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1

Locating the Ideal Defendant: Punishment, Violence and Legitimacy

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This chapter outlines the central propositions of this book as a whole by drawing on its component chapters. In a nutshell, the book demonstrates that, within a variety of criminal justice systems, an implicit model of the 'ideal defendant' is at work. There is an expectation that defendants (by which we mean anyone proceeded against by the state) should display certain characteristics. This model of the ideal defendant is based on individual character, and on attitudes towards the state, the alleged offence and likely future offending. A key component of these norms is that defendants are expected to demonstrate a free and sincere acceptance of their personal responsibility for the offending. Ideally, this admission of responsibility should be so wholehearted that defendants can be seen as expressing 'genuine' remorse. While this is the ultimate ideal and defendants' representations typically fall short of this, they are nonetheless encouraged to align themselves as closely as possible to that ideal. These expectations of defendants are brought home to them at all stages of their journey through the system not just by judges and prosecutors, but also by lawyers, probation officers and therapeutic professionals (eg psychologists, psychiatrists, social workers). Defendants are evaluated on the extent to which they perform in accordance with the ideal. This 'grading' of defendant emotion and its expression has consequences – whether negative or positive – for the subsequent state penal response to the defendant. In practice, encouragement and evaluation mesh so that expressions of remorse-like feelings and responsibility are constructed through interactions between defendant and criminal justice practitioners. This 'making' of remorse and responsibility is fraught with cultural misinterpretations and unrealistic expectations of particular defendants. Yet, the public acknowledgement by defendants of the legitimacy of their own punishment serves a latent function: it reassures practitioners that the routine coercion of their systemic practices does not represent injustice. It also enables

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the enactment of an apparent mutuality between state and citizen at a moment of rupture in that relationship.

I. THE IDEAL DEFENDANT IN THE MAKING OF REMORSE AND RESPONSIBILITY

This book shows that, within a variety of criminal justice systems, an implicit model of the 'ideal defendant'[1] is at work: there is an expectation that defendants should display certain characteristics, and they are judged on the basis of those expectations and treated accordingly.[2] This model of the ideal defendant is based on assessment of individual character, the defendant's attitudes towards the state, the alleged offence and likely future offending. Central to the state's evaluation of defendants' performances of expectations is a judgement as to whether they are compliant and accepting, or, uncooperative and defiant. The ideal defendant admits guilt, accepts individual responsibility for the alleged crime and, in the process, shows particular kinds of emotions, especially the authentic demonstration of remorse, or at least 'retractive'[3] feelings (eg regret, guilt, shame, embarrassment) which appear to approximate to remorse. In so doing, defendants are seen – implicitly or explicitly – to be acknowledging the legitimacy of state coercion and its claims to administer fair and humane punishment.

How well the defendant appears to align with these expectations shapes the state's assessment of the individual's character and personality, and this informs the state's penal response both to the act it defines as criminal and to the offender. For instance, the state may offer humane treatment that is responsive to the needs of the individual, but this penal response depends upon the defendant showing alignment to expectations. Thus, constructions of the 'ideal defendant' involve a process of classification and 'normalisation' of defendants.[4] Therefore, this book examines the interplay – in different procedural fora and jurisdictions – between the normative construction of defendants, their acceptance of responsibility and demonstrations of remorse, and their management through the criminal justice system.

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

[2] We use the generic term 'defendant' to refer to any person proceeded against by the state. This includes different statuses, which may vary between different national jurisdictions: suspect, accused, convicted offender awaiting sentence, sentenced offender, supervisee and parole applicant.

[3] M Proeve and S Tudor, *Remorse: Psychological and Jurisprudential Approaches* (London, Taylor & Francis, 2010).

[4] By 'normalisation' we mean a process by which defendants are required to conform to certain norms or standards. This process of normalisation means that unique features of individual cases tend to be diminished and there is greater standardisation: cases become quickly recognisable as one of a kind to practitioners. This process is common to professional work in other fields beyond criminal justice.

II. CONTEXTUALISING THE BOOK

This book focuses on the role of the presentation of the self in the categorisation and management of defendants. In doing so, it bridges two apparently distinct strands in recent criminal justice scholarship. First, there is work on the role of categorisation and sorting: for example, focusing on the impact of social categories (such as gender, race and social class) on the assessments and decisions of officials.[5] A second strand examines the influence of categorisation using state managerial tools or performance indicators (based on, for example, speed, targets, risk and efficiency).[6] This scholarship provides important insights into the operation of categorisation and sorting within the criminal justice system. But there is a need to integrate into that analysis an empirically informed conceptualisation of the role of defendants' displayed emotions and presentations of self (as constructed in interactions with criminal justice practitioners).

The focus of this book on the significance of defendants' presentation of self to the functioning of criminal process adds a new dimension to a broader, emerging, multidisciplinary and international interest in the role of emotions in legal decision-making and their implications for the legitimacy of state processes.[7] Part of this attention to emotion has been aimed at remorse. Existing criminal justice scholarship on remorse and its relationship with criminal responsibility addresses many important questions: whether remorse affects the tendency to reoffend; its relationship with risk; the feelings of victims; and public attitudes to the role of remorse in sentencing.[8] Normative work examines whether remorse ought to be a factor in decision-making (particularly in sentencing and parole) and considers how this relates to philosophical theories justifying punishment.[9] The book adds to this scholarship by focusing on perceived remorse and the acceptance of responsibility as key means of classifying and managing defendants.

This book, therefore, brings together insights into emotion and concerns about classification. It argues that emotions are themselves a key consideration

[5] S Walker, C Spohn and M Delone, *The Color of Justice: Race, Ethnicity, and Crime in America*, 5th edn (Belmont, Wadsworth Thomson Learning, 2012). See generally the work of Darrell Steffensmeier: https://sociology.la.psu.edu/people/d4s.

[6] K Hannah-Moffat, 'Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penality' (2005) 7 *Punishment and Society* 29; P Maurutto and K Hannah-Moffat, 'Assembling Risk and the Restructuring of Penal Control' (2006) 46 *British Journal of Criminology* 438; M Tonry, 'Sentencing in America, 1975–2025' in M Tonry (ed), *Crime and Justice in America, 1975–2025* (Chicago, University of Chicago Press, 2013); M Tonry, 'Punishment and Human Dignity: Sentencing Principles for Twenty-First Century America' (2018) 47 *Crime and Justice* 119.

[7] S Bandes, 'Remorse and Criminal Justice' (2015) 8 *Emotion Review* 14; S Roach Anleu and K Mack, *Judging and Emotion: A Socio-legal Analysis* (London, Routledge, 2021).

[8] Proeve and Tudor (n 3); A Hough and J Roberts, 'Public Opinion, Crime, and Criminal Justice' in S Maruna, A Liebling and L McAra (eds), *The Oxford Handbook of Criminology*, 6th edn (Oxford, Oxford University Press, 2018).

[9] Bandes (n 7); R Duff, *Trials and Punishment* (Cambridge, Cambridge University Press, 1986); H Maslen *Remorse, Penal Theory and Sentencing* (Oxford, Hart Publishing, 2015); Proeve and Tudor

in the classification of defendants and central to the managerial efficiency of the criminal justice system. Framing the criminal process around the expression of emotions like remorse, and the broader acceptance of responsibility, has implications for individual defendants and their relations with the state. The result may not always be catharsis, healing or therapy or even genuine recognition of the unique individual. The price of continued recognition as an individual, as a citizen and as a member of the community may be conformity to certain expectations about appropriate displays of emotion, such as remorse and the acceptance of responsibility. The book investigates the challenges and paradoxes that emerge when an emotion such as remorse (and emotions perceived to be broadly similar) is made part of a system of normalised expectations and even statutory requirement. It goes beyond the conceptual and empirical research on classification and emotion by examining what happens when the perceived emotion itself becomes classified.

III. UNDERPINNING THEMES, CONCERNS AND CONCEPTS

A. From Case Factors to Case Process: Relationships in the Making of Remorse

There is a long and valuable analytical scholarly tradition of studying case characteristics to see what effect they may have on criminal justice decision-making. Without any explicit intention to do so, this analytical tradition conceptualises decision-making through the implicit lens of autonomous individualism.[10] The holy grail has been to isolate (seemingly) autonomous case 'factors' as individual stimuli, which are thought more or less to determine decision outcomes. While this is one valuable way of explaining decision-making, its weakness is that it ignores *relationships* in two ways.

First, at best, this tradition marginalises the relationships within cases by seeking to abstract and isolate supposedly independent, autonomous individual 'factors', rather than seeking to understand the ways in which decision-makers intuitively grasp the meaning of cases as 'typified whole case stories'.[11] Second, it cannot attend to the social relationships between and among those inflicting and receiving punishment. While a sufficiently complex model of

(n 3); J Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge, Cambridge University Press, 2011); J Roberts (ed), *Exploring Sentencing Practice in England and Wales* (London, Palgrave Macmillan, 2015); A von Hirsch, AJ Ashworth and JV Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Oxford, Hart Publishing, 2009); A von Hirsch, *Deserved Criminal Sentences* (Oxford, Hart Publishing, 2017).

[10] C Tata, *Sentencing: A Social Process – Rethinking Research and Policy* (Cham, Springer, 2020).

[11] ibid; C Tata, 'Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process' (2007) 16 *Social & Legal Studies* 425.

independent and dependent variables can strive to re-aggregate these relationships, it cannot understand them as a dynamic social process in situ. For example, how do those inflicting harm, pain, control, etc on those receiving it make sense of what they do as legitimate punishment? How do they understand the way(s) that punishment is understood and interpreted by those receiving it? How can, and should, empirical research and theoretical scholarship confront these questions?

B. The Legitimacy Problem Confronting Professionals and the Urgent Demand to Justify State Violence

As philosophers have repeatedly noted, if criminal justice and its power to control, hurt or harm is to be more than sheer coercion, its practices must be legitimate. How, if at all, can and does the state and its officials morally distinguish between actions such as: abduction/kidnapping and arrest; extortion and the payment of a fine; community service and slavery; entrapment and imprisonment? This book takes as its starting point that those charged with determining this coercion cannot ignore the demand to make these moral distinctions: to show to themselves that their work is just, or at least not unjust.

Take, for example, the work of judges. Like other penal decision-making professionals, it would be unthinkable for a judge to declare that she or he does not care about and has no interest in 'justice'. Would a judge, lawyer, psychiatrist, probation officer, etc declare that their work is simply the equivalent of a violent mafia exercising naked coercion? After all, mafia/gangsters control a certain territory and enjoy the habit of obedience from their population, but need not be concerned about this obedience having any morally justifiable basis. No criminal justice professional would, or could, ever suggest that the obedience and compliance they require is morally indistinguishable from that of gangsters. To do so would negate their social, moral and financial capital.

How, then, does the state and its officials seek to draw this moral distinction between their actions and those of gangsters? One answer to this question is provided by normative penal philosophy.

Normative penal philosophy endeavours to guide decision-makers on what they *ought* to do. For example, ought the existence or lack of remorse make a difference to sentencing and, if so, how? How ought sentencing, parole and probation decision-making take account of the deprivation and poverty of the person to be punished? All of this is important and valuable in determining laws, policy and decision-making practices.

However, the focus of this book is different. Its purpose is not to determine what penal decision-makers ought to do, or how laws and policies ought to be written. Instead, it is preoccupied with the reality of what *is* happening. It seeks to develop an empirically grounded conceptualisation of the everyday reality of

the relationships and roles of those inflicting and receiving punishment. How do decision-makers make their decisions? How do they interpret and justify them? How do they understand the ways in which defendants, as direct recipients of these decisions (and, indeed, additional audiences, like other professionals, victims, the public, etc), perceive and interpret those decisions and the wider legitimacy of criminal justice?

This is not to say that we eschew interest in the normative (or moral) philosophy of punishment. Indeed, the book draws on categories and debates in the philosophy of punishment. Likewise, empirical research can shed valuable light on how those normative ideas are interpreted and operationalised, often in unexpected ways. An empirically led analysis can contribute to the development of normative penal philosophy: by knowing what is happening, we have more of a chance of thinking about what ought to be and how to get there. But here, our primary interest is in thinking about what happens on the ground. In particular, we are interested in the everyday anxieties and dilemmas faced by those inflicting punishment.

While normative penal philosophy must (rightly) stand back from the fray of everyday criminal justice work to think logically and imaginatively about a truly just penal order, penal decision-makers (as they rightly remind academic scholars) do not have that luxury. They are faced every day with decisions which must be made, the palpable distress of those entangled in criminal justice and the risks and dangers to individuals and society of different courses of action. They cannot meditate for long on demands to justify their violence as legitimate punishment. The obligation to decide and act is an immediate demand of the here and now.

It is for this reason that this book shows that the search by criminal justice decision-makers to confirm the legitimacy of the punishment they inflict is found in the immediacy of social interactions and relationships, as much as it is in abstract intellectual ideas and formal legal requirements. Criminal justice practitioners are acutely conscious that, in general, decisions must be made rapidly. Decisions must be seen to be made fairly, but also expeditiously. Practitioners depend on each other to 'get through the list'[12] and 'dispose' of cases quickly. To manage to achieve a sense of both fairness *and* efficiency, uncertainty and doubt about the legitimacy of such decisions has to be minimised. To square this circle, decision-makers must see themselves acting in ways which they can regard as legitimate *because* others appear also to see those actions as legitimate. It is not enough, this book argues, for decisions to be considered legitimate in purely abstract, intellectual terms. Rather, how decisions are or appear to be perceived by their audience (other practitioners and, crucially, those directly affected, like defendants) is critical.

[12] S Roach Anleu and K Mack, '"Getting Through the List": Judgecraft and Legitimacy in the Lower Courts' (2007) 16 *Social & Legal Studies* 341.

As previous empirical research has found, decision-making operates not as an individual intellectual or cognitive exercise, but as a social practice, communicating ideas and relationships typically within and between professional communities. Courts, for example, are able to get through the list of their cases quickly and efficiently because professionals (eg judges, defence and prosecuting lawyers, probation officers) work together in largely cooperative and convivial ways, in more or less shared cultures.[13] They work in ways which follow taken for granted habits of seeing, interpreting and acting, which themselves are established by conventions and familiar scripts. Rather than each individual case being seen as completely unique, they can recognise the familiar 'typical' case plot.[14] In this way, professionals can dispose of the case 'efficiently' because they know each other's expectations and what is being implicitly communicated. They know what they need to do so that other professionals can agree the case has been dealt with adequately. This is a recursive practice of checking and adjusting behaviour and decisions so that in general there are not too many unpleasant surprises.[15]

In the same way, this book argues that the search for legitimacy is partly answered by the responses of professionals to each other: checking, adjusting, reassuring each other of what they are doing. Thus, the twin potential problems of uncertainty as to what to do and doubt about its fairness – which could easily paralyse decision-making – are largely avoided.

As important as the affirmation of other professionals is, the need to justify the infliction of violence can most immediately and powerfully be answered by the perceived reaction of the person thought least likely to accept it: the person upon whom that violence is inflicted (ie the defendant). Nothing is more potent in showing to officials that their actions are morally justified than the person who is to be harmed appearing willingly to accept it as justified and deserved punishment. Rightly or wrongly, the perceived reaction of those with an immediate stake in the case tends to trump abstract, logical intellectual arguments about what ought to be done. It is the immediacy of this human and social interaction which vividly defeats potentially debilitating doubt and uncertainty. So it is that practitioners can move forward with confidence in what they do to get the case 'done'.

[13] For an empirical analysis of the way defence lawyers in France largely accommodate to assumptions about the functioning of the inquisitorial tradition shared with judges and prosecutors, see S Field and A West, 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pretrial Criminal Process' (2003) 14 *Criminal Law Forum* 261. For an empirical analysis of how Italian and Welsh youth justice practice is built on contrasting assumptions shared between practitioners within each system about the trust to be invested in families, see S Field and D Nelken, 'Reading and Writing Youth Justice in Italy and (England and) Wales' (2010) 12 *Punishment and Society* 287.

[14] Tata, *Sentencing: A Social Process* (n 10).

[15] M Heumann, *Plea Bargaining* (Chicago, Chicago University Press, 1978).

This is why perceived 'retractive' feelings more or less approximating to remorse and the full and sincere acceptance of responsibility are so coveted by those inflicting punishment. Nothing can feel so potently affirming of one's actions in inflicting this harm and violence than the reaction of the person who is shown freely and sincerely to accept it. By appearing to show full and sincere acceptance of individual responsibility, even remorse, the tendency of criminal justice to view its clientele as consisting of presumed 'offenders', even before they have been convicted, seems justified. The image and demonstration of the person who exhibits (or appears to exhibit) full and sincere acceptance is taken to legitimate that violence as justified and deserved punishment.

Remorse is the ultimate indicator of the ideal defendant who completely and wholeheartedly accepts the legitimacy of her impending punishment. It shows to the state, its officials and all those involved in making decisions that they not only have the right, but *are* right, to punish this specific individual. So much so that she herself is seeking to punish herself. Nothing could be more legitimating to the authority of the state and its officials than the appearance of the genuinely remorseful defendant.

C. What Do We Mean by 'the Defendant'?

Eagle-eyed readers will note that this book uses the term 'defendant' in an expansive way. Officially, the term 'defendant' typically refers to someone who has been charged by the prosecution but not convicted of those criminal charges. In this book, we use the term 'defendant' to refer, for example, to: those proceeded against by the state but not (yet) prosecuted through court; those prosecuted but who have not (yet) been convicted; those who have been convicted; those who are about to be or have been sentenced; and those serving a sentence, such as those being considered for parole. Why do we use the term to refer to such a wide range of people? The reason is that in this book we are focused on how the person proceeded against by the state is *expected* to admit, freely acknowledge, and indeed often explain, their guilt and individual responsibility for the alleged offence. This book shows how the person has to imagine and anticipate the future consequences of her posture towards state authority and its officials. So it is that the unconvicted person has to imagine the negative consequences (eg in terms of sentencing, the reality of any sentence) of denying guilt if she is then convicted at trial. The subjective experience of the person blurs the formal, temporal segmentation of official identities (eg police suspect, accused person at court, unsentenced convicted person, sentenced person). The person cannot simply imagine herself in only a single official identity, but has mentally to traverse these supposedly discrete identities.

The most technically accurate term to cover all of these different official statuses would have been 'the person proceeded against by the state', but that would have been quite a mouthful; 'defendant' seems the most intuitive alternative.

IV. OVERALL STRUCTURE AND INDIVIDUAL CHAPTERS

The book is divided into three parts. Part 1 is about the 'Making of Remorse and Responsibility': the 'how' of it, the process of constructing and evaluating remorse and acceptance of responsibility as a characteristic of the ideal defendant. Part 2 is titled 'Beyond Remorse', and explores variations to the initial themes around remorse. We note that decision-makers may look for remorse but actually demand more of the defendant. Remorse may not be enough. But sometimes courts will 'make do' with much less by elaborately and publicly treating the mere fact of a guilty plea (however qualified, grudging and reluctant) as if it were an open, full and voluntary acceptance of responsibility. Finally, sometimes the political and institutional contexts may lead penal agencies to move away from close examination of remorse to focus on risk. The final part (Part 3) examines the political and cultural significance of remorse. It asks what the public performance of acceptance of responsibility and remorse does for the criminal process, the state and the relations between state and citizen.

A. The Making of Remorse and Responsibility

(i) Tracing the Subterranean Influence of Remorse in the Dossier

Virginie Gautron's chapter explores a paradox. French criminal justice is shaped by a scientific, rationalist tradition that sees laws as detached from morality and religion. As a result, statutes and regulations avoid all reference to defendants' feelings and remorse. Yet Gautron, as one of the leading empirical criminal justice researchers in France, examines large case-file samples and extensive semi-structured interviews with practitioners drawn from two of her recent empirical studies to show that realities on the ground are different. She provides ample empirical evidence that all the key professional actors (judges, lawyers, police officers, probation officers, and psychiatric and psychological experts) refer regularly to feelings of remorse across the various phases of criminal justice, from police interrogation to judicial implementation of sentences. Yet Gautron characterises the influence of remorse as 'subterranean'. This is not only because it is not explicitly referenced in legislation, but also because its relevance in published case law is obscured by limited reporting, terse reasoning and difficulties in distinguishing its influence from those of related criteria, like regret, shame and guilt.

This brings out the importance of Gautron's close empirical study of the world of practice across all phases of French criminal justice. The official dossier is central to the French interpretation of the inquisitorial tradition. Gautron is able to trace this subterranean influence in the dossier to show the way defendants are penalised for what she describes as 'emotional deviance': the expression of feelings that are socially inappropriate. Not only are defendants expected

to show remorse, but practitioners will look for evidence that may confirm or deny the authenticity of that remorse. Gautron describes this as a process of 'objectifying emotional states'. The evidence sought is related to three modes for the expression of remorse identified by Proeve and Tudor: first, the language; secondly, the behaviour and attitudes associated with that language; and finally, the actions that express or are motivated by remorse.[16] Practitioners are looking for spontaneity, consistency and detail in what is said and corroborating evidence from elsewhere in the case file. They are looking for evidence of self-reflection that brings out, rather than minimises, their responsibility and looks primarily to the consequences for the victim rather than the offender. And what is said should be matched by appropriate gestures and other non-verbal signs that the words express real emotions. Even beyond that, practitioners are looking for practical action such as compensation or apology and, more broadly, signs of moral transformation: this is evidenced by acceptance of punishment and commitment to personal change.

Gautron concludes that what is going on is the 'punishment of emotional deviance'. The less experts see what they consider to be genuine expressions of remorse, the less positive their prognosis for the future. Where such 'feeling rules' are followed, the empirical evidence from Gautron's studies suggests they are rewarded not only by greater use of alternatives to punishment and less severe sentences, but also by sentence adjustments during the course of a punishment. On the other hand, emotional deviance is punished by longer custodial sentences.

(ii) Relations on the Ground: Appropriately Performing Remorse-Like Feelings is Produced through in Situ Relations

For over two decades, Sharyn Roach Anleu and Kathy Mack have conducted a major programme of research into the everyday practices of judicial officers in Australia. This includes how judicial officers manage the emotions of those coming before the court as well as their own emotions. Through their rich empirical data (including interviews with judicial officers, court observations and transcripts of observed court sessions), they argue that the emotions of defendants (such as remorse or other more or less 'ideal attitudes') do not simply exist as things in themselves. Roach Anleu and Mack show how remorse must be appropriately *displayed*. For instance, defendants should comport themselves in ways that the court finds sincere and credible. They should sit,[17] stand,[18]

[16] Proeve and Tudor (n 3). This suggests significant similarities with the way remorse is evaluated in common law jurisdictions from the adversarial tradition and those from the inquisitiorial tradition.

[17] I van Oorschot, P Mascini and D Weenink, 'Remorse in Context(s): A Qualitative Exploration of Remorse and its Consequences' (2017) 26 *Social & Legal Studies* 359.

[18] K Rossmanith, 'Affect and the Judicial Assessment of Offenders: Feeling and Judging Remorse' (2015) 21 *Body & Society* 167.

speak,[19] cry 'appropriately'.[20] In doing so, the defendant is seen to acknowledge the authority of the court. By contrast:

> [A] person who does not comply with the feeling rules and appears to be without emotion or as expressing the wrong emotions may be viewed as rejecting the authority of the court … [it can be interpreted as] disengagement from the court proceedings, lack of respect for the sentencing process …

Moreover, this appropriate display is not something that defendants can simply 'switch on' by themselves. It is the result of their relational interactions: the defendant is encouraged, coaxed, cajoled towards the appropriate display of feelings.

> To focus on 'true' remorse – as a discoverable 'thing', which just needs precise indicators to enable accurate identification – diverts attention from the social, relational and interactive nature of emotion experience and display. Judicial officers are active in the process of constituting remorse … [Judicial officers] use emotion language in interaction that elicits in the defendant feelings of shame, embarrassment, guilt or remorse.

Roach Anleu and Mack's point is highly significant for research and scholarship. That the production of the appropriate display of emotions (eg remorse) is collaboratively produced through in situ relations means that scholars should re-examine attempts to abstract and reify 'remorse' as a case 'factor' that somehow exists autonomously in itself regardless of social relations:

> Approaching emotion as a relational process means that finding remorse is much more than registering or correctly labelling an emotion as present, absent or sufficient. It entails a process of construction that is embedded in the courtroom context shaped by the structural relations and inter-personal interaction between judicial officers and other courtroom participants.

(iii) Temporal Shuttling – Reimagining Oneself 'as if' the Ideal Culpable Offender

Louise V Johansen's chapter examines the practice in the Danish courts of encouraging defendants who deny the charges against them nonetheless to imagine themselves 'as if' they have been found guilty and are culpable offenders. As a leading legal anthropologist, Johansen has studied and thought deeply about social relations in criminal justice and the ways in which appropriate emotions are encouraged and displayed.

Denmark's criminal courts practise a 'hybrid' system combining ideals from both adversarial and inquisitorial traditions. On the one hand, and in common

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

[20] T Hawker-Dawson, 'Defendants in the Crown Court' (PhD Thesis, University of Cambridge, 2022).

with adversarial systems, defendants enter a formal plea of 'guilty' or 'not guilty'. On the other hand, in common with inquisitorial ideals, examination of the defendant's character and attitude to the alleged offending is conducted even when the defendant pleads not guilty. Here, personal investigation reports are conducted by the probation service *not* after conviction and before sentencing (as in pre-sentence reports in adversarial countries), but prior to and regardless of any conviction.[21]

So, a person who formally denies guilt is expected to engage with this examination of character (a practice noted by Field in his chapter on French criminal courts). Denmark's strong emphasis on the value of rehabilitation makes defendant engagement with this examination particularly significant. Defendants need to defer to this examination and express appropriate emotions. It is in the nature of rehabilitative work that defendants have to examine, and be seen to examine, their 'inner core'. In doing so, defendants who have not admitted guilt are asked to imagine their attitude 'as if' they are guilty. Ostensibly, the collection of this 'knowledge' (through the personal investigation interview) about the inner character of the person (eg what might motivate the offending *if* the person is found guilty: anger issues, etc) is collected and presented 'just in case' it is later needed by the court. However, the reality and effect are less innocuous. Although Denmark's enduring attachment to rehabilitative ideals may have benign effects in humanising defendants, in the context of personal investigation reports it also means that the defendant has to imagine herself as the ideal culpable offender:

> The Danish penal system emphasises rehabilitation and treatment. To be able to offer treatment, however, one needs an offender who openly reflects on and copes with personal problems and accepts treatment. This necessity is met by interweaving emotions in the 'time–space'[22] surrounding the defendant and the criminal act as presented in the pre-sentence report. Probation work is structured so as to enable workers to move back and forth between past, present and future events.

While ostensibly respecting the formal principle of the presumption of innocence, the defendant is in fact more or less expected to reimagine herself as a culpable offender (again moving her self-presentation closer to the ideal of someone willingly participating in her own punishment). In this subtle way, rehabilitative and therapeutic work tends to encourage the appearance of admissions of guilt and self-incrimination.

(iv) Using 'Culture' as a Lens to 'Read' Defendants

The problem posed by the defendant who fails (or is believed to fail) to open her soul to state officials is that the state's violence cannot be justified by the

[21] See also R Wandall, *Decisions to Imprison* (London, Routledge, 2008).

[22] T Scheffer, *Adversarial Case-making: An Ethnography of the English Crown Court* (Amsterdam, Brill, 2010).

defendant's reaction. While there are occasional examples of defendants who overtly challenge state authority, this challenge more commonly arises by implication from silence, non-engagement and state officials being unable to 'read' defendants. Here, the problem of the demographic chasm between those judging and those being judged is immense. Bandes has noted, for instance, how difficult it can be for judges to know whether or not a defendant is truly remorseful and how that is complicated by, say, issues of class.[23] In general, middle-class defendants are more likely than working-class defendants to be able to pick up cues and clues about how they are expected to perform in the courtroom. This issue of judges knowing whether or not the defendant accepts the authority of the court is brought into sharp relief for judges in cases in which they perceive the defendant to be from an 'other' culture. They cannot dispose of cases (and certainly not with professional pride) unless they feel they are able to 'read' the defendant's communication.

Irene van Oorschot has been conducting penetrating and imaginative research into the use of 'race' and 'culture' and the relationship between them in the work of the criminal courts in the Netherlands, especially during sentencing. In her chapter, she draws on her own empirical research to show how vernacular or everyday ideas about 'other cultures' are used as a 'sense-making resource' to understand what particular cases are about. In this way, van Oorschot explains, the idea of defendants being from a different 'culture' is paradoxical. On the one hand, it is seen as an obstacle to understanding defendants' attitudes (or a veil). On the other, 'culture' is used as a lens through which to see defendants. As amateur or casual anthropologists, judges use ideas of culture (and sometimes stereotypes) to explain the attitudes of defendants towards the authority of the court. This enables judges to reassess as acceptable communications those which would otherwise seem less than ideal: 'Culture, in other words, can be mobilised to account for and at times excuse certain words and actions that do not fit judges' preferred mode of communication.'

Focusing empirically on judges' different uses of culture in relation to three received distinct ethnic minority groups, van Oorschot observes that judges know that culture is an imperfect way to understand and apprehend individual differences. Culture is understood as:

> A screen behind which hides the 'real' defendant. In precisely this double sense, [judges] *see through culture*: on the one hand, they can use it as a lens to see the individual defendant more clearly; on the other, it operates as a veil that the judge needs to strive to see through or beyond …

As a scholar of anthropology and performance, Kate Rossmanith has conducted studies examining judicial experiences of defendant emotions (most notably remorse) not only in their perceived verbal but also bodily expression.

[23] S Bandes, 'Remorse and Judging' in S Tudor et al, *Remorse and Criminal Justice: Multidisciplinary Perspectives* (London, Routlege, 2022).

Her chapter reflects on attempts to inform judicial assessment of defendants from 'other' cultures through cultural sensitivity training. What effects do these programmes have in practice? They are intended to promote cultural awareness and sensitivity, but how do they play out in everyday judicial working practice and specifically in the practice of remorse assessment? The overwhelming view among policy-makers, practitioners and scholars is that such programmes can only be a 'good thing' in making judges more aware of other cultures. Rossmanith scrutinises this assumption by thinking about some points that arose from her research into the study of how judges identify remorse. While cultural sensitivity programmes can be useful, we should, she cautions, be mindful that how they play out in practice is mediated by a much more complex world than can ever be replicated in the judicial classroom. In particular, judges (like any other professionals) have to read the attitude of those coming before them. Carrying the heavy duty of trying to do justice in individual cases in an unjust society, judges (rightly) take pride in performing their role fairly and impartially.

Rossmanith argues that in order to assess whether training is *effective*, we need to understand how it works *affectively*. As conscientious professionals who feel the weight of responsibility to be fair (almost heroically so), Rossmanith explains that judges may become anxious when they find that the tools that were given in training do not seem to work in making the defendant 'legible'. Such frustration can lead to irritation with the defendant for failing to make themselves more transparent. This is a paradox and a potentially counter-productive effect of such training. On the one hand, training programmes are attractive because they enable professionals to move ahead with greater certainty and to dispose of high caseloads more efficiently. Yet, on the other hand, when that training does not seem to solve the problem, professionals (especially those responsible for 'justice') may experience frustration, shame, even anger with themselves or those who appear to have made themselves 'illegible'.

Like van Oorschot, Rossmanith observes how judges sometimes use 'culture' to reinterpret what appear to be resistant or hostile defendant attitudes as, in fact, indicative of qualities closer to the ideal defendant. For example, judges talked about the 'posturing' of 'young Lebanese men' as something that they initially saw as a challenge to the court's authority, but later came to see it as manifesting their discomfort, their sense of not fitting into society. In her chapter, Rossmanith sketches conceptual outcomes of cultural sensitivity training, for example how such training can result in judges attempting to balance confidence and varying degrees of doubt in their decision-making and how the training might also propagate judicial expectations regarding offender legibility: the idea that offenders produce non-verbal signs that judges then read and make sense of. Rossmanith considers a training outcome whereby judges expect to understand people's comportments. On the one hand, this lends judges a sense of pride that their skill and knowledge enables them correctly to read defendants, especially where defendant attitudes can appear more or less consistent with qualities of the ideal defendant. The corollary is, however, that where defendants do not seem

to present themselves in a legible way, judges might respond more negatively with confusion, anxiety, shame and frustration. In such circumstances, judges may sometimes grow frustrated with the offender, blaming offenders for their illegibility. Instead of judges framing the situation as not understanding offenders, judges may describe instances of offenders 'not making themselves understood'.

B. Beyond Remorse

The opening part of the book sets out various ways in which expressions of remorse and the acceptance of responsibility are cultural expectations in diverse stages of many different criminal justice systems. Our second part acknowledges that sometimes decision-makers may look for remorse but actually demand more of the defendant. On the other hand, it shows that sometimes courts 'make do' with much less than an open, full and voluntary acceptance of responsibility, and that the political and institutional contexts may lead penal agencies to move away from close examination of remorse.

(i) Remorse May Not Be Enough

Richard Weisman's chapter analyses the relationship between remorse and 'insight' and the parallel but distinguishable roles they play in the treatment of offenders in Canada and the US. Analysing the discourses in 66 Canadian criminal cases decided between 2010 and 2020 that applied both concepts to the same offenders, Weisman points out overlaps, differences and conflicts in the way these distinct but related concepts express the characteristics the ideal defendant is expected to demonstrate. Both concepts express qualities that defendants must show to make clear the moral separation between the person that committed the past wrong and the person they are now. Weisman describes this as a 'moral performance': a presentation of the self before an audience that feeds into a moral judgement of the status of the defendant based on an assessment of that performance. Weisman concludes that remorse is still the paramount consideration in Canadian sentencing courtrooms whereas 'insight' prevails on the Parole Boards. Yet he identifies a temporal shift: insight was already discernible as a key concept in parole decisions in North America two decades ago, but its influence is now becoming more evident in sentencing decisions as well.

But what are the differences between these concepts as revealed by their discursive use in criminal cases in Canada? Weisman concludes that remorse is about how offenders feel about their crime: it requires a genuine and fully expressed acceptance of personal moral responsibility. But to demonstrate insight, it is not enough to feel and express a profound sense of regret about one's act and acknowledge fully its moral wrongness: the necessary transformation requires the defendant to have identified and addressed the underlying causes of the offending. This insight must be developed or gained over time

through a learning process that requires certain cognitive and verbal capacities. Remorse, on the other hand, can be demonstrated by spontaneous emotional display. These differences are evident in the contrasting meanings attributed to incoherence in a defendant's discourse. Incoherence may suggest authenticity in conveying the emotional weight of remorse. But incoherence may suggest limitations of cognitive capacity, which may prevent effective self-analysis of the cause of the offence or expression of that understanding. Noticeably, Weisman found several instances where offenders were attributed with remorse, but no offender was believed to have acquired insight without also being attributed with remorse. Hence, expressing feelings of remorse is necessary to the moral performance of ideal defendants in Canada but increasingly is not enough.

Weisman reflects on the significance of the increasing salience of insight as a criterion for evaluation. He sees this not just as a change of emphasis, but as a change in discourse that elevates the findings of the court to an apparently more objective plane. An 'actuarial standard of risk and the likelihood of reoffending' is presented as bringing the capacity for greater predictive power. Although lack of awareness or insight is a moral standard in that it is founded on expectations of what an ordinary member of the community should understand, its adoption represents a shift from the overtly moral discourse of remorse to the more specialised language of risk and dangerousness. Yet it is not clear whether insight is in fact a more effective test than remorse of defendants' readiness to return to the community.

For the individual defendant, demonstrating insight carries a number of challenges. The elevation of cognitive and verbal competence to a necessary requirement has adverse consequences for those who are socially disadvantaged or suffering from cognitive disability. Furthermore, the individual's causal analysis of the crime is expected to focus on those factors found within the individual rather than external situational factors. Evoking the latter risks a judicial critique of the defendants' minimising of their responsibilities. And simultaneously demonstrating both remorse (with its requirements of authenticity and genuine emotion) *and* insight (with its requirements of verbal dexterity) may be particularly challenging. The smooth verbal performance necessary to demonstrate insight may arouse suspicions as to the genuineness of expressed emotion. Ultimately, this tight control of what Weisman describes as the 'scripting of redemption' meant that only a small number of the offenders within his database were able to demonstrate both.

(ii) Taking What You Can Get

There is evidence that in some contexts the courts are looking for the fullest and most sincere expressions of remorse (closely examining signs of this in words, gestures and practical action). But very often courts seem to be happy to accept representations of the acceptance of responsibility that are much 'thinner' and more formal, such as a guilty plea or confession. These are often

more like acquiescence than acceptance.[24] But even then, it is necessary to keep up appearances, to maintain certain representations around the acceptance of responsibility.

Key to this is a public acting out of voluntariness that ignores and obscures the range of incentives and pressures exerted to encourage confessions and guilty pleas. This is the core to Jackie Hodgson's chapter, where she argues that the ideal defendant is one who pleads guilty. But the legitimacy of these pleas depends on the idea that they represent a voluntary and informed decision not to contest guilt but to acknowledge responsibility. In England and Wales, this legitimacy is rooted in an idea central to notions of procedural fairness within the adversarial tradition, namely a party's autonomy to pursue self-interest in a legal dispute. The role of the defence lawyer is seen as a key guarantee that this party autonomy is 'real' in that decision-making is not only voluntary, but also informed (something itself critical to the equality of arms underpinning adversarial due process). Thus, the defence lawyer's role is central to the legitimacy of guilty pleas and the broader criminal process exactly because it suggests that defendants are making a free and informed choice. Once made with the support of a defence lawyer, it is very hard to challenge the legal validity of a guilty plea even where there is ambivalence in the plea or ambiguity in the evidence. The smooth processing of cases is thus assured.

Yet Hodgson points to widespread evidence that incentives are routinely offered and pressures applied to encourage guilty pleas. This is done not only by prosecutors, judges, magistrates and their advisers, but also by defence lawyers. In general, these incentives and pressures cannot be acknowledged as such: in the case of the defence lawyer, this is presented as the giving of advice necessary to an informed choice. But defence practice is itself materially and professionally encouraged by the time and resource constraints involved in running a profitable practice and the peer pressures from practitioner groups working a system whose collective functioning is seen as dependent on guilty pleas. This means that processing guilty pleas may often be the preferable option for defence lawyers. Yet all these pressures (on both defendants and defence lawyers) must remain hidden in the public court discourse. Attempts are made to limit defendants' public participation to a defined role consistent with the plea. Case law emphasises not just the legitimacy, but also the professional imperative of strong advice about the advantages of a guilty plea while ignoring the ambivalence and contradiction in many such pleas. What we have here is a remarkably flexible concept of 'voluntariness' that enables the courts to accept as meaningful almost any public acceptance of responsibility however grudging or confused. On this depends the state's capacity to process efficiently high volumes of cases while maintaining its public authority to punish.

Hodgson draws comparisons with France. There, too, admissions of responsibility are systematically encouraged and then largely rendered immune from

[24] J Gormley and C Tata, 'Remorse and Sentencing in a World of Plea Bargaining' in Tudor et al (n 23).

scrutiny at trial. But the institutional framework that lends legitimacy and credibility to those admissions is differently constructed. Rather than the procedural fairness of party autonomy and equality of arms, it is pre-trial judicial supervision of police investigations (by judges or prosecutors) that is presumed to give integrity and thus credibility to that which is recorded in the official dossier (including admissions to the police). Yet Hodgson suggests that judicial supervision in most cases does not provide a rigorous examination of the conditions under which confessions have been produced but rather provides retrospective bureaucratic scrutiny limited to the documentation within the dossier. Nevertheless, the inquisitorial procedural tradition invests legitimacy and credibility to everything within the dossier (including confessions) for all professionals (including defence lawyers).

Thus, again – though by a different mechanism – systematic incentives are produced to encourage the ideal defendant to accept responsibility. In France, much of this 'incentivising' work is still done in the police station, where defence lawyer participation remains marginalised and interrogation recordings are rare. As a result, the realities underpinning the 'voluntary' assumptions of responsibility that determine the outcome of most cases are largely obscured. The dominant assumption at public trial is that what is in the official dossier gains credibility from the fact that it is the outcome of a judicially supervised pre-trial process. And admissions of responsibility will often lead to prosecutors processing cases through abbreviated procedures that limit scrutiny of pre-trial evidence while maintaining the public image of judicial verification of the truth of the dossier. Such procedures, including a relatively new form of formal plea procedure, are formally subject to the consent of the defendant. Yet that consent is itself encouraged by the incentive of reduced sentences. Thus, in both France and England and Wales, there are routine backstage pressures to admit responsibility, the extent and significance of which is obscured. In England and Wales, this is done by the public courtroom portrayal of guilty pleas as voluntary and informed acts of an autonomous party. In France, a similar role is performed by the courtroom presumption of credibility that is invested in the official dossier and by pre-trial judicial supervision.

(iii) Marginalising Remorse

Nicola Padfield examines the role of remorse in Parole Board decision-making in England and Wales as opposed to initial sentencing decisions. She reviews case law and the evidence from two empirical studies that she conducted in 1999 and 2016–17 (based on observation of Parole Board hearings and formal interviews with participants). In the earlier study, the researchers concluded that panels considered remorse relevant as part of the 'making progress' in prison that they were looking for in their assessment of risk (though this was often discussed in other terms, such as victim empathy or appreciating the impact of the offence on victims). But by 2016–17, remorse had become a much less salient feature of discussion. Future risk assessment still depended on assessment

of behavioural change and victim empathy might still be relevant, but remorse itself was seldom mentioned.

Padfield concludes that there has been a shift in England and Wales to a narrower focus in Parole Board decision-making on evaluation of future risk and its management. This has been accompanied by the marginalisation of remorse. Padfield also considers recent case law. In reviews of Parole Board decisions – whether by judicial review or the relatively new 'reconsideration' mechanisms – there is evidence of arguments made around remorse by applicants and in reports on them, but they do not seem to be decisive to the decisions. In contrast, in cases involving review of minimum terms or tariffs in relation to indeterminate life sentences, remorse remains relevant and, in relation to young people detained at His Majesty's pleasure, remorse is an explicit criterion under the relevant guidance. Padfield points out that these latter categories of decision are much more akin to re-sentencing exercises than the narrower risk assessment exercise for post-tariff release decisions.

Padfield is reluctant to offer clear-cut conclusions as to precise mechanisms by which remorse has been marginalised in the period between 1999 and 2007. She does, however, point out that over the relevant period there has been a shift in the nature and role of the Parole Board and the political context within which it operates. Criminal Justice Acts in 1991 and 2003 shifted the focus of Parole Board decision-making from decisions about discretionary early release from determinate sentences towards decisions about either late release or recall of 'dangerous' offenders with indeterminate sentences who had already served their tariff period for retributive purposes. The political context in which these changing functions are performed has also shifted. The Parole Board has moved from a small body of experts working at least in part for rehabilitative purposes to one rooted less in practitioner experience and shaped more by a prevailing penal populism. This has been reflected in the prioritisation of protection of the public over broader notions of promoting law-abiding lifestyles. Initial sentencing embraces a range of purposes to which remorse might be thought relevant. But these changes mean that post-tariff release decisions have a much narrower focus on predicting and managing risks of recidivism. Given that there is no evidence that remorse correlates with such risks, Padfield is not surprised by the lack of significance accorded now to remorse: it reflects the task now assigned to the Parole Board in England and Wales. But if one were looking to help offenders take responsibility for their offending then the Board might regard remorse as more relevant. She points to contrasts with France and the role of the *juge d'application des peines* (JAP; a judge with broad responsibility for enforcing and in some cases varying sentences), where reintegration remains a key function. Crucially, perhaps, Gautron provides evidence that remorse matters to the JAP.[25]

[25] Note also that remorse remains an explicit criterion for parole decisions in California. For a recent discussion of how that is interpreted, see K Young and H Chimowitz, 'How Parole Boards Judge Remorse: Relational Legal Consciousness and the Reproduction of Carceral Logic' (2022) 56 *Law and Society Review* 237.

Padfield also makes a strong case for the view that it would be inappropriate to seek to identify and evaluate remorse in a parole hearing. She points out the acute cultural difficulties of expressing remorse as a prisoner in such a formal public penal context. Yet many prisoners did express to the researchers their remorse and desire to make amends. Padfield concludes that, even for those with the capacity to express themselves in a formal parole hearing, the injustices and the degradations of prison life generate anger, resentment and personal survival strategies that render unthinkable public expressions of remorse to the system that has done this to them. Padfield does not say this explicitly, but in the light of other chapters, we might speculate that, for prisoners, expressing remorse to the state would feel like acknowledging publicly the legitimacy of what that state is doing to them. And this they will not do.

C. Cultural Meanings of Remorse: What Does Performance of Acceptance of Responsibility and Remorse Do for the Criminal Process, the State and Relations between State and Citizen?

(i) The Ideal Defendant as Citizen: Criminal Process and Political Cultures

The public performance of remorse and acceptance of responsibility as expectations of the ideal defendant represents a recognition of the legitimacy of state punishment. It symbolically (re)affirms – despite the offence – a certain continuing apparent mutuality in the relationship between state and citizen. As such, Stewart Field's chapter argues, it should be seen as a resonant moment in the enactment of political cultures. Field is a comparative lawyer originally brought up in the adversarial tradition of criminal procedure and the liberal political culture of Anglo-American liberalism. He uses practitioner interviews and courtroom observations of the French *cours d'assises* (CA; the highest first instance criminal courts) to explain how different court practices are shaped by, and enact, particular normative conceptions of the political relations between state and citizen. In so doing, Field explicitly puts into concrete practice David Garland's injunction to see penal practice as positively constructing cultural relations.[26] This is not just a matter of representing and reproducing images of individual subjects ('normal persons and normal attributes'), but also one of social authority and social relations. By representing a certain style of state authority to victims, defendants, court professionals and the public, the court acts out a distinct sense of how social relations are (and should be) constituted in that society, for example by reproducing a particular way of understanding the breakdown of social relations. The appropriate role of both citizen and state in this process is publicly acted out.

Field argues that the way in which defendant remorse and acceptance of responsibility is constructed and performed before the CA reflects a concept

[26] D Garland, *Punishment and Modern Society* (Oxford, Clarendon Press, 1990) ch 11.

of state and citizens rooted in a French republican tradition that is significantly different to that of Anglo-American liberalism. The French state expects a broader commitment from the French citizen defendant than would be the case in equivalent Anglo-American courts. True, the 'good accused' accepts responsibility, expresses remorse and shows commitment to personal change in the Anglo-American criminal process as well as the French. But this is only part of the established expectations before the CA: the ideal defendant must also actively participate in a detailed examination of how and why the offence was committed that is set within the context of the defendant's character and journey in life. And participation in this broad ranging discussion is expected to come from the defendant herself. In Anglo-American systems, the norm of a guilty plea means that the defendant is not directly questioned by the court (rather, her voice is mediated through her defence lawyer's plea in mitigation and/or in the pre-sentence report).

In contrast, the defendant in the CA is expected to respond directly to the judge. And, rather than formally segmenting the question of criminal conduct (guilt-determination, or what Anglo-Americans call a 'trial) from that of the character of the person (sentencing), the CA (like other continental European courts) operates a unitary model in which character and alleged conduct are examined together. So it is that the judge may begin court proceedings with an examination of the defendant's life and character – something largely excluded by the evidential rules adopted within the liberal Anglo-American tradition.

In this way, rather than delegating the examination of the defendant's character and attitude to the offence to pre-sentence report writers and the defence lawyer's plea in mitigation prior to sentence (as is the case in Anglo-American countries, where guilty pleas are the norm), the defendant is expected to explain herself directly to the court in response to direct judicial questioning not just about the offence and her attitude to it, but also about her character, prior to any guilt having been established. Thus, the defendant is expected to participate more actively, to a greater depth and for a greater duration than in Anglo-American court practices. And all of this is done through the public 'front-stage' work of the court rather than through the 'backstage' case-cleansing work of pre-sentence reports in other jurisdictions (see Tata on Scotland), or even the rapid public lawyer-led mitigatory work of a sentencing hearing.

In return, the French state is publicly making two offers that go further than either the negotiated settlement of the Anglo-American guilty plea or the narrowly constructed party conflict of adversarial trial: first, to engage in a careful and meaningful dialogue with defendants about their responsibilities in the light of the reciprocal responsibilities of the French state and other citizens; and secondly, to offer a viable route back to full citizenship and reintegration into the polity.[27] Field argues that what is being acted out in the CA is a symbolic

[27] Field expresses significant doubts as to whether the French state is actually delivering on these promises.

exchange between citizen and state based on certain background assumptions about normal underlying relationships between state and citizen. These evoke a positive concept of the French citizen and the place of the state in defining the identity of the nation and its citizens that reflects a polity that is significantly at odds with dominant notions of liberal pluralism as understood in Anglo-American society.

(ii) Legitimising Violence: Working Separately yet Together

Tata's chapter argues that the practices of distinct professional groups (particularly judges, lawyers and probation officers[28]) in reality work together to manage two related tensions in their working lives: first, that between justice and efficiency; and secondly, that between legitimate punishment and unjustified violence.

Professionals who operate a system that ultimately involves the routine application of violence and coercion need to see that system, and especially their work in it, as more or less just and legitimate. Yet the everyday reality is of a criminal justice system seeking the 'efficiency' of the cheap and rapid mass processing of cases. How do practitioners maintain their distinct professional ideals about what they do in the face of these pressures? For probation officers, it is by seeing their therapeutic support as enabling positive defendant self-change; for defence lawyers, it is providing legal advice and support for the free choices of autonomous clients; for judges, it is the appropriate penal response to a particular offence and offender. Yet the system, in order to promote the 'efficient' processing of convictions, relies on the defendant realigning her posture closer to that of the ideal defendant, who sincerely accepts both responsibility for the alleged crimes and the legitimacy of the state's punishment. And practitioners of all types play key roles in encouraging defendants to make this adjustment.

Drawing on an empirical study of the Scottish sentencing processes, Tata argues that these apparent tensions are managed through an implicit 'symbiotic' cooperation between legal and therapeutic professionals. By this, he means that autonomous professional groups, despite their different occupational ideologies and functions, depend on and sustain each other's work in ways that encourage and oblige people to behave more or less as 'ideal defendants' who are seen to accept sincerely their culpability and impending punishment.

The symbiosis of this work by the two professional groups is 'blind'. By this, Tata means that it operates without any acknowledgement that the work of legal and therapeutic professionals is mutually sustaining. This symbiotic professional co-working is obscured by official, academic and professional portrayals of criminal justice as a linear, step-by-step system in which individuals proceed from one distinct, autonomous decision moment to the next. According to this prevailing image, each of these autonomous steps is dominated by distinct

[28] Known in Scotland as criminal justice social workers.

professional groups performing separate functions. For example, therapeutic professionals' character assessments are formally seen as relevant only after guilt has been determined or accepted following defendants' interactions with judges and lawyers. Yet, pleading guilty but then providing to pre-sentence report writers an account of the event and of oneself that does not fully and coherently accept responsibility attracts negative consequences. That is not what the ideal defendant is expected to do; it challenges the legitimacy of the process. Thus, Tata argues, defendants cannot afford to treat decisions about guilt and presentations of their moral character as separate.

Rather than being in any sense a planned or deliberate conspiracy, practitioners work separately but in mutually supporting ways to bring home these realities to defendants. So, Tata suggests, defence lawyers are concerned that probation officers' pre-sentence reports set out a defendant account that aligns with the formal plea. This encourages clients to take the opportunity of the interview with the probation officer for their pre-sentence report to emphasise clear and unambiguous acceptance of responsibility and show remorse. In turn, probation officers themselves in those pre-sentence reports reformulate representations of events and contexts made to them by defendants in interview so that they align more closely to these same expectations of the ideal defendant. Yet judges reading these reports do not appear to be aware that this double re-modulation of defendants' voices is taking place: they appear to assume that the reports express defendants' unfiltered views and attitudes. That, in turn, maximises the opportunity for judges to treat those representations as a free and voluntary acceptance of responsibility. This is the unacknowledged symbiotic relationship that exists between the work of lawyers and judges and that of probation officers. It enables – but at the same time obscures – the sustained obligation that is exerted on defendants to conform to the model of the ideal penal subject.

In what way are the inconsistencies between the reality of those sustained pressures and the ideal of voluntary defendant participation and the presumption of innocence obscured from view? Tata argues that official temporal and professional separations between practitioners and their roles are key. Judges do not appear to know the detailed work that defence lawyers and probation officers do to persuade defendants to act as the ideal penal subject (or to reframe their words so that they appear to be so acting). And the clear separation between the formal roles of defence lawyers and therapeutic professionals obscures the mutually assisting work they each do (and thus also the appearance of pressure being exerted on the defendant). The integrity of cherished ideas around free participation is thus preserved by obscuring from view this 'cross-contamination' of legal and therapeutic casework. The 'blindness' of each professional group to the detailed work of the other enables each to remain (or at least appear to be) more or less unaware of the full reality of the process for defendants. Yet, the two key decisions made by defendants, which are formally separate and involve interaction with different practitioners – do I plead guilty

and what kind of account do I give of myself, my motives and my circumstances – need to be carefully aligned in order to get the benefits of being considered an 'ideal defendant' and avoid the sanctions attached to being considered less than ideal. Thus, the 'blindness' of practitioners to the detail of each other's work enables them together, without bad faith, to create a reality for defendants that is one of sustained pressure while maintaining professional ideologies built on the idea of defendant autonomy. Tata concludes by calling for research to address more directly, comparatively and longitudinally the way that defendants (and in comparison with practitioners) experience the criminal justice system, the decisions that they have to make in it and the pressures to which they are subject.

(iii) Individualising Responsibility: Remorse and Restorative Justice

Giuseppe Maglione looks at the significance of remorse within the context of restorative justice (RJ). RJ is seen as a global reform movement advocating a non-punitive and participatory approach to wrongdoing. It is mainly pursued through facilitated, voluntary, face-to-face meetings between the offender and the victim in the presence of mediators and/or facilitators and one or more supporters of the offender and victim. Analysing the official policy documentation on RJ, Maglione examines its concept of the 'ideal offender' and shows the importance to that ideal of defendants showing remorse and taking individual responsibility. He traces its emergence to political shifts under 'New Labour' in the late 1990s and 2000s: RJ was a 'third way' justice that did not supplant rehabilitation or retribution. RJ presents itself as 'non-punitive, inclusive, stakeholder-led, emotionally intelligent and community based intervention on minor crimes'. But such crimes are seen as matters of interpersonal conflict to be dealt with by the conflicting parties: 'the role of social structural determinants or macro-relations of power, is neglected if not denied'. As RJ has been constructed as an 'institutionally-organised self-allocation of blame', remorse has become a crucial and recurrent component in normative representations of the offender involved in it. Maglione calls RJ a 'etho-political' ritual in that it bridges the realms of the individual/moral and the political. The expression of remorse is critical to this in that it is an essential step in the 'responsibilising journey' that frees the victim and offender of the burden of the crime while 'commit[ting] visibly and morally to the norms that govern group affiliation and determine group membership'. Maglione argues that if the state is to use RJ to respond to these social harms through punishment and the individualising of responsibility, then this requires remorse. But a 'remorseless' RJ would open up the possibility not of a 'better criminal justice, but something *better* than criminal justice': this critical RJ might be a space to think about harms and conflicts by looking more broadly at the wider social, cultural and economic conditions of social harms and issues around criminalisation. Thus, the expectation that defendents show remorse and accept individual responsibility for the harm as part of the RJ discourse plays a key part in narrowing down the scope of these

encounters. For Maglione, remorse renders RJ 'a distinctive justice ritual with a specific political import'. While remorse may appear benign, it shifts the burden of judgment from the court onto the offender and onto the victim:

> Such a shift does not empower stakeholders within RJ processes; it actually binds them to an individualising process, however disguised. If RJ aims to be a progressive challenge to the very idea of punishment, the role of remorse needs to be critically re-assessed, possibly leading to a demotion of its centrality as a defining aim of the ideal offender's moral performance toward the victim.

This book, based on contributions from different jurisdictions and in different institutional settings, examines the diverse ways that manifesting the sincere acceptance of responsibility and expressing remorse are part of the normative expectations of the 'ideal defendant'.[29] It shows how practitioners evaluate defendant performance of these expectations and the structural inequalities that any such evaluation obscures. But above all, it shows how this system of normative classification of emotions helps practitioners to resolve underlying tensions within their criminal justice systems. State violence needs to be legitimatised by the promise of close attention to the particular unique circumstances of individuals and their alleged offences. Yet the sheer volume of interventions is *also* seen as calling for rapid and cheap processing of convictions in order to 'get through the list' and dispose of cases 'efficiently'. Performance of remorse (or at least some public acceptance of responsibility) can be seen to square the circle by an acknowledgement – by those who will ultimately suffer the coercion and violence – of the legitimacy of their punishment by the state. As such, it is a key part of a public performance that emphasises mutuality at a moment of acute conflict between state and citizen.

The paradox, however, is that this apparent mutuality is in part procured by state inducements. The rewards for the 'ideal defendant' are inevitably mirrored by penalties for those who do not (and perhaps cannot) conform. In turn, that public performance is organised in a way that obscures the significance of both inducement and penalty.

[29] And related feelings such as regret, guilt and shame that might be thought as less than 'ideal'.