective work helps to generate 'ideal' defendants (penal subjects) precisely because of the absence of any coherent system. In other words, the segmented character of the formally separate stages in the criminal process 'belonging' to autonomous professions (so cherished by the due process view) is in fact 'efficient'. It helps to generate the making of 'ideal' defendants (penal subjects), and therefore expeditious case disposal. In this way, the felt professional dilemma (justice versus efficiency) is largely resolved. Justice professionals can get through caseloads 'efficiently' because they can at the same time observe 'justice' being done. Expectations on defendants to admit responsibility and (ideally) show remorse are pervasive and coordinated without appearing (most especially to justice professionals) to be so.

These modifications mean that the manifestation of the person (with varying degrees of their own active or passive complicity) begins to move towards an approximation of the 'ideal' penal subject, who shows that she sincerely accepts individual responsibility and wholeheartedly consents to her punishment as deserved.

My argument is that the realignment of the person through the blind symbiosis of legal and therapeutic professional practices is not achieved through the routine exertion of palpable pressure on people, nor through the aggregation of individual professional acts of bad faith. The approximation of the person towards characteristics of 'the ideal defendant' is not, and could not be, achieved by a grand conspiracy. To do so would be to deny the validity and self-identity of judges, lawyers, probation officers, social workers, etc as professionals who are self-consciously the practical custodians of 'justice'. It is not achieved through deliberately coordinated intentions, thought-out planning or malevolence of motive. It is precisely because of the absence of deliberation that seemingly autonomous stages of the process and autonomous professional activities in fact combine and work together. Without intended design, the casework of the two professions symbiotically accomplishes mutually desirable outcomes, which helpfully facilitates work for the other.

While individual legal and therapeutic professionals may wish to encourage defendants to 'take responsibility' and 'show remorse', doing so alone without the substantive casework of the other profession could not achieve the realignment of the defendant. It is the symbiosis of the casework of the two separate professions that secures the realignment of displayed defendant postures. Legal and therapeutic professionals are able to do this precisely because they are largely unaware (and, indeed, cannot afford to be too aware) of the detailed, substantive casework of the other profession.

The 'blindness' of one professional group to the substantive work of the other is regenerated by vocational training, academic scholarship and empirical research. Further, vocationally led academic education and scholarship has tended to focus on the intentions of individual professionals and whether those intentions are honourable, fair, ethical, etc. As a result, as academics, educators and researchers, we have tended to ignore the unofficial and non-intended symbiosis between the officially autonomous segments of criminal justice, each 'owned' by different professional groups.

What, then, should empirical research do? In this chapter, I have sought to reflect on how people proceeded against by the state have to make decisions. The way they have to is at odds with the imagery presented by flow charts, policy documentation and, indeed, academic scholarship, which focuses on each individual decision moment as if autonomous from the rest. Rather than having to make decisions as if they are independent of each other, temporally linear and sequential, people are required and expected to consider the consequences and interrelationships between officially separate decisions by mentally shuttling forward in time to anticipate the consequences.[52] By doing this, they are encouraged to approximate themselves, and be shown to be aligned with, the

[52] On this temporal shuttling, see Johansen (n 19): the person who has formally denied guilt is nonetheless required to imagine herself 'as if' a convicted offender and how she will be evaluated at sentencing and beyond.

characteristics of the ideal defendant (or penal subject), who accepts the legitimacy of her punishment. The implications of my argument for research are threefold. First, we need to know far more about people's experiences, including studying them over time, of going through the criminal justice process. Second, we need to pay more attention to those who literally and metaphorically connect people proceeded against by the state from one professional realm to another. Third, in this chapter, I have concentrated on (nominally) adversarial systems – or at least those influenced by adversarial traditions. However, nominally inquisitorial systems may operate functionally equivalent practices (eg humanisation, which encourages admissions of guilt), albeit in quite different ways. Here I elaborate on this threefold agenda for future research.

A. Study Defendant Experiences, Especially Longitudinally

Remarkably little research (including my own) has devoted itself to an in-depth documentation of the experiences of those subjected to the criminal process – and then on through to the implementation of the sentence. This is understandable. Due to a myriad of logistical, ethical and access challenges, this is extremely labour-intensive and difficult work. However, we should acknowledge that we know little about what people experience in the criminal-penal process. Partly because they are so much easier to access, but also because we have been so enthralled with the question of whether individual professional motives are 'good' or 'bad', we have tended to 'read off' what people experience from what professionals believe people feel and experience. As desistance research[53] has begun to show, that is not the same thing. There have been valuable recent[54] and not so recent[55] studies asking people in interviews or surveys for their views about their experiences of being subject to criminal proceedings. However, what is needed is to follow and observe cases *longitudinally* on their journey through the process to the implementation of the sentence; and, ideally, to directly compare them to the experiences and intentions of the professionals involved in the same case. This necessitates stepping out of familiar academic comfort zones and combining with scholars from other disciplines. It means that socio-legal scholars who study guilt determination and judicial sentencing practices should also study the substance of therapeutic work and their interrelations.

[53] eg S Maruna, *Making Good* (Washington, DC, American Psychological Association, 2001); F McNeil, *Pervasive Punishment: Making Sense of Mass Supervision* (Bingley, Emerald Publishing, 2019); F McNeill and B Weaver, 'Changing Lives? Desistance Research and Offender Management' (2010) SCCJR Project Report No 03/2010; Schinkel (n 44); B Weaver, *Offending and Desistance: The Importance of Social Relations* (London, Routledge, 2016).

[54] eg Transform Justice, 'Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts' (April 2016); Jacobson (n 29); Gormley and Tata, 'Remorse' (n 25).

[55] JD Casper, *American Criminal Justice: The Defendant's Perspective* (New York, Prentice-Hall, 1972).

Similarly, social work, probation and desistance scholars need to become far more interested in studying guilt determination and sentencing practices.

B. Study Ancillary Workers and their Interactions with Professionals and People Proceeded Against

Research should pay closer attention to the work of non-professional 'ancillary workers', by which I mean those workers who seem to have an auxiliary and subordinate role to professionals, including, for example, reception, security staff in courts and court cells, prisoner transportation staff, court ushers and clerks. Just as most research has concentrated on professional perceptions of people's experiences, so too has research neglected the work that connects the person from one separate professional dominion with another. This means that research should also study the loosely connected interfaces between domains of professional work (eg between 'legal' work and 'therapeutic' work). True, *formally speaking*, non-professional ancillary work seems prosaic: nothing important seems to be decided officially in these interfaces, where the person's status is liminal, uncertain and suspended between different official statuses.[56] Yet, it may be that the experiences of the person are shaped in these obliquely connected interfaces between professional domains, between one formal decision node and another. Those who literally and figuratively receive the person from and deliver the person to different professional dominions have tended to be ignored by criminal justice researchers. For example, research until now has paid limited attention to the experiences and effects of waiting (eg for a court appearance,[57] or the work of tranforming the person from the status of police suspect to defendant to offender[58]). We should develop a research agenda to study not only visible official professional work conducted at formal decision points (eg sentencing), but also the interfaces between the work of different professions. These interfaces are mediated by the work of ancillary staff. Their work may be more important to the person's experience, setting the agenda of their expectations, than we have hitherto appreciated.

C. Functionally Equivalent Work in Adversarial and Inquisitorial Practices

Scholarship comparing practices in (formally) adversarial and inquisitorial regimes could also examine the relationship between therapeutic and legal work

[56] Tata, 'Ritual Individualisation' (n 5).

[57] P Carlen, *Magistrates Justice* (London, Martin Robertson, 1976) 18–38; K Cheng and B Leung, 'The Punitive Nature of Pre-trial Detention: Perspectives of Detainees in Hong Kong' (2019) 58 *Howard Journal of Crime and Justice* 143; M Feeley, *The Process Is the Punishment* (New York, Russell Sage, 1979); A Woof and L Skinns, 'The Role of Emotion, Space and Place in Police Custody in England' (2018) 20 *Punishment & Society: International Journal of Penology* 562.

[58] Tata, 'Ritual Individualisation' (n 5).

in re-manifesting the person as closer to the ideal penal subject. While there are major differences, as other chapters in this volume suggest,[59] practices in both traditions appear to be orientated towards soliciting admissions of guilt by a person who recognises her culpability and shows justice authorities signs of genuine remorse.

To a greater or lesser extent, and in varying ways, admissions of guilt are encouraged across the world. Especially in putatively adversarial jurisdictions in the Anglo-American world (and increasingly in those countries with long inquisitorial traditions), guilty pleas are expected and encouraged. In other jurisdictions, there may not, formally speaking, be an equivalent idea of 'a plea', but nevertheless there is some notion of 'a confession', or 'admission' that is sought and/or expected. Albeit in different ways, questions of criminal conduct (guilt) and questions of the person's character and amenability for rehabilitation (which may be entangled with ideas of citizenship[60]) are, in reality, intimately interdependent, even fused.

[59] See Field, 'The Enactment of Political Cultures' (n 12); Hodgson (n 19); V Gautron, 'Remorse in the French Criminal Justice System: A Subterranean Influence' in Field and Tata (n 12) ch 2. On the 'hybrid' system in Denmark, see Johansen (n 19). See also Field, 'State, Citizen and Character' (n 12).

[60] Field, 'State, Citizen and Character' (n 12).