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Humanising Punishment? Mitigation and "Case-Cleansing" Prior to Sentencing

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Abstract

The purpose of this article is to stimulate new thinking about the role of the humanisation of the person to be sentenced. By rendering the person's offending more comprehensible, humanisation is assumed to obstruct harsh penal treatment and mechanical case-disposal. Distinctively, however, this article argues that "humanisation work" *also* achieves profound latent effects. By resolving the potential threat of a person's own account appearing to be at odds with her formal admission of guilt (e.g. guilty plea), humanisation work enables efficient case-disposal. Applying Douglas' work on purity and pollution, and with empirical illustrations, I show how the "dirty work" of humanising the person to be sentenced cleanses cases of troubling ambiguities, making punishment easier to impose with confidence. Nevertheless, humanisation work *can*, especially if the communicative distance between sentencer and the person sentenced is reduced, also be a facilitator of inclusive and empathic penal sentiments.

Key words

Sentencing; humanisation; guilty pleas; punishment; court efficiency; mitigation; Mary Douglas; dirty work

Resumen

El objetivo de este artículo es suscitar un nuevo planteamiento sobre el papel de la humanización de la persona que va a ser sentenciada. Al volver la ofensa de la persona algo más comprensible, se supone que la humanización impide el mal trato penal y la gestión mecánica del caso. Lo característico del artículo, sin embargo, es su argumento de que el "trabajo de humanización" también surte profundos efectos latentes. Al resolver la amenaza potencial de que el relato de una persona aparezca en contradicción con su admisión formal de culpa (por ej., declararse culpable), el trabajo de humanización posibilita una disposición eficaz del caso. Aplicando el

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trabajo de Douglas sobre pureza y polución, y con ilustraciones empíricas, muestro cómo el “trabajo sucio” de humanizar a la persona que va a ser sentenciada depura las ambigüedades problemáticas del caso, de forma que se puede imponer el castigo con confianza. No obstante, el trabajo de humanización también puede facilitar sentimientos penales inclusivos y empáticos, sobre todo si se reduce la distancia comunicativa entre el que sentencia y el que va a ser sentenciado.

Palabras clave

Sentenciar; humanización; declaración de culpabilidad; castigo; eficacia judicial; mitigación; Mary Douglas; trabajo sucio

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1. Humanisation Work

The purpose of this article is to stimulate new thinking about the work which humanisation does in the criminal (especially sentencing) process. I will propose that in addition to its explicit purpose. Humanisation work generates latent effects, which are essential to the perceived legitimacy of the act of punishment.

What is "humanisation work"? "Humanisation work" takes different forms in different systems. However, by using the generic term "humanization work" I seek to draw the reader's attention to its *common functions*. "Humanisation work" in the sentencing process[1] refers to the collaborative practices which offer the prospect of and/or undertake the humanisation of the person to be punished, so that the sentencing court can better understand and relate to her as a whole human being. The explicit purpose of humanisation is to render the offending comprehensible (though not excusable) in the context of the person's life. The work of humanisation makes it possible to understand the person as a whole, so challenging the tendency simply to condemn, vilify and exclude her. Humanisation work includes the processes of actual, promised and potential attention to: the person as a whole human being in context; her personal and social circumstances; her unique life-story; her voice; the possibility and actuality of mitigation; the examination of her character as a whole; her story of the offence; and crucially, her attitude towards her culpability and the authority of the court. Importantly, I will show that "humanisation work" incorporates both the actual *and anticipated* means of gathering information to understand and depict the person in relation to the offence. This work of humanisation is carried out differently in different countries and varies between inquisitorial and adversarial regimes. Yet all penal systems require this work. I will argue, however, that in carrying out these roles, humanisation work achieves a more profound output. It cleanses cases of troublesome ambiguities which would otherwise be seen to sully the perceived legitimacy of the penal act. Humanisation work purifies cases of their ambiguous features, (especially about the person's views about their culpability and attitude towards the authority of the court), which, if ignored would imperil the efficient disposal of cases.

1.2. Humanisation Versus Efficiency?

In contrast to conventional thinking, I will argue that the work of humanisation tends to assist, rather obstruct, the efficient delivery of punishment and case-disposal. Let me explain. Typically, efficiency and humanisation are viewed as mutually contradictory (cf e.g. Heimer 2001). Albeit with different normative leanings, both policy and academic thinking regard efficiency and humanisation as opposing values, operating in a trade-off with each other: the more humanisation the less efficiency and vice versa. The question becomes, therefore, where the correct "balance" between the two ought to be struck. Policy thinking, influenced as is it is by managerial and instrumentalist assumptions, tends to deride humanisation as somewhat superfluous, impeding the swift, economic and efficient throughput of cases (Bottoms 1995, Tata 2007a).

Meanwhile, a recurring anxiety in much academic work is that sentencing is, in reality, too governed by the mechanistic values of efficiency, automation and speed. Particularly in the lower and intermediate courts, too little attention is thought to be paid to the circumstances and social context of the unique individual, human being to be sentenced (e.g. Hagan *et al.* 1979, Rosecrance 1988, Newman and Ugwudike 2013, Ward 2016). Against this back-drop, the process of depicting the defendant as a whole and unique person (conducted in nominally adversarial systems in the period

[1] In this article the focus of humanisation work is restricted to the sentencing process – the formal decision to punish. This is not to deny that humanisation work occurs throughout the criminal justice process (from police stages through to implementation of the sentence), and there is potential to compare how this is done. However, since sentencing is recognised as the moment which determines and justifies the violence and to be done to the person, humanisation is central to the legitimation of practices both after, and indeed prior to, sentencing.

between conviction and sentencing), is seen as an important, humanising corrective (e.g. Newman and Ugwudike 2013). By enquiring and informing the sentencing judge about the person, her human story can be told in its context, enabling more rounded judgement to be made, thus complicating and obstructing the possibility of harsh punishment. Contextualising the offence and humanising the person to be sentenced, pre-sentence investigation and mitigation may enable the judge come to see the offending as explicable (though not excusable), so rendering the imposition of harsh punishment more difficult (e.g. Raynor 1990, Gelsthorpe *et al.* 2010, Carr and Maguire 2017). By humanising the person, the sentencing court can be provided with "an account which enables the court to see an offence as intelligible human action, however deplorable, in the context of the individual circumstances" (Canton and Dominey 2018, p. 88).

So the following sorts of concerns commonly surface among those concerned about the march of efficiency. Does work to humanise the person to be sentenced tend to be glossed over by a court impatient to move onto the next case. Does humanisation really impact on case outcomes, or, is it mere empty ceremony? Are the demands of efficient case disposal bound to bulldoze attendance to the unique human being? Underlying these questions is the widespread belief that humanisation and "organizational efficiency" are "inversely related" (Hagan *et al.* 1979, 509) or that humanisation is more ceremonial than real (Rosecrance 1988).

However, not all work regards efficiency and humanisation as necessarily irreconcilable. Suggesting instead that humanisation can generate greater compliance with authority and so yield efficient case-processing, Procedural Justice and Therapeutic Jurisprudence offer a rosier outlook of what is possible. Therapeutic Jurisprudence (TJ) (e.g. Winnick and Wexler 2003) and Procedural Justice (PJ) are each, and in their own ways, concerned that humane treatment should be communicated to those subject to the legal process (e.g. defendants) (e.g. Tyler and Huo 2002, Tyler 2003; see also Elek 2019 [in this issue]). TJ and PJ focus on how humanisation can be reassuring to, even (especially for TJ), empowering those subject to law. It enables them to see for themselves that the punishment is, in fact, "fair enough" (e.g. Schinkel 2014). For advocates of PJ, those subject to law's violence can see for themselves that the process is fair: it enables their free participation; treats them with dignity as an unique individual; it shows that it attends carefully to their version of events; demonstrates to them that justice personnel are motivated by a concern for them and can be trusted, etc. Rather than mindlessly processing people and so disempowering and degrading them, through free participation, the person's encounter with the authority the authority of the court can not only be dignified (as in PJ), but empowering. This can aid her willingness and ability to comply with the requirements of the court. TJ and PJ argue that humanisation values can convert the efficiency versus humanisation zero-sum game into a win-win.

While both PJ and TJ propose a way of out of the efficiency-versus-humanisation bind, they nonetheless remain conventional in the object of their focus. In common with most policy and academic literature, PJ and TJ concentrate almost exclusively on what humanisation *does to and for* defendants, victims and others whose fates are determined by justice officials. This is in-line with the focus of academic enquiry on the potential of humanisation either to empower and include (as PJ and TJ would like to see it), or, to disempower and degrade them (e.g. Garfinkel 1956, Carlen 1976, McConville *et al.* 1994, Newman 2012). Thus, thinking to-date has tended to adopt the point-of-view of professionals as the agents who *impact upon* the people as the objects they process. Importantly, much of this work in fact reads off from professional accounts what those subject to the courts feel. In other words, most research has tended to examine the experiences of people through the eyes of professionals dealing with them. The accounts which professionals give to researchers may be viewed by researchers with a benign or critical eye. This in turn gives rise to the hotly-debated as to whether professional treatment is empowering

or degrading. Yet by standing back from this debate we can see that both these friendly and critical traditions are preoccupied with what the process *does for and to* the people coming before the courts. Distinctively, this article relocates the gaze of enquiry. Rather than looking at what humanisation may do to those coming before the courts it asks instead: what does humanisation do for and to professionals, (especially lawyers and judges),[2] who conduct and witness it?

Even in the lower and intermediate courts, humanisation work is essential. Indeed, without humanisation work, the sense of the otherwise-empty routine operation of "efficient" assembly-line justice would be imperilled. In common with the arguments of PJ and TJ, the work of humanisation enables, rather than obstructs, expeditious case disposal. In contrast, however, to TJ and PJ, this article does not focus on what the work of humanising processes does to assuage the concerns of the recipients of legal decisions, but how a sense of humanisation assuages the potential anxieties of professionals who are responsible for fair process and just outcomes. While not disputing the claim that humanisation work may often achieve its explicit purpose to contextualise the person and her offending, I argue that humanisation work simultaneously achieves a second latent, but more profound, consequence.

Humanisation work cleanses cases of their potentially noxious ambiguities. So, and in contrast to the efficiency-humanisation conundrum discussed earlier, the work of humanisation enables, rather than obstructs, expeditious case disposal. By conceiving of humanisation work as a collaborative activity which professional identities, beliefs and ideals of potentially adulterating influences, the article unearths what the work of humanisation *does for and to* legal professionals (especially judges and defence lawyers).

Successful humanisation work purifies cases of their potentially polluting ambiguities which would threaten elevated professional beliefs and ideals. The article is illustrated with examples from research into the process of mitigation and the uses of pre-sentence investigations and reports. The aim of the four year study, was to conduct a direct comparison between how sentencing judges interpret and use particular individual pre-sentence reports in intermediate court cases and what the writer of those same individual reports intended to convey. The research incorporated four elements. These were: 1. An ethnographic study of the construction of pre-sentence reports in two sites in Scotland deploying "shadow" report-writing in which the field-based researcher prepared a "shadow" (i.e. mock) report based on the same information available to the pre-sentence report writer who prepared the real report. This enabled a comparison between the "shadow report and the real report and proved to be a particularly valuable way of eliciting what the report writer intended to convey (often implicitly) in specific parts of a particular report and the reasons for doing so. 2. An observational and interview court-based study of the use of these same (and other) cases, with interviews with the sentencing judges, defence lawyers and prosecutors. 3. A series of focus group discussions with intermediate court judges throughout Scotland discussing general and specific issues relating to specific pre-sentence reports, including those already observed. The judges were sent the case papers in advance and asked to review them in the same way in which they normally would. 4. A series of moot sentencing hearings with pre- and post-interviews with

[2] Generally speaking, in nominally adversarial systems, responsibility for investigating and attending to the unique individual defendant bears particularly heavily on defence lawyers and judges, typically assisted by pre-sentence investigators (who may be social workers, probation officers or others from a range of backgrounds). This is not to deny that prosecutors play a part, and indeed their humanising work may be more acute in nominally inquisitorial systems (see e.g. Field 2006, Hodgson 2006).

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intermediate court judges and defence lawyers using anonymised case papers whose production and sentencing had already been observed.[3]

1.3. Structure of the Article

The article proceeds as follows. Section 2 explains that court professionals face a potential dilemma. On the one hand, as justice professionals, lawyers and judges are self-consciously aware of their personal responsibility in each case, and are bound to be acutely sensitive to the need to humanise punishment. Yet at the same time, court professionals feel obliged to dispose of cases as expeditiously as possible. That being so, Section 3 asks how judges and lawyers are able to dispose of cases relatively free from worries about fair process. Having explained the limitations of conventional explanations relying on an internal discourse of rationalisation or denial, Section 4 initiates the concept of "case-cleansing". Drawing on Mary Douglas' social anthropology of the construction of ideas of purity and pollution, Section 4 argues that, where successfully accomplished, the work of humanisation cleanses cases of potentially threatening ambiguities. Particularly important is the defendant's posture towards her own culpability for an offence to which she has formally pled guilty. Left unresolved such ambiguities threaten to pollute inviolable principles, including: the free participation of the defendant, the presumption of innocence, and conviction beyond reasonable doubt. Developing the concept of case-cleansing, I consider the role of social status and social distance. In many jurisdictions, the "dirty work" of case-cleansing conducted by humanisation work is delegated and re-delegated, distancing and refracting the voice of the person to be punished from the court. Concluding, Section 5 explains how humanisation work may not only contextualise the offence and offender, but through its case-cleansing solidify the social norms and collective identities of criminal court communities. Reflecting on the normative implications of this empirical conceptualisation, the article considers the effects of distancing and delegation in humanisation work and the value of closer communications in the conduct of humanisation work.

2. Professional Responsibility and Potential Qualms

A recurring preoccupation of judges and lawyers is the need to balance the mechanistic requirements of efficiency, speed and standardisation with a focus on upholding inviolable principles including the presumption of innocence, and free participation. As we saw earlier, in legal professional and academic discourse these ideas are seen to be mutually contradictory. It is normally taken as a self-evident truism that the more efficient the court process, the less fair it is and vice versa. A perennial anxiety is about how best to "balance" these two apparently competing virtues. In the work of the lower and intermediate criminal courts judges and lawyers are subject to expectations to "dispose efficiently" of cases as speedily and with as little effort as possible (e.g. Tata 2007a, Mack and Roach Anleu 2007, Roach Anleu and Mack 2017). This can lead to an awkward sense of justice becoming like an assembly line or factory with insufficient concern for the individual and her participation, thus querying the legitimacy of the process, being seen to imperil the precious liberal rule of law values to which they must subscribe (e.g. Morgan 2008). Lawyers and judges frequently complain of the pressures that they are under and their fears that the process is increasingly becoming a "factory", "sausage-machine", "assembly-line" or "cookie-cutter", in which the demands of speed and standardisation crush the opportunity of the defendant to tell her story and be treated with humanity. For example, defence lawyers expresses a sense of awkwardness and

[3] The main sources of data comprised transcripts of five separate focus groups with judges discussing specific cases; five moot sentencing exercise transcripts; 55 interview transcriptions comprising 22 pre-sentence report writer follow-up interviews, 17 post-observed sentencing judge interviews, 11 one-to-one defence lawyer interviews, five moot pre- and post-observed sentencing interviews with defence lawyers, 10 court observation diaries, 43 weekly fieldwork diary returns, 29 shadow reports and 29 original reports with their attached papers. The main research participants were: 22 report writers, 26 intermediate court judges and 11 defence lawyers. ESRC Award Number RB000239939.

a degree of embarrassment about the impact of extrinsic (e.g. legal aid) changes on their ability to spend time with clients and so relying on personal circumstance information gathered in the pre-sentence report (Tata 2007a, 2010). Tata (2007a) documents that most lawyers were willing to observe the deleterious impact of changes to payment structures on the work of *other* lawyers, but refused to countenance that these same changes had any negative impact on their *own* personal professional practice.

However, some readers may wonder whether lawyers and judges are really subject to any misgivings about the fairness of the process they constitute. One view is that legal professionals more or less jettison acclaimed legal principles for expedient, cynical and self-interested motivations (e.g. McConville and Marsh 2014). So, the thinking goes that legal professionals replace: the presumption of innocence with the presumption of guilt (e.g. Sudnow 1965, Mulcahy 1994); the principle of free and fair participation with the overt pressuring of defendants; and the concern for the client's best interest with the lawyer's self-interest (e.g. Newman 2012). In that way, it could be supposed that judges and lawyers are subject to no potential qualms about the justice of the process they constitute because of they do not, in reality, hold to their vaunted professional values.

However, it cannot be so simple. While professionals have to find ways to adapt and their ideals to the imperatives of daily reality, neither can they completely relinquish them without invalidating their own professional identity. Lawyers and especially judges have to be acutely conscious of their responsibility to some idea of justice. Simply to deny that would be to deny their own purpose, as well as their own moral and social elevation as "professionals". Professional discourse holds the values of individual personal responsibility to be central (e.g. Marshall 1939, Sommerlad 2015). This is why, for instance, lawyers and especially judges are acutely sensitive to criticism of the system they constitute, often seeming to take it personally, anxious to justify their *personal* practices (e.g. Tata 2007a, Jamieson 2019).

This can be seen for example in the ways in which the potentially troubling practice of plea bargaining or negotiation is described. So central is the practice to the mass disposal of cases by way of guilty pleas that it poses questions about the presumption of innocence and free and fair participation. Judges and lawyers tend to be concerned to defend and justify their own practice. For instance, many tend to dislike the term "plea bargaining" since it may connote something vulgar, grubby, "underhand" or "seedy" (Flynn and Freiberg 2018, 19-21). Flynn and Freiberg (2018) report that judges were anxious to "'put a more positive shine' on the process": "Using the word bargaining or deal implies that it's almost a bit underhanded, or that it's not a fair process or a fair outcome" (Defence lawyer, Flynn and Freiberg 2018, 21). Similarly, members of the judiciary tend to be somewhat ambivalent about the term "sentence discounting", preferring more refined terms like "allowance" (Gormley and Tata 2019). Such discomfort speaks, albeit in different ways, to a more general ambivalence or anxiety about such practices which could be seen to "trade" a guilty plea for some perceived benefit: "There's nothing noble about this. It's just a seedy little bargain that we enter into with criminals (…). It's just not an ethically justifiable stance" (Brown 2017, 223).

How is it possible for legal professionals to reconcile daily assembly-line practice with cherished legal principles?

2.1. The Problem of Ambiguities

The particular problem on which this paper focuses is that of formal admissions of guilt (in nominally adversarial systems, the formal plea of "guilty"), where they appear, in some way, to be contradicted, minimized, or equivocated by the defendant's account. While it is well known that the lower and intermediate courts around the world rely on admissions of guilt, a straight, unambiguous denial of guilt may be unwelcome, but it does not, in itself, raise troubling questions of legitimacy.

However, what is more awkward and troubling is the non-ideal defendant whose position appears to query (explicitly or implicitly), the legitimacy of the process, so disrupting the smooth flow of case disposal. For example, her account to the court may be ambiguous or at odds with the formal plea; appears confused; explicitly or implicitly defiant (Weisman 2014); exculpatory; or tactical in some way, (e.g. Jacobson *et al.* 2015). This includes: the person who exhibits a contradictory (e.g. exculpatory), or, an insincere admission of guilt (e.g. Bottoms and McClean 1976), equivocal guilty plea (e.g. Weenink 2009, Bibas 2012) or, obvious disengagement, cynicism, reluctant conformity, or, "passive acceptance" (e.g. Weenink 2009, Jacobson *et al.* 2015); or, is palpably not an informed, rational decision-maker (e.g. struggling with addiction or other problems). For the admission to be consistent with the inviolable idea of a freely participating defendant who willingly admits guilt, the admission has to be seen by the court as free and sincere.

Defendants who appear to be less than wholehearted in the formal admission of guilt; or whose account of their guilt seems contradictory; or, who suggest or imply pressure or outright coercion to admit guilt; or, whose posture appears to exude cynicism about the fairness of the process; or, who appears confused, in distress, or, unable to cope with or comprehend the process, all pose important challenges to the legitimacy of the process, which cannot be ignored (Weisman 2009, Martel 2010, Bandes 2015, van Oorschott *et al.* 2017). To ignore these implicit challenges would be to fail to address potential qualms about the fairness and legitimacy of the process. This portends the prospect of hesitation about the legitimacy of (and specifically the genuine consent to), a guilty plea in the instant case, and guilty pleas in general upon which the system depends.

How are judges and lawyers reconciled to constituting a process, which could be regarded as falling short of what they themselves must hold as core ideals? Let us first consider the conventional way in which this problem tends to be explained as an internal discourse of self-justification.

3. How are Potential Professional Qualms about the Fairness of the Process Managed?

The first point to note is that we should not expect that expression of qualms about the legitimacy of the process to be vented openly. "The suppression of emotion and personal feelings is a key attribute of traditional conceptions of the profession" (Roach Anleu and Mack 2019 [in this issue], 7). Court professionals must learn when not to show signs of embarrassment or guilt to the court community. This is key to professional emotion work (e.g. Roach Anleu and Mack 2017, Bergman Blix and Wettergren 2018). Weisman (2014) points out that to do so, would engender group embarrassment and question loyalty to the group. Although writing about the showing of remorse by offenders and others, Weisman's arguments can be adapted to court professionals:

> For a member to show remorse for actions that the [court] community has deemed honourable, or principled, or courageous is tantamount to betrayal just as the refusal to show remorse for actions that are viewed as heinous are occasions for collective moral outrage. (Weisman 2014, 16)

So a key element in the craft of professional performance is learning whether, when and how to show signs of discomfort. In the collective and collaborative effort to "dispose" of cases expeditiously, doubt, awkwardness or embarrassment about the speed and cursory nature of proceedings should not normally be very apparent. To do so would be to be seen to query the social norms of the court community, and be seen as an act of disloyalty, a taboo. How are these potentially troubling feelings managed? First, I will outline the standard way of answering this question, premised as it is on individual self-justification, before offering a distinctive thesis about the cleansing work of humanisation.

3.1. Discourses of Denial and Rationalisation

Existing work on how potentially troubling feelings are managed among criminal court professionals has tended to suggest that the potential discord between venerated ideals and the disappointing reality is explained through an *internal individual* dialogue of rationalization.

Perhaps the most common resource in criminal justice for explaining how people avoid full responsibility for their wrongs was sketched out by Sykes and Matza in relation to "juvenile delinquents" more than sixty years ago (see also, for example, Presser 2003, Maruna and Copes 2005). Juvenile delinquents employ a range of techniques of neutralization and distancing (see also Cohen 2001; Bauman 1989, 208-221 on "adiaphorisation"). In criminal justice work scholars have applied this idea to the work of court professionals. Tombs and Jagger (2006) argue that judges (like Sykes and Matza's delinquents), seek to neutralize and justify their decisions to imprison: denying responsibility for their decisions; denying harm (only a summary case, previous imprisonment), and by condemning the condemners (e.g. the appeal court, academics and others unaware of the reality). Individual professionals can and do tell themselves and each other a range of justifications: "these are trivial, meaningless cases with negligible consequences"; "these defendants are really guilty criminals who are 'in denial'"; "they are tactically game-playing"; "too stupid to understand"; or, "that this is just my job and I am not really responsible" (e.g. Mulcahy 1994, Newman 2012). More generally, defence lawyers may, where their financial environment has radically altered, justify advising clients to take different decisions which the lawyer used to describe as unethical, by recasting case facts and employing a range meanings to explain the ethical "duty to serve the best interests of the client" (Tata 2007b).

Yet while recognising that this justificatory talk forms part of the discourse of the lower and intermediate courts, such explanations are not, in themselves, be sufficient. Previous explanations of the "rationalizing" accounts of judges and lawyers (e.g. McBarnet 1981, Mulcahy 1994, McConville *et al.* 1994, Tombs and Jagger 2006) have tended to pay scant attention to the importance of the professional self-image of judges and lawyers.

As justice professionals, lawyers and judges are bound to regard themselves as carrying a weight of duty in three ways. Firstly, judges and lawyers in the lower and intermediate courts are starkly reminded every day of the consequences of the desperate plight of people about whom they have to make penal decisions. They are faced with a relentless parade of human misery. As one sentencer put it: "If you've got any feelings at all, you're seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out (…)" (Roach Anleu and Mack 2017, 19).

Secondly, self-identifying as "professionals", not "mere" business people, demands that judges and lawyers must make some reference to higher ethical and altruistic responsibilities incorporating valour, honour, public service, and duty to others (Sommerlad 2015), even if the ways that is done is contingent and indeterminate (Tata 2007a). This idea of being professional is typically understood by legal professionals as an immediate personal, individual responsibility (Abbott 1988, Sommerlad 2015).

Thirdly, lawyers but especially judges are well aware of their responsibility as the practical custodians of justice. Even if sentencing is a collaborative process (e.g. Tata 2007b), judges tend to read "the master narrative of judicial independence" as bringing a sense of a weight of individual, personal and inescapable responsibility (e.g. Jamieson 2019). The difficulty of sentencing lies in its uncertainty and the heavy consequences for the defendant (Roach Anleu and Mack 2017).

This triple sense of duty with which lawyers and especially judges, albeit in varying ways, must identify, means that the comparison with Sykes and Matza's juvenile delinquents cannot be straightforward.

While judges and lawyers can generally only express in relatively muted and subtle ways, qualms about the legitimacy of the process they constitute, they seek signs of reassurance from those subject to punishment. For example, court professionals observe the body language of the person to be sentenced not only in court, but as she or he leaves the court after sentencing to see whether or not there appear to be signs of acceptance. Indeed, there can be a tendency to revel in stories about those who, despite being punished not only accepted their punishment as deserved but praise the fairness of their treatment by the court. In interviews with researchers, judicial sentencers can be pleased to recall with quiet pride the manifested acknowledgement of their fairness, especially when they hear it directly from the person herself (e.g. Jamieson 2019, Tata 2019). In muted ways, judges observe their professional pride in the fairness of their sentencing. Commonly, courtroom professionals note how the person reacts to her sentence and judges may delight in recalling how despite receiving a heavy sentence, the person recognised verbally or non-verbally the fairness of the court. For example, a recurring motif of judicial recollection is the sentenced person who despite not being the subject of leniency is recalled nonetheless to accept of the fairness of the judge's treatment:

> And interestingly when we were visiting [name of nearby] Prison they always asked them what their view of the sentence was. And mostly the view of the sentence is that it was 'a fair enough sentence', you know, standing back from it and those who considered that the sentence was fair were much more easily managed in the system than those who considered that the sentence was unfair. [Judge, Focus Group 6]

Similarly, defence lawyers may take pride in describing how their rapport with their clients boosts client self-esteem (e.g. Tata 2010).

In other words, justice professionals (lawyers and especially judges) seek signs that their work is fair. Fairness may and often is signaled by other professionals in the court community. However, the most potent and convincing sign that the court's work has been fair is from the sentenced person's own communication – both through non-verbal communication (e.g. their perceived posture to the court) and in the account the person appears to give about the offence and their view of the legitimacy of the process. .

Thus, rationalisation through a self-justifying internal dialogue cannot, by itself, be sufficient for judges and lawyers to assuage the potential menace of ambiguity in the person's posture towards the court compared to her formal plea. As well as an internal dialogue, more importantly and convincingly, as members of court communities, judges and lawyers participate in social, collective practices, which assuage, preventatively channel and largely head-off potential concerns.

Let us now explore more fully the idea that humanisation work transforms and recreates apparently messy ambiguous defendant postures, cleansing them of their unsettling ambiguities. The threat of ambiguity and uncertainty about the true factual guilt and moral responsibility of the person to be sentenced is resolved through humanisation work, which shows the person as accepting his/her imminent punishment.

4. Case-Cleansing

Mary Douglas' seminal anthropological account of purity and pollution can help us to understand the threat which ambiguous admissions of guilt pose and how this leads to the transformation (cleansing) of cases. Douglas (1966/2002) argues that dirt is not defined universally, nor, biologically driven. What any given community may regard as "dirty" is culturally generated idea. That which is regarded as dirty is socially defined. Dirt is that which offends what is seen as the natural order. "[D]irt

is essentially disorder (…). Dirt offends against order" (Douglas 1966/2002, 2) It is that which is out of place, which does not belong, which is discordant. For Douglas classification is a universal social urge not merely an individual cognitive need:

> In chasing dirt, in papering, decorating, tidying, we are not governed by our anxiety to escape disease, but are positively reordering our environment, *making it conform to an idea*. (Douglas 1966/2002, 3)

Dirt is what offends certain key cherished, sacred *ideas* of order, classification and normality, which constitute the group. Dirt, in the form of unsettling ambiguity, pollutes and contaminates the purity of these ideas. Dirt is what does not fit into the group's ontology: it is neither one thing nor the other. It threatens venerated, totemic ideas. To avoid endangering the purity of revered ideas, purity and dirt must be separated:

> In short, our pollution behaviour is the reaction which condemns any object or idea likely to confuse or contradict cherished classifications (…). Defined in this way [dirt] appears as a residual category, rejected from our normal scheme of classifications (…). Discordant [cues] tend to be rejected. (Douglas 1966/2002, 45)

Douglas (1966/2002, 47-8) argues that in practice anomaly and ambiguity are synonymous because they challenge and pollute cherished principles and categories. Applying this to the sentencing process, we can see that the person who formally admits guilt, but who, at the same time, appears to the court to minimise, deny, or whose narrated account appears to be at odds with that formal admission, threatens to pollute the clear distinction between categories of guilt as opposed to innocence, freedom of choice as opposed to coercion, participation and the presumption of innocence. Discussing Douglas' thesis, Turner observes that *liminis personae* are almost always considered polluting:

> The concept of pollution 'is a reaction to protect cherished principles and categories from contradiction'. [Douglas] holds that, what is unclear and contradictory (from the perspective of social definition) tends to be regarded as (ritually) unclean. The unclear is the unclean (…). From this standpoint one would expect to find that transitional beings are particularly polluting, since they are neither one thing nor another; or may be both; or neither here nor there or may be nowhere (…), and at the very least 'betwixt and between' all the recognized fixed points in space time structural classification. (Turner 1967, 97)

The removal, or, cleansing of this contaminating dirt can be collectively cathartic, strengthening shared group bonds of belief and belonging. Cleansing is a way "to regain life – or strength – for an individual, a community, or an environment as a whole, and the purification rites, also known as cathartic rituals, have a major role to play in this".[4]

Humanisation work, which in nominally adversarial countries, is carried prior to sentencing, cleanses the case of its offensive, noxious, threatening features so that it is disposed in accordance with sacred legal ideals (e.g. freedom of choice; the presumption of innocence; participation in one's own case; consistency balanced with attendance to the unique individual). Resistant / discordant narratives (e.g. denial of guilt; denial of true culpability; confusion or passivity) are translated and transformed into acceptable categories (e.g. unequivocal admission of guilt; participation; attendance to the unique individual).

4.1. Delegation

Typically in nominally adversarial countries this cleansing is done through delegated humanisation work. The case is then returned to the courtroom, having been cleansed of such 'dirt' and the person can then be seen to be punished with certainty and confidence. The person manifestly accepts her guilt, and ideally, is remorseful,

[4] Perhaps it is instructive to note that "catharsis" is derived from the Greek *catharsis*: "to remove dirt or a blemish (*katharma*) for the purpose of making oneself, an object, or one's environment pure (*katharos*)".

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in effect willing her own punishment. In this way, the natural order of the criminal process in which defendants willingly plead guilty, has been challenged but vindicated: the person willingly accepts her punishment.

The stress and uncertainty of liminality means it must be time-limited. To transition the liminal defendant to the status of culpable offender requires that the discordant mess, the dirt has to be cleaned up. Here the concept of "dirty work" first sketched out by Hughes is useful.

4.1.1. "Dirty Work"

"Dirty Work" is work which is believed to be necessary, but obnoxious, repellent, demeaning (Hughes 1951), tainting and stigmatising "… those pariahs who do the dirty work for society are really acting as agents for the rest of us" (Hughes 1962, 7).

> Dirty work refers to those aspects of their tasks that most workers would prefer not to do (…). Those who work in these occupations typically look for ways to neutralize stigma, ways to rationalise, justify, assuage, or explain their actions to others as well as themselves (…) [work that is] figuratively unclean.

Hughes (1962, 6) notes that dirty work derives from an:

> [U]nwillingness to know unpleasant facts. That people can and do keep a silence about things whose open discussion would threaten the group's conception of itself, and hence its solidarity, is common knowledge (…). To break such a silence is considered an attack against the group.

Examples of "dirty work" include the work done by refuse collectors, butchers (e.g. Meara 1974, Simpson *et al.* 2011), funeral directors, psychiatric-related community decision-making (Brown 1989); probation officers (Mawby and Worrall 2013, see also Hochschild 1983). Ashforth and Kreiner (1999) develop Hughes' concept that there are three kinds of dirty work: physical, social and moral, which taints the image of those doing that work. Physical taint refers to occupations associated with what is "tangibly offensive", while:

> Social taint occurs where an occupation involves regular contact with people or groups that are themselves regarded as stigmatized (…). Moral taint occurs where an occupation is generally regarded as somewhat sinful or of dubious value. (Ashforth and Kreiner 1999, 416)

We can conceive of the humanisation work of defence lawyers and pre-sentence report writers as carrying out social and moral dirty work, who develop ways of coping with occupational stigma. Mawby and Worrall (2013) focus on explaining enduring occupational identity among probation officers: the buffers, tactics and explanations they develop to manage and maintain positive self-image (e.g. Ashforth and Kreiner 2014).

4.1.2. The Re-Delegation of "Dirty Work"

Dirty work tends to be delegated and re-delegated. Hughes (1958) suggests that delegation of dirty work from one group to another is "also a part of the process of occupational mobility." Applying this point to the criminal process, we can think of the distancing of judges from direct discussion with and understanding of the defendants about plea, attitude to the charges, and the messiness of defendants' lives.[5] It authorises "the practice of legitimate violence, leaving unsoiled the hands of the person inflicting" (Garapon, *Bien Juger,* p. 81, cited in Hodgson 2006, 228). Except in the case of unrepresented defendants, this dirty work with defendants has over time been delegated from judges to defence lawyers (Horovitz 2007) and re-delegated to pre-sentence report writers (Tata 2010), which in turn are being re-

[5] The endeavour of Problem-Solving Courts to encourage direct judicial-offender communication can be seen as an exception to this tendency towards delegation of dirty work. However, despite the considerable interest in this model, we should recall that such courts are very much the exception rather than the norm.

delegated from professional probation officers to the third sector, and self-employed casual workers (e.g. Johansen 2018) and private organisations (Robinson 2017, 2019).

4.2. Case-Cleansing and the Required Agility of the Defence Lawyer

An account of offending in a pre-sentence report following a guilty plea which appears not to fully and freely accept guilt and moral responsibility presents a potentially socially embarrassing situation for the defence lawyers and most especially for the judge who is in charge and is the custodian of justice. Goffman explains:

> [I]f the individual for whom embarrassment is felt happens to be perceived as a responsible representative of some faction or subgroup (as is very often the case in three-or-more person interaction), then the members of this faction are likely to feel embarrassed and to feel it for themselves. (Goffman 1956, 265)
>
> … At such times the individual whose self has been threatened (the individual for whom embarrassment is felt) and the individual who threatened him may both feel ashamed of what together they have brought about (…). (Goffman 1956, 268)

Continuing denial even after a trial can imply a failure, one observed publicly by the judge in front of the court community. It may be attributed to the defence lawyer's failure to manage the client. Here a judge explains the problem of an ambiguous guilty plea how s/he would "task" the defence lawyer to "put that right". An ambiguous guilty plea,

> can be very unhelpful actually because as you say you'll have had a plea of guilty, or, the case will have gone to trial and he's been found guilty in all cases in the remand court. And then the [pre-sentence] report will indicate a [legal] defence. Now that makes life very difficult because I think the [judge] is duty bound in these situations where a plea of guilty has been tendered and then it's made apparent in the report that there may be a defence to say to the offender's agent:[6] 'what is your client's position? Does he want to withdraw the plea of guilty?' You've got to explore that once it's been raised. You can't just leave it hanging there. It can be disadvantageous to the offender where it's after trial and he is still saying 'I didn't do it' (…). But the [defence] agent will almost invariably try and put that right. [Interview Westwood Judge 5]

Following a guilty plea an account in the pre-sentence report in which the defendant appears to minimise responsibility or be exculpatory, (or not fully and freely accept guilt), presents a socially embarrassing situation most especially for the judge who is in charge of the court. The judge is the custodian of justice, and therefore, embarrassment which may felt by the judge and is a problem for the defence lawyer who could be seen as responsible for having failed to protect the court from the embarrassment (cf Goffman 1956, 265-268). Defence lawyers tend to be well aware of the potentially embarrassing impact of a defendant's account which maintains the claim of innocence following conviction at a contested trial:

> It's even worse [than disastrous] when they are found guilty and then are asked to give an explanation of the offence [to the pre-sentence report writer] and give the exact same explanation as they gave in court when they went to trial, as I had recently and the [judge] kept saying: 'But he's not admitting it! He's not admitting it!' And you say, 'well, well I know because he's just had a whole trial where he's denied it and he's giving his position' (…). 'He said he respects the decision [of the court], but he says he didn't do it. I can't really change it for you.' But this particular [judge] went on and on and on about the fact that 'he said the same thing in the [pre-sentence report] as he said in the [trial]'. [Interview, defence lawyer 4]

To address this potential inconsistency, the defendant is presented with a dilemma if she continues to maintain complete factual denial following conviction at an evidentially-contested trial. If she continues to deny guilt then she will appear to be "in denial", can expect a higher penalty and be seen as unsuitable for a rehabilitative

[6] "Agent" is sometimes used as another term for "defence lawyer".

sentence. 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 time-waster. This dilemma means that the low-risk course of action is to plead guilty. Having done so, the defence lawyer must then be vigilant about the possibility of an account to the pre-sentence report writer which could appear to the court to imply an account of the plea which may appear to the court to be less than free and wholly sincere. Here a defence lawyer explains his/her awareness of his/her social obligation to manage clients and cleanse ambiguous 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. This guy is saying that, and I'm thinking about there might have to be a proof of mitigation about this.' 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. [Interview, defence lawyer 7]

Judges observe the role of the defence lawyer in "putting right" an ambiguous admission of guilt. In nominally adversarial systems the defence lawyer is the key actor. S/he is expected by the court community to persuade the client to wholeheartedly admit guilt. Thus, from the perspective of the defence lawyer, it is crucial that clients, having formally pled guilty, do not then provide an account to the report writer which could be seen by the court to be at odds with that guilty plea. It is understood that a central job of the defence lawyer is to manage the accused, her expectations, and display an acceptance of legitimacy of the process. As a judge explains:

> One of the important things is to try to keep accused persons within the system and if at all possible [for them to] see that the disposal is either inevitable or is a legitimate sentence, that he accepts it as a legitimate sentence. And there's actually quite a lot of man management in the defence agents [i.e. lawyers] and so on explaining things and the court explaining to the accused. [Judge 18 Focus Group 6]

A key way in which the accused persons come to see, and at least be shown to see, the sentence as legitimate and accepted is by heralding the opportunity of humanisation (and so implied mitigation) of the person. Defence lawyers tend to encourage the person to bear in mind that how they present themselves in a pre-sentence report interview is important and to avoid an account which is at odds with the plea of guilty. However, where the person in interview with the report writer presents an inconsistent account, the report writers may also play their part in cleansing the case of its potentially messy ambiguity.

4.3. Humanisation Work Cleanses the Defendant's Account about the Offence Incident

Where a person presents an account of the offence which appears to be inconsistent with her formal plea of "guilty", pre-sentence report writers may, in their report to the court, tend to minimise this tension. They may subtly recast the person's account so as to avoid it appearing to be a denial of the earlier guilty plea. By doing so report writers may hope to mitigate the sentence and in that way still be true to their professional welfare values to "support" the person. Thus, the humanisation work of reports simultaneously reconciles the potentially jarring discord between abstract ideas of how things should work compared with the everyday reality by cleansing the case of its ambiguity about criminal guilt and culpability, while *also* hoping to mitigate the sentence.

However, sometimes this high-wire balancing act between erasing a denial and mitigation of sentence can be miscalculated. In doing so, it may render the person more blame-worthy. For example, "Patrick Swan" pled guilty, among other charges, to theft and then to a separate (and more serious) charge of possessing of an

offensive weapon ("namely a lock-back knife"). In his interview with his report writer ("Geena"), it became apparent that Patrick said that he was carrying a screwdriver *not* a knife:

> Patrick was paid back money so he bought some 'blues' [valium] with it. He always carries a screwdriver with him [Geena later clarified that this was used for stealing] in a coat pocket. [Diary, pre-sentence report interview observation].

However, in her Report, under *Offending History*, Geena fudges Patrick's account in such a way that it is not at odds with what he had pled guilty to (carrying a "lock-back knife") while not mentioning that he had told her that was only carrying a screwdriver:

> Mr [Swan] advised that he had an offensive weapon[7] with him when apprehended and reported that this weapon was used to access locked areas and that he had no intention of using it to harm [any] person. [Pre-sentence report about "Patrick Swan"]

Despite the attempt to argue earnestly for a non-custodial sentence, this reconciliation of the inconsistency between Patrick's formal guilty plea and his account about the weapon, means that Patrick is seen to "fit the profile" of a violent drug addict. Crucially, it was

> the weapon, which struck me as being not within the, if you like, the parameters of chronic drug abuse like theft, stealing, buying drugs. [Focus Group 7, judge 14]

In other cases, the report writer may cleanse the case of the person's account denying the sincerity of her formal guilty plea, but not quite completely. For example, "Carrie Villiers" pled guilty to assaulting a police officer (including biting him); and a breach of the peace (public order offence) in a hospital. At interview with her social work report writer ("Jodie"), Carrie is asked to explain the offences:

> Carrie leans forward and tells Jodie that she is going to tell her 'stuff', but doesn't want it written down (…). On her way [home] the police stopped her for 'no reason'. She struggled as they tried to put her in the car, and *she maintains they banged her on the head*. They however said she had done this. She received a head injury and as a result went to the hospital. 'Why were you shouting?' Jodie asks. Carrie explains that she was being dragged from the police car. She points to her underarms and says she was covered in bruises because the police handled her so roughly. 'They were not handling you appropriately?' Carrie shakes her head: 'no, they weren't.' Carrie admits she can't remember everything that happened, but she 'wasn't treated right'. She doesn't know why she was picked up in the first place (…). Regarding the assault [she had pled guilty to], Carrie is unsure what happened [she had been drinking that night], but she looks shocked by the description of her biting the police officer: she 'didn't do that!' Jodie suggests that if she did bite him, there must be evidence, and she should speak to her lawyer about 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. [Diary, social work report writer interview observation, emphasis added]

In contrast to what Carrie told her, in Jodie's Report, under the section entitled *Offending Behavior,* Jodie wrote:

> In discussing the matter with Ms Villiers *she acknowledges her involvement in the offences* (…). Ms Villiers states that she was en-route to the taxi rank when the Police arrested her. She reported that it was at this time when Police Officers were forcing her to enter the Police vehicle that *she banged her head* to injury and needed medical attention (…). 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. *However, Ms Villiers indicated that whilst she pled guilty to the offence of Police Assault, she has no recollection of such actions.* [SER – case 15 Carrie Villiers, emphasis added]

[7] In Scots law, both a knife and a screwdriver can be classed as "an offensive weapon".

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Thus, pre-sentence report writers play their part in purifying the defendant's account of the offence and guilty plea so as to be mutually consistent, or at least potentially consistent.

However, at times report writers may (unwittingly or not) to include some disruptive, dirty ambiguity about legal guilt and moral responsibility. Here, on the one hand, having cleansed the case of its ambiguity about the incident with the police, Jodie explains that she tries to use report to suggest scepticism about the charges against Carrie Villiers (which she has already pled guilty to). In this way, she is staying true to her professional penal-welfarist mission to "support" Carrie:

> We move onto the offence account, noting that Jodie has mentioned that Carrie was injured entering the police car. Jodie explains that the [judge] would be wondering how Carrie ended up in the hospital in the first place (…). She continues that she thinks that it is important to tell the [judge] 'what, where and when' an event happened, to give Carrie's version of events. Jodie nods and reminds me that Carrie was vague about what happened and also did not wish Jodie to mention this in the report. However, Jodie feels that by mentioning this, she is not only telling the [judge] 'what happened', but is also giving the [defence] lawyer an opportunity to question what in fact took place that night. Jodie therefore is leaving it open for the lawyer to 'dig this out'. Jodie pulls a face, she isn't colluding with Carrie or trying to write a plea for her, but she feels she is 'supporting' her by doing this. If there was evidence that Carrie was mishandled, this is for her lawyer to raise this as an issue. Similarly in discussing the second offence Carrie has no recollection of what happened yet she pled guilty. Jodie then points out that unless the court has evidence that Carrie did indeed bite the officer, she shrugs her shoulders. [Diary discussion of Carrie Villiers pre-sentence report]

Jodie is giving the defence the opportunity to "question what in fact took place that night." Jodie is leaving it open "for the lawyer to dig this out". Jodie questions whether the biting took place and wants the court to do so.

4.4. Humanisation Work Tends to Assist Expeditious Case Disposal

Importantly, through its effects in cleansing cases of their ambiguities, humanisation work may tends to assist, rather than inhibit, instrumental case disposal. Rather than slowing the process, pre-sentence investigations are instrumental to the expeditious disposal of cases through the courts. Often, lawyers find that reports replace the need for any lengthy plea in mitigation. For example:

> Sometimes the [judge] will say to you: 'There's a recommendation here for probation. Unless you disagree with that, you don't need to address me.' And then, so it's a tool to (…) speed up the whole process because it puts everything in context. [Interview defence lawyer 10]

5. Conclusions and Implications

5.1. The Latent but Profound Effects of Humanisation Work

Most literature on humanisation tends to view it as the benign hero in the story of an otherwise mechanical system. It is seen as a way of correcting and rebalancing a process which is too often offence-focused, cursory and mechanical. It tends to be seen as a small moment of understanding, humanity, empathy and compassion in a brutalising system otherwise oblivious to the unique person. Literature and practice concerned to mitigate punishment and prick the conscience of the court invests great hope in this moment of compassion and humanity. It heralds a chance to inject a degree of substantive and social justice (often called "social context") into an otherwise cold, uncaring system, concerned only with the mechanistic virtues of consistency, standardisation, speed and disposal (e.g. Newman and Ugwudike 2013). On the other hand, some writers contend, (or even despair), that this work makes little real difference. Humanising the person is typically thought to be inversely

related to efficiency (Hagan *et al.* 1979, Ward 2016), or, little more than decorative symbolism (Rosecrance 1988).

My argument differs from both of these claims. It would, of course, be churlish to deny that humanisation makes a difference by offering a more rounded and contextual picture of the defendant, mitigation and a more lenient sentence *may* tend to result. *Yet in doing this, and at the same time*, humanisation work plays another role: the cleansing of the case of its ambiguity, especially in the defendant's account of culpability.

In addition to an "ideology of triviality" (McBarnet 1981) and presumption of guilt which may envelope dialogue, this paper suggests that we need also to attend to humanisation work. How the defendant is seen to relate to the story of the offence, tends to be cleansed of its dirty and threatening ambiguities. Implied challenges are negated and the defendant's posture is aligned more closely to that of the "ideal" defendant who consents to her impending punishment. Through its promise, anticipation, and enactment, humanisation work tends to cleanse the case of its generally implied, or (occasionally) explicit, resistance and defiance. The story of the defendant is purified of its noxious qualities re-presenting her as a culpable offender accepting her deserved punishment.

Humanisation work does much more than provide a discourse to enable professional action to be rationalised and doubts to be explained away. It tends to cleanse cases of their unsettling ambiguities, which threaten to pollute the sanctity of venerated legal ideas. Humanisation work cleanses and purges cases of potentially unsettling ambiguities, implicit or explicit defiance, and anxieties that the defendant is not treated humanely and accordance with cherished legal principles. We might go further. Does the level of professional confidence in the fairness of justice systems depend, at least in significant part, on the ability of humanisation processes to solicit the manifestation of active consent of the defendant to her own punishment? Showing that the violence of punishment is not questioned, but accepted, converts and heads-off the potential for doubt about the validity and fairness of the process into confidence and conviction.

More ideally still, the showing of sincere remorse affirms that the person who is to be harmed does not see it is as an act of power or violence, but one which is just and deserved "by affirming that the institutions that imposed punishment did so with cause" (Weisman 2014, 77). This is why signs of remorse are so widely sought. There is no more convincing evidence to the court that the person accepts the fairness of the violence to be done to her than the manifestation of authentic remorse. Despite the problems of being able to detect the authenticity of remorse in the shadow of law's own power (e.g. Weisman 2009, 2014, Bandes 2015, Rossmanith 2015, 2018), the courts must search for it. An authentic performance of remorse is the ultimate legitimator of the violence of sentencing. In this most dramatic way, professionals can see, hear, and feel (Rossmanith 2015) how completely the person accepts the legitimacy of the harm about to be imposed upon her. In fact, the truly remorseful subject is seen to accept its legitimacy so completely that she has begun to punish herself. Remorse is regarded as the ultimate affirmation of the court's fairness and is the key reason why, even though they can never know whether or not remorse is genuine, courts must search for it.

Court community identities are bound by shared norms, cherished moral values and principles. While expeditious case disposal is a collaborative enactment, professional court communities coalesce around special, elevated ideas (e.g. free individual choice and participation; attendance to the voice of the unique individual freely allowed to tell her story). Thus, the validity and compatibility of efficient case disposal goals and practices with these elevated principled is always open to doubt. Can what is seen as the pragmatic, compromised solution of efficient case disposal be squared with inviolable legal principles? This is the question is tested routinely and recursively. It is tested through repeated case-by-case practice where a defendant may not appear

wholeheartedly to accept factual guilt or moral culpability, or may appear confused, contradictory or defiant. In justice regimes regarded by court professionals as fair to the defendant, the work of humanisation processes may generally head-off and resolve potential hestitation, showing key principles such as participation, consent, the presumption of innocence to have been put to the test, and then accepted by the defendant. Faith in ideals is more convincing when it is shown to have been questioned, tested and revalidated. The boundaries of the shared values of the court community can be seen to have been queried and then reaffirmed, fortifying shared identity and beliefs. This makes manifest to the professional court community that the speedy expeditious case-disposal *is in practice* compatible with venerated legal values.

5.2. What Humanisation Work Does To and For Professionals

What, then, are the normative implications of the empirically-focused conceptualisation proposed by this paper? One could be tempted to assume a rather bleak view of the normative implications. Humanisation work could seem simply to be a way of purporting to humanise only in reality to de-humanise. That would be a misconception. Humanisation work is very far from necessarily being an empty charade or deceit. I have sought to show that aside from its overt work in showing the person as a rounded human being, it does latent material work on cases to cleanse them of their threatening ambiguities about the person's posture towards the authority of the court. I have sought to explain how successfully performed humanisation work reduces ambiguity and the potential hesitation of professionals.

In doing so this paper offers a different vantage point to view the role of humanising processes. Conventionally, humanising processes such as mitigation and treating people subject to the law's force with dignity, respect and listening to their stories are regarded as beneficial to those subjects of law. Approaches such as therapeutic jurisprudence (e.g. Winnick and Wexler 2003) and procedural justice (e.g. Tyler and Huo 2003) reveal how perceptions of fair process can increase a sense of legitimacy among those subject to law. By attending carefully to the feelings and dignity of the person to be subject to law's coercion, the pay-off is that they are more likely to comply than resist. Without necessarily disputing this argument, this article views it through the opposite end of the telescope. It focuses on how professionals *perceive* those subject to the law's violence feel they are treated. If the elevated moral and social status which justice professionals claim means anything, it has to mean that at some level they are obliged to see themselves as more than mindless bureaucrats processing people through law's violence and more than simply business people solely interested in monetary profit. At the very least the self-identity of the justice professional necessitates regarding one's role as not producing injustice. No judge or lawyer can declare callous indifference to just process: to do so would be to invalidate their *raison d'etre* and risk being ostracised by their peers. So it is that sentencing and the wider criminal court process *must* seem fair – or at least not palpably unfair – to those carrying out its work especially the violence of sentencing.

5.3. Normative Implications

That justice professionals genuinely care about just process and need reassurance that the person to be punished has been listened to, treated with dignity and accepts her culpability, is in itself, surely no bad thing. To a lesser or greater extent professionals demand the reassurance that the process has allowed the person fair chance to participate and that she now accepts the imminent violence of punishment. In that way the case-cleansing effect produced by humanisation work validates the role of the justice professional. This does not mean that professionals are somehow cynical or disingenuous. What it means is that *they need to be reassured that the process is fair*.

How then, one may ask, should we seek to encourage practices which allow the person to be punished to be as humanised as possible? The effects of humanisation work is contingent: it can render the subject of sentencing more easily punishable or less easily punishable. Humanisation work enquiring about the person's story, listening to her, (including the need to show that the court is listening), *can* help to show the person as a whole and so render her punishment more difficult. What features should we look for and which should we avoid?

In a brilliant analysis of social organisation which enable indifference to suffering, Bauman (1989, 208-221) identifies three key arrangements. By thinking about how these social arrangements we can sensitise sentencing policy and practices to *avoid* the following three practices of dehumanisation. First, by stretching the distance between action and its consequences "moral responsibility belongs to no one in particular, as everybody's contribution to the final effect is too minute or partial (…)" Second, by "evicting the face" from "routine human encounter in which the face might become visible and glare as moral demand (…) the moral responsibility for the Other is suspended and rendered ineffective" (Bauman 1989, 216; see also Levinas 1961/1991). Third, by rendering the person merely the aggregation of discrete traits, actions which are narrowly targeted on those discrete traits ignore the impact on the whole human being.

One of the most important contingent features is perceived distance: remote and close interactions. Indifference to suffering is made easier when "stretching the distance between action and its consequences beyond the reach of moral impulse (…) when actors have to gaze at the consequences of their deeds" (Bauman 1989, 215). Thus, distancing the penal subject from the sentencer is likely to render her more easily punishable. We have seen how the practice of delegation (e.g. by the court to the defence lawyer to the professional probation officer and now to non-professional pre-sentence report writers) dilutes the impact and further refracts the intended meaning of the person's story. It also "stretches the distance" between the sentencer and the person to be sentenced, so that moral responsibility is diluted and "belongs to no one in particular". The more delegated the communication with the person the easier it may be to condemn her, or at least dispose of her case in relative indifference. As the late Barbara Hudson would remind us, punishment should always be carried out in bad conscience.

If we want to humanise the subject of sentencing, then the person to be punished should be directly communicated with by the person making that decision. The person to be sentenced should be able to offer her face-to-face direct narrative representation rather than appearing as a disembodied, "de-faced" collection of risk factors. For that reason, policies and practices which regard the physical presence of and communication with the person to be sentenced as a luxury to be done away with in the name of "efficiency" hit a deeper point than they acknowledge. Reforms (e.g. remote sentencing where the person who appears by video-link) is indeed more "efficient" – not simply in that it saves costs, but also in that it makes sentencing less morally challenging than having to face the person to whom one has to do harm. It also means that direct and closer communication hold out potential impact on those judicial sentences and others involved in determining punishment.

While procedural and therapeutic approaches emphasise the potential positive impact on the person to be punished, we should also ask what is the affective impact on those delivering punishment and how this directly compares that with the experiences of those sentenced. We still know remarkably little about the perspectives of defendants in specific observed cases and how that directly compares in the same cases to professional perceptions of defendant experiences. Much of what we think we know derives from the perspectives and assumptions of practitioners. We need to know more from defendants and, indeed, the extent to which their interpretations and perspectives are shared by professionals. Rather than reading-off from professionals what they *believe* sentenced people feel, we should enquire more

seriously about the *impact on the judge* of delegated communication between judge and defendant as opposed to direct communication on the judge. For example, does more direct communication between defendant and judge tend to yield greater empathy, or, can it also result in its own distancing practices? How is "the routine case-driven character of judicial work" (Travers 2016, 343) affected and affect attempts at closer communicative dialogue? Even if the experience of defendants may or may not be to feel more humanised, do judges taking up positions in courts intended to enhance closer direct communication (e.g. problem-solving courts) change their outlook in sentencing as a result of such work? Do such effects endure?

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