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# Remorse in Context(s): A Qualitative Exploration of the Negotiation of Remorse and Its Consequences

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## Abstract

The presence or absence of ‘signs of remorse’ is often understood to have consequences for judges’ sentencing decisions. However, these findings raise the questions, first, how ‘remorse’ is communicated and demonstrated by defendants within court settings, and second, whether remorse plays a uniform role across and between various offence and offender types. Drawing on ethnographic data gathered in a Dutch criminal court, we contextualize remorse to answer these questions. First, we demonstrate that the performance of remorse has to strike a fine balance between potentially competing legal and moral narrative demands. Second, we identify three different typified ‘whole-case narratives’, within which defendants’ performances of remorse assume differential levels of importance. In doing so, we seek to complicate binary portrayals of the role and consequences of remorse, arguing for a more holistic and narrative understanding of sentencing practices.

## Keywords

Courtroom interaction, ethnography, judicial decision-making, narrative, remorse, sentencing

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## Introduction

Remorse, despite existentialist protestations that one ‘can call me a criminal, [...] but no one has the right to judge [my] remorse’ (Sartre, 1943), is a routine object of judgement in virtually all Western criminal law jurisdiction (Bandes, 2016; Duncan, 2002; Eisenberg et al., 1997; Everett and Nienstedt, 1999; Martell, 2010; Proeve and Tudor, 2010; Sundby, 1998; Wood and MacMartin, 2007). But judging offenders’ remorsefulness, and then the relevance of that remorsefulness to the decision at hand, is by no means a straightforward affair to judicial decision makers. Moving away from the question as to how *accurate* decision makers’ perceptions of defendants’ remorsefulness actually are (see Bandes, 2016), we wish to pay attention to the interactional and narrative complexities that attend to the negotiation and imputation of remorse in a Dutch court site.

We arrived at this issue through our experiences doing ethnographic fieldwork in a Dutch criminal court where we noted the absolute centrality of performances of remorse to judges’ decision-making processes. Our observations thus lend further support to the empirical finding that ‘signs of remorse’ (Tombs and Jagger, 2006) are crucial to judicial decision makers. However, our study also demonstrates that defendants’ remorsefulness is by no means straightforward and unambiguous to these judicial decision makers. First, rather than a given ‘sign’, we argue that remorse should be seen as a local performance in which two potentially conflicting requirements have to be negotiated. While judges, on the one hand, ask of defendants to ‘tell their story’ and give a causal and temporal account of what happened, defendants must simultaneously ‘take responsibility’, which gesture is then part and parcel of their performance of remorse in court. Second, we aim to show how the interactive performance of remorse in the courtroom is made sense of within the legal and moral constellation of the case, or what Tata (1997, 2007) has called the ‘typified whole-case narrative’ (see below). We identify three distinct, morally charged, ‘whole-case narratives’ (Tata, 1997, 2007) in which defendants’ performances of remorse are weighed and evaluated differently (see also the Crown Court Sentencing Survey, 2012). In this way, the aim of our intervention is not just to further understanding of the role and the effects of remorse but also to inject prevailing binary conceptualizations of remorse with some contextualization and nuance.

## Contextualizing remorse

Remorse is a quite nebulous concept; a concept, furthermore, with a history. The centrality of remorse in criminal law is contingent upon a particularly Western and modern conception of the criminal subject. Where Roman Law, for instance, did not treat (criminal) acts as a manifestation of individual intentions, modern Law instead ‘assumes a subject that is answerable for its acts in the world’ (Pottage, 2014: 153, see Thomas, 1977), as it considers deviant acts ‘expressions of some complex authorial psychology’ (Pottage, 2014: 153). It is only with the development of a more modern conception of criminal subjects that the notion of remorse enters the picture. Now one *can* and indeed *has* to relate one’s criminal action to oneself. This, of course, is what Foucault points out when he sketches the rise of a modern, juridical concern with the ‘soul’ of the deviant

subject (Foucault, 1977). Weisman (2009, 2014: 51) further argues that remorse contrasts productively with *apology*: as criminal justice practices are coercive, ritualized, and characterized by unequal power relationships between participants, 'there is always the possibility that expressions of self-condemnation will be more strategic than authentic, more calculated and ulterior than spontaneous'. If apology is about forging a relationship between a wrongdoer and an *audience* and hence always other-directed and potentially untruthful, remorse is commonly understood as a relationship the wrongdoer forges with *himself/herself* and his/her past doings. For that reason, remorse assumes central importance as an expression of the criminal subject's authenticity. Therefore, remorse has a greater 'truth effect' than apology and therefore is a particularly salient aspect of sentencing practices.

Studies into the role and function of remorse in criminal justice systems indeed suggest that remorse plays an important role in judicial considerations. The previously mentioned Crown Court Survey of 2012, for instance, shows that remorse on the part of the defendant is the most cited mitigating factor in judges' sentencing decisions (2012). Eisenberg et al. (1997: 1631–1632) similarly show that jurors' attribution of remorse to defendants tends to mitigate their sentencing, that is, unless jurors perceive the crime to be particularly vicious. Martel (2010) unpacks the absence of signs remorse in a case study of Robert Latimer who notoriously neglected to show remorse for the 'mercy killing' of his severely disabled daughter in 1993. More specific about what constitutes remorse is Sundby (1998), whose study of jurors' perceptions of defendants potentially facing capital punishment shows that defendants' physical demeanour, attire, and expressions of sorrow all contribute to the jurors' attributions of remorse. Tombs and Jagger (2006) note that 'signs of remorse', together with 'signs of hope' like a secure job, play an important role in sentencers' decisions, in particular when it comes to cases perched on the 'custodial threshold', that is, those cases where both a community sentence and a prison term are viable options.

Making the distinction between the remorseful and the remorseless seems to assume an almost routine character in such settings. However, remorse should not be treated as an unambiguous, straightforwardly binary distinction. Weisman (2009, 2014) is particularly insistent upon the necessity to dereify remorse and to move beyond simplistic portrayals of remorse as either absent or present. Instead, he foregrounds remorse as 'marked by negotiation, contestation, surrender and opposition, claims and counter-claims, and power and resistance' (Weisman, 2014: 8). Remorse is not only an imputation on the part of decision makers; it is also a performance. As a performance, it is embedded in specific contexts. In the following, we make the effort to not only dereify but also contextualize remorse.

Now, if remorse is not simply a 'sign' but rather a negotiated, and hence possibly contested accomplishment, the court setting is arguably a pivotal site in such negotiations. Indeed, Bandes (2016: 5) argues that it is an understudied site in research on remorse and that sustained attention to the question how courtroom settings 'influence the expression and interpretation of remorse' is needed (Bandes, 2016: 5). That courtrooms are, in general, sites of truth production, storytelling and narrative strife is demonstrated by the tradition of 'courtroom studies' or that of 'law and communication' (see e.g. Atkinson and Drew, 1979; Bennett and Feldman, 1981; Conley and O'Barr, 1998;

Jackson, 1988, 1996; Komter, 2000; Matoesian, 1993; Travers and Manzo, 1997; for an overview of the field, see Dingwall, 2000). These traditions also show that courts are not simply truth-finding sites but moral spaces (Emerson, 1969: 204; Lempert, 1977) and settings where Garfinklean ‘status degradation ceremonies’ take place (Garfinkel, 1956, Lempert, 1977). This field of research sensitizes researchers to the fact that the courtroom is never a neutral site, but one rife with interactional conflicts and negotiations. These studies also demonstrate that courts are sites in which non-professional participants (witnesses, victims or defendants) in particular face contradictions and tensions, for instance, between ‘telling one’s story in one’s own words’ on the one hand and doing it in such a way as to be compatible with legal classifications and rules on the other (see e.g. Conley and O’Barr, 1998).

Tata (2007) shows that sentencing research is dominated by a series of binary oppositions, for example, the contrasts between offenders versus offence variables, or the distinction between mitigating and aggravating factors. Whether an artefact of legal self-understandings or sociological–statistical modelling, Tata (2007) argues that these binary conceptualizations do little to understand sentencing as a holistic and interpretative practice. While sociological–statistical modelling of sentencing decisions can helpfully point out racial, ethnic, or gender bias in sentencing across the (statistical) board, these binary understandings of ‘judgecraft’ (Tata 2007) the role played by typified whole-case narratives in judges’ sentencing decisions (see also Mascini et al., 2016). Rather, cases are produced holistically, synergistically and narratively:

The accounts or ‘stories’ of it [the case] presented to and interpreted by sentencers are patterned, normalized, and typified. Access to the social world is not direct or unmediated: the criminal process necessarily must impose some narrative or interpretative order upon it. (Tata, 1997: 403)

Examples of such a typified whole-case narrative are for instance the typical ‘car thief’ involved in a typical ‘car theft’, or a more or less typical shoplifting incident involving teenage girls, and so on. Tata’s analysis resonates with, for instance, Sudnow’s (1965) distinction between ‘normal’ and ‘abnormal’ crimes (1965) and with those seeking to understand the role of typification in legal-bureaucratic practices (e.g. Baumgartner, 1992; Hawkins, 1992; and more generally, Lipsky, 1980). The centrality of narrative in this concept furthermore suggests that these are storytelling typifications, which not only mobilize images or categories about a typical thief or a typical theft but also invoke assumptions as to the kind of ‘plot’ that characterizes certain cases (see also Ewick and Silbey, 1995; Jackson, 1996). While Tata (2007) argues that these typified whole-case narratives serve *cognitive* purposes, we suggest that they may also serve *moral* purposes, in that they inform decision in that they inform decision makers’ evaluations of remorse. We suggest that the notion of the typified whole-case narrative helps to understand *why* remorse matters more or less for different offence types.

Based on the above considerations, we inquire how remorse is performed and what role it plays in sentencers’ decision-making practices. More specifically, we ask how the context of the courtroom interaction shapes performances of remorse and how judges

make sense of these performances in the legal and moral context of typified whole-case narratives. First, however, we elaborate on the methods used.

## **Method: Tracing cases**

### *The research context*

This article is based on an ethnographic study into judicial sense making and sentencing practices, focusing in particular on what in the Netherlands are known as *police judges* (*politierechters*). These police judges are in charge of sentencing cases that are deemed relatively simple on an evidentiary level and are punishable with up to one year of prison. These cases make up for the vast majority of criminal justice cases: In 2008, out of the 141,937 criminal cases that were sentenced by the criminal courts, 126,494 were handled by police judges (Ministerie van Justitie/Ministry of Justice 2010). Police judges generally face case loads of between 10 to 20 cases per court day. Prior to the court session, these police judges have read and summarized the official *dossiers* accompanying these cases. As the Dutch system is moderately inquisitorial, the judge leads the inquiry in court, which tends to be based on their reading of the dossier prior to the court hearing. Defendants are not required to attend their own trial and are allowed to remain silent or refuse to answer certain questions. However, there is widespread consensus among judges that defendants should take their chance to ‘tell their story’ to show that they are ‘willing to talk’. Defendants are usually asked to relate the events in their own words, and after the treatment of the facts and his or her ‘personal circumstances’, they have the last word before the police judge reaches an oral verdict. Other participants in court include the prosecutor and possibly a defence lawyer; in these ‘smaller’ cases, (expert-) witnesses are rarely called upon.

### *Ethnography and ‘shadowing judges’*

The ethnographic approach taken in this study reflects a focus on the mundane and everyday level of judicial work practices in that it relies heavily on informal as well as loosely structured conversations and open-ended observations of court sessions. More specifically, data were gathered through the method of ‘shadowing’ judges (see also Halliday et al., 2008). This method consisted of the following steps: first, the first author of this piece familiarized herself with the dossiers making up a single court session, after which she observed the judge’s ‘file work’ (Van Oorschot, 2014a, 2014b), asking questions about individual cases and eliciting the judges’ pretrial impression of the case. Having observed their file work, the researcher then followed them to court, where she noted detailed transcripts of the interrogation with the defendant. After the court session or in between the treatment of cases, the researcher asked the judge to reflect on the cases just adjudicated and sentenced. Often, conversations concentrated on judges’ appraisal of the impression defendants made in court and the extent to which they had incorporated this concern with the defendants’ stories and attitudes into their sentencing decisions. Particular attention was paid to those cases in which judges explicitly mentioned offenders’ remorsefulness (or lack thereof) as relevant components of their sentencing decision. This shadowing method ensured that cases could be traced from case file to verdict

and as such assisted in highlighting judges' interpretative work. Fourteen judges have been 'shadowed' this way, with the total sum of cases amounting to around 180.

### *Data analysis*

Data analysis proceeded along inductive lines and was characterized by open coding. This means that the researcher at various points engaged in preliminary data analyses, so that observations could be checked and remaining questions answered in the field. Through this inductive method of analysis, we were able to follow up on recurring tropes in judges' sense-making practices, which allowed us to tease out the three whole-case narratives we will report below: the typical drug addict, the typical 'angry young man' and the typical 'explosive couple'. While not all cases were so easily categorized, these three typified whole-case narratives kept recurring in judges' sense-making work, and, as we will see, they had consequences for their evaluations of offenders' remorsefulness. The cases we present to substantiate our findings are selected to represent, in detail, the formation of these narratives. As our purposes here are primarily explorative and theoretical, these cases represent not the most common case, but exemplary 'extreme cases' in which the conceptual issues of concern are played out with particular force or clarity. Names of individual judges and defendants were treated confidentially, and anonymity is ensured by changing names, dates and, where necessary, other identifying characteristics of the individuals and cases involved. The subsequent sections report the results of our inquiry into the contexts within which remorse is demonstrated, contested and evaluated. First, we show how judges evaluate performances of remorse, as defendants navigate between providing a legal and moral account of their case. Second, we will show how remorse gains different meanings, depending on the three typified whole-case narratives we identified.

### **Defendants negotiating remorse: Between legal and moral demands**

Knowing that the 'paper world' of the case file can only tell them so much about individual defendants, judges often point to the court room as a space where they can 'get a sense of what kind of person the defendant really is' and where these defendants can 'tell their side of the story'. These simple phrases, often evoked by judges, hide a central tension. For the 'story' demanded of defendants is both legal and moral in nature. Due to the inquisitorial nature of the Dutch judicial system, defendants are asked for a factual account of the events in question. That is, questioning in court proceeds by way of judges asking the defendant for temporal and causal sequences of action, reflected in opening questions such as 'and then what did you do?', 'and how did you respond to that?', or 'what did you then say?'. Legally, facts and circumstances have to be made comparable with various other renderings, such as those of eyewitnesses and police officials (which are present in the file). However, the court session also functions as a moment in which defendants are given the option to provide a *moral* rendering of their thoughts and actions during and following the facts in question. Here they are required to show remorse by taking responsibility for what they have done and, importantly, how

they have changed (see below). Many defendants manage to negotiate this interactional dilemma by injecting their factual rendering of the story with frequent apologies and admissions of bad judgement, switching back and forth between a legal and a moral repertoire. Yet our data suggest that while defendants are usually asked for factual stories, it is generally the moral story that is far more important to judges (particularly in cases in this type of court, which tend to be quite straightforward on an evidentiary level). The judges studied here, when asked, affirm the importance of remorsefulness to their sentencing decisions. Sketching their work as one of negotiating between (still widely shared) rehabilitative ideals and their task to ‘protect society’, they point to defendants’ remorsefulness as a highly relevant factor to their sentencing decisions. One judge comments:

The question is, are they *really* sorry? Are they *really* shocked with what they did? I had a really nasty case some time ago, with a couple of young guys charged with the armed robbery of a store. In court they were trying their best to appear as laconic as possible, making themselves out to be such cool guys. Look, if they tell me they saw the videotapes of their robbery and would say something like, ‘Gosh, is that really me? I didn’t know I was capable of doing such a thing!’ But they were indifferent, they didn’t see the gravity of what they had done. Needless to say I sentenced them accordingly . . .

This insistence on defendants ‘taking responsibility’ is widely shared among the judges studied here and resonates with the oft-noted distinction between defendants who attribute responsibility for their crimes externally – that is, locate it outside of their own control – and those who locate responsibility ‘internally’ (Bridges and Steen, 1998; Mascini and Houtman, 2002). However, ‘taking responsibility’ is not *enough*. When asked about defendants’ remorsefulness, judges focus on the question whether the defendant has demonstrated that he or she has ‘made a change’ or ‘turned things around in their life’. Judges seek for evidence that the defendant has truly transformed himself or herself (see also Weisman, 2009, 2014). Thus, the judges studied here routinely check if the defendant has sought help for drug- or alcohol-related issues, for instance, and gauge to what extent the defendant shows himself/herself a ‘functioning adult’ with a job or a ‘meaningful way to pass the day’, for example, by going to college or through volunteering. Thus, remorse, to the judges studied here, is a performance that includes both demonstrating personal change and taking responsibility.

Above, we indicated that defendants are required to navigate between a legal and a moral account and that it is the latter that gains relatively more importance in judges’ sentencing practices. The following exceptional case underlines this finding in a remarkable way. Defendant Martin has been accused of domestic violence – a charge of shoving his wife against the wall – and of resisting arrest by two police officials who showed up at his and his partner’s doorstep. In court, Martin is accompanied by a lawyer and makes a nervous impression. When Judge Peters asks the standard questions as to the events in question – when did you get home, what did you say to your partner, how did you react? – he tells the judge that he had been drinking a lot that night and doesn’t remember much. When pressed, Martin falters and is at a loss for words. There is no account he can give for his behaviour, he says:



But I see that I have a problem, I understand that. [...] When I came to my senses in the police cell I thought, what am I doing here? And then they told me what I did. It shocked me. That's not who I am. [...] I am sorry, but that is not an excuse.

Martin goes on to tell the judge he has taken steps to find treatment for his alcohol addiction, and, in his 'last words', emphasizes that:

I have had a reality check. I think I have taken a step in the right direction, and I don't want this to happen again, ever. [...] This is no way to spend your life. I really want to continue my treatment, but some supervision would certainly be in order.

Judge Peters praises Martin for his 'wise words' and tells Martin he wants to focus on Martin's future. He has decided that a suspended sentence with parole supervision is best for Martin. Considering the fact that Martin has quite a criminal record, this sentence is quite mild. Explaining his choice for this sentence, Judge Peters tells Martin that, 'We'll have to compensate for what happened – this you [Martin] understand, but we all, and particularly, you, want this to never happen again.' Martin's case is interesting because it shows that perhaps the most effective way to 'show remorse' is to *not* meet the requirement of providing a legally relevant account. Ironically, it is precisely in *failing* to provide both temporal and causal narrative of his involvement in the events that Martin manages to give great weight to the *moral* account about himself the judge is seeking. Finally, we conclude this section with another exceptional case in which the defendant, Ms. Carpenter, initially seemed to be in an excellent position to offer a successful performance of remorse. Nevertheless, her performance failed to impress Judge Mason. Therefore this case demonstrates the intricate requirements of providing a convincing performance of remorse. Ms. Carpenter was accused of throwing a glass of beer towards one of her friends. The glass had broken, and the victim had sustained rather severe injuries to her face. While this is a serious offense, Judge Mason had inferred from the case file that:

Ms. Carpenter 'is not trying to lie, and she hadn't immediately requested a lawyer but was just telling the police her story'. She also points out that Ms. Carpenter had attempted to get in touch with the victim after the offence [...]. These meetings also mean, to Judge Mason, 'that she never really meant to hurt anyone that badly. This really shows something about her as a person, it tells me something about her willingness to talk'.

Thus, based on the case file, the judge expected this defendant would make for a convincingly responsible and remorseful defendant, ready to show her regret, and her openness to change. But things appeared differently in the courtroom:

Judge Mason commences the inquiry in court by asking her a series of questions about the event in question. 'Yes, it happened', Ms. Carpenter immediately confesses, visibly intimidated by the court setting. She goes on: 'But I just think it's weird that she [referring to the prosecutor's summary of the legal charges] is using the words, "purposefully". I never meant to do this! I have spent a night in jail, then sought contact with the victim and we

talked a lot, and I've felt bad about it a long time. I even offered to pay her health insurance costs! It was such a difficult period for me back then . . .'

Judge Mason is growing slightly irritated. Ms. Carpenter seems to have a way of reorienting Judge Mason's factual questions back to the hardships she herself had faced during and after the offence. At some point Judge Mason tells Ms. Carpenter sternly, 'I see. But I must say, you seem to lack an appreciation of the severity of what you have done here, Ms. Carpenter.' The prosecutor, seeing her chance, chimes in, 'Because this really is about something terrible, isn't it? [Turns to the judge] I don't think Ms. Carpenter is showing a lot of understanding of what she has done, and the consequences of what she has done for the victim, to be honest'. Ms. Carpenter, shocked with the stern tone of both judge and prosecutor, has now started to cry silently, 'But, I never expected this . . .'. Judge Mason, unmoved by Ms. Carpenter's story or tears, in the end finds her guilty and sentences her to 100 hours of community service – conforming in her sentence decision to the prosecutor's stated demands. Over lunch after the court session, she notes, still somewhat annoyed, 'Look, she was talking about herself all the time, about how difficult this has been for her.'

Evident in the prosecutor's and judges' elicitation of remorse is a concern with the 'consequences of what she has done for the victim'. Ms. Carpenter however failed to live up to Judge Mason's previously appreciative evaluation. While the defendant did appear as a meek and cooperative young woman who was willing to provide a coherent factual account, Judge Mason faced what she perceived as a self-centred and self-pitying defendant. Thus, a successful performance of remorse should testify that defendants are ready to accept their moral burden, without complaining. So far, we have indicated the importance of remorse in judges sentencing and how it relates to the requirements to provide a legal and moral account. However, the way remorse actually can and should be performed also depends on the context that is provided by the typified whole-case narrative.

## **Courtroom performances of remorse in the context of typified whole-case narratives**

In this section, we will show how remorse gains different meanings, depending on three typified whole-case narratives (Tata 2007, 1997) we identified. More specifically, we argue that judges distribute and allocate responsibility for the criminal act differently within these whole-case narratives and that they, in doing so, attach varying levels of importance to defendants' displays of remorse. These three typified whole-case narratives are quite common, and while individual cases may never fully approach the most ideal-typical case, they nevertheless form an interpretative and – as we will argue – *moral* legal template that assists judges in their sense-making work.

### ***The drug addict: Remorse and empty promises***

A first recurring typified whole-case narrative in these judges' work is the drug addict facing charges of petty theft. This narrative is mobilized often in cases where the value of the stolen goods (in particular food items) only amounts to a couple of Euros and is generally coupled with the expectation that defendants are homeless. Often, these defendants have long criminal records, 'here you have 21 pages of small thefts', a judge notes

and explains, 'my immediate impressions is: must be a junkie!' Morally, this whole-case narrative reveals some tensions. On the one hand, as the life circumstances of these defendants are particularly dire, judges may find it difficult to attribute absolute moral responsibility to the defendant and rather blame his or her addiction. Judges also understand that a drug addiction is excessively difficult to combat, especially as these defendants have often little non-addicted friends and acquaintances left to help them sort out their life. Interestingly, our data suggest that it is often *these* defendants that are most uniformly apologetic, *most* apt to fully 'take responsibility' in court, and most keenly aware of the need to seek treatment. Clarence is one such a defendant.

Clarence has been addicted to crack cocaine for over six years, he tells judge Emerald in court. During that time, he frequently stole small items from supermarkets and corner shops; crimes for which he was repeatedly charged and convicted. As the defendant is in debt, a fine is not a desirable kind of punishment; judge Emerald is facing a choice between a community sentence or a custodial sentence. Clarence is deeply unhappy with the 'choices he has made', blames himself for everything that happened the last few years, and tells the judge that he has been seeking treatment with help of his parole officer, whose testimony is also present in the file. Judge Emerald sighs and tells him, 'I am sure you told us you were sorry and would change before. At a certain point we are just done handing out second chances.' He consequently sentences Clarence to a custodial sentence.

Many judges act similarly when faced with profusely apologetic and remorseful drug addicts, even when they have taken the requisite steps to better their lives. These defendants' narratives and demonstrations of remorse generally fail to convince judges, who then sentence according to the prosecutor's custodial demands. Not only do judges refer to defendants' (often quite long) criminal records as factors that make a noncustodial sentence difficult to justify; they also point to defendants' drug addictions as seriously undermining their chances of rehabilitation. 'We hear this all the time', one judge sighs, 'they *always* tell us that they won't do it again, that they see it's wrong what they've done, they will finally kick the habit, make a positive change in their lives, yadda yadda . . .' While defendants in this kind of typified whole-case narrative may display remorse, and even where judges generally demonstrate a concern with rehabilitation, their drug addiction discounts them as persons able to take responsibility and able to transform themselves, which makes them particularly likely to relapse into their old behaviour. Within this moral economy of responsibility, then, drug-addicted defendants are often *denied* the very status of a moral subject as their performances of remorse are judged as empty promises or inauthentic, strategically apologizing. Finally, we want to point out that the narrative of the drug addict is not uniquely tied to the sentencing practices of judges. A similar narrative was also found among Dutch police officers who tended to treat 'junkies' less considerate and were less likely to explain their actions to them, as they were seen as persons without moral sensibility (Van der Torre 1999). The notion that addiction discards moral responsibility is part of a wider societal discourse. In this discourse, addiction, particularly concerning the most criminalized substances, is seen as dangerous mainly because it means a loss of dependence, which in

turn threatens prevailing ideas about persons as autonomous individuals responsible for their own life trajectories (Cohen, 2000).

### *The angry young man: Walking a fine line*

The second typified whole-case narrative pertains to what we call the ‘angry young men’. Again, this narrative includes an appraisal of the offender – a youngish male with, in medicalized jargon, ‘anger-management issues’ – and of related offences, especially physical assaults taking place in public (e.g. in or outside of night clubs) and criminal threats, which may be directed at police officers responding to a call. Judges typically conceive of these defendants as prone to random, possibly alcohol-fuelled outbursts of verbal and physical violence. Judges often point out that physical assaults like these tend to originate in messy, chaotic fights, in which the line between active participant and bystander, as well as victim and offender, is quite blurry, ‘it’s often the winners [of the fight] who end up being the defendant; the losers of the fight, the victims’, a judge laconically comments. Indeed, judges often point out that responsibility is in actual fact *distributed* over the other participants in such fights: other participants who were probably equally inebriated, equally caught up in ‘peer-group dynamics’, and equally concerned with ‘showing off their masculinity’ – but who simply didn’t ‘win’. Nevertheless, defendants are unlikely to make a remorseful impression when they point this out to the judge. Indeed, cases like these are often characterized by very partial confessions (along the lines of, the defendant did push the victim, but never hit him, for instance), and defendants tend to emphasize that the victim is not innocent either.

Take for instance the case of Harry, a 22-year-old White male who is charged with the physical assault of another young man in a bar. The day prior to the court session, Judge Starr reads through Harry’s file carefully. Even though she notes small discrepancies between various witness statements, she does not conceive of this case as particularly complex, ‘I know enough’, she says after a few minutes of studying the file, ‘it’s all quite typical. Guy goes out, has a few drinks, gets angry for some reason, and gets violent’. In court, Harry is asked for ‘his side of the story’. While Judge Starr guides him through the events with help of temporally and causally oriented questions like, ‘what time did you arrive?’, ‘then what did you see?’, and ‘what happened after?’, Harry provides a neat narrative. That night, Harry elaborates, he had accidentally bumped into the victim who had reacted aggressively and gathered his friends. ‘They then threatened to kill me’, Harry tells Judge Starr:

So I asked police officers [who were patrolling the area and close-by] for help, but they said they couldn’t help, so I went back to my friend, but those guys approached me. And that’s why I felt very threatened, one of them was getting so close-by . . . and that’s when I head-butted him.

Throughout his answering of the judges’ factual questions, Harry refers a few times more to the threats issued by the victim and his friends and his anxious response to such a threatening environment and connects his statements using temporal and causal sequential markers such as ‘and then’, or ‘and that’s why’. In his defence, Harry’s lawyer

further emphasizes the threats issued by the victim and his friends. Getting the ‘last word’ – formal procedure in Dutch criminal law courts – Harry states that he is sorry about what happened and that he is aware that he shouldn’t have reacted the way he did. He also notes that he has sought psychiatric help to deal with the anxiety that overtook him at that moment.

At first sight, Harry both takes responsibility *and* has taken steps to change and mitigate that which made him react violently in the first place (i.e. he sought help for his anxiety). Despite this performance of remorse, and having no criminal record to speak of, Judge Starr cannot be swayed: she sentences Harry wholly according to the public prosecutor’s demands, that is, 120 hours of community service (half of which is conditional), sternly arguing that Harry should have known better and that there is no excuse for what he has done: ‘You are an adult man who is expected to take responsibility for his actions’. After the court session, the judge is rather dismissive of what she perceived as Harry’s self-excusing behaviours and reiterates her conviction that Harry has not sufficiently taken on the responsibility for what he has done. Now, providing a neat chronological and causal narrative – like the judge requested – here clearly competes with Harry’s attempt to successfully signal remorse. Even though he professes that he is sorry and has taken steps to seek psychotherapy, his narration of the events in question, which distributes responsibility for the event over various participants, including the victim, fails to express the requisite remorse. This example is particularly forceful because Harry was a quite ‘good’ defendant; he had been cooperative during the early investigation, was deemed well behaved in court and had a relatively brief criminal record.

Thus, defendants who note the distributed nature of responsibility in their efforts to provide a temporal and causal coherent story of what happened, run the risk of damaging their remorseful impression, as it suggests that they are not taking responsibility for their actions. ‘Look, he said, “I was afraid he was going to hit me,”’ Judge Dempsey comments on a defendant’s testimony, and continues jokingly, ‘and that’s when he started crying, probably’, and laughs, remaining unconvinced by the defendant’s statement that he had felt threatened by the victim prior to his assault. Not only do judges respond incredulously to the attempts of defendants to ‘distribute’ responsibility over themselves and their victim; in court, judges tend to emphasize that ‘we are not here to talk about them [the victim(s)], we are here to talk about *you*’, or that ‘you still had the responsibility to walk away when it got messy’. While judges know very well that responsibility is distributed over participants in such situations, defendant’s factual accounts should downplay or neglect this. If not, their performance runs the risk of failing to show remorse. And as judges tend to sentence these offenders according to the prosecutor’s demands – that is, they don’t mitigate these demands – our data suggest that such defendants are penalized for their perceived ‘unwillingness’ to show remorse. In light cases like this, the question is how exactly defendants like Harry may claim that their actions were self-defence while simultaneously demonstrating sufficient levels of remorse.

The narrative of the angry young man is again not uniquely tied to sentencing practices but is part of a wider discourse that links violence and aggression to masculinity. Central is the idea that young males, notably from working-class origins, cannot remain

passive when they are provoked and challenged by other males. Their aggressive responsiveness is then regarded as fear of acting pusillanimous and weak, especially before an audience of young males. Judges' accounts of these 'angry young men' also resonate with criminological studies of masculine violence that suggest that young males who lack conventional resources to enact dominant forms of masculinity, feel that violence is a necessary option when they sense that their masculine identity is threatened (see Polk, 1994, Winlow and Hall, 2009).

### *The explosive couple: Distributed responsibilities, remorse suspended*

The third narrative we identified can be called the 'explosive couple'. This narrative tends to come into play when judges are facing domestic abuse charges, or when criminal threats were made in the relational sphere. Importantly, judges tend to make inferences about the relationship between the defendant and the victim, incorporating additional typifications of the (female) victims of such relational violence. For instance, judges tend to stress that the female victims of such abuse are often not completely innocent themselves by pointing to the victim's 'difficult behaviour'. Or, the victim may be portrayed as a strategist, for instance, when the couple is caught up in legal disagreement over custody, so that these victims may have motives to file a criminal complaint (as a conviction would strengthen the victim's position in custody agreement negotiations). What prevails is the idea that these relationships are characterized by a dynamic between two partners who 'think it is normal, that people push or shove their partner in relationships' (Judge Starr). These kinds of relationships, in the words of judge Roberts, are 'explosive', within which the (often female) partner is conceived of as alternatively 'mad' or 'bad'. In these instances, judges – like they do in cases involving 'angry young men' – are prone to distribute responsibility for the act over both the defendant and the victim. However, and contrary to the 'angry young men' typified whole-case narrative, here the defendants are not always asked to take full responsibility to demonstrate the requisite levels of remorse. In court, defendants tend to mirror judges' perceptions of domestic abuse as a private matter between two equally responsible, quarrelling adults. They tend to portray their wives or girlfriends as excessively hostile and nagging, as psychologically unstable, as attention-seeking or as strategists trying to thwart custody arrangements. These strategies do not always work. When a young man told Judge Starr that even his girlfriend told him she hasn't been the best partner for him, Judge Starr tells him 'you are taking this much too lightly. You say that there are fights like this in every relationship. But you cannot do the things you did'. However, these strategies may also *work*: when they have the impression that 'more is going on in that family', that 'the wife isn't an angel herself' judges may be seen to the prosecutor's demands – or, in the case of a defendant accused of hitting his wife, creatively arrive at an innocent verdict. An example of the explosive couple typified whole-case narrative is provided by the case of defendant Jeremy. Judge Kingsley, in narrating his impressions of Jeremy prior to the trial to the researcher, is quick to point out that the victim, Jeremy's wife, seems to be suffering from borderline personality disorder, basing his diagnosis on a statement made by defendant Jeremy's brother. He also points out that the couple is caught up in custody agreement negotiations. In court, Jeremy tells the story of the circumstances leading up

to his arrest. He mentions the complicated divorce proceedings in which he and his wife are caught up and suggests that she filed a criminal complaint to receive custody of the kids. He also tells the judge he has long suffered from his wife's cheating and her mental ailments:

'It hurts. We've been together for 23 years. The first time she cheated on me I tried not to care. I did everything, by then: washing up, cleaning, and cooking. I was always careful to not irritate her.' Judge Kingsley then asks him about Jeremy's previous conviction for domestic abuse, in which the same woman had become a victim. Jeremy tells him that 'Back then, I was just cooking, cutting up some vegetables, and she had half a bottle of coke in her hand, and she empties it over my head! Normally I walk away, but that time I thought, enough is enough.' Judge Kingsley also asks him about the anger-management course Jeremy had taken as part of his previous parole conditions: 'yeah, I did that course. I thought it was me. Therapy and training. Until someone said, it's not you. I'm just a regular guy.'

On the face of it, Jeremy does *not* seem remorseful: pointing at his wife's role in previous, as well as this particular offence, he suggests that he is a 'regular guy', that 'it's not him'. He even suggests he is the *real* victim of his wife's manipulative ways; the court-ordered aggression regulation course he also brushes aside as not addressing the real problem, which – again – is his wife. At no point does Jeremy 'take full responsibility' for what happened, neither does he indicate to have changed even though he was willing to seek therapy. After all, the problem was 'not him'. Of course, this performance, strategic or not, resonates with Judge Kingsley's appraisal of the case characterized by the 'explosive relationship' narrative.

Given the available evidence, Judge Kingsley judges Jeremy not guilty: as one piece of evidence was an eye-witness statement by Jeremy's son, he argues that Jeremy's son was too young to testify: 'he's only 12 years old, and you can't expect a 12-year old to testify in such a case without any kind of expert present in the interrogation room'. With this piece of evidence disregarded, left is only the victim's statement – which itself provides too little evidentiary weight, Judge Kingsley argues, to convict Jeremy. Crucially, however, Judge Kingsley later tells the researcher that convicting Jeremy was simply not an option for him, but that this did require some creativity on his part: 'Leaving out the son's statement is a bit of a ploy, really. I could have used it, but I really didn't want to convict.'

Apparently, performing remorse – as consisting of both telling a story through taking responsibility and a willingness to change through seeking treatment – is in such cases not as vital as it is in cases that bear more resemblance to the 'angry young men' typified whole-case narrative. In both instances, judges recognize the messiness of the human relationships in which violence takes place, but in domestic abuse cases this does not always translate into the demand that defendants display remorse, that is, take full responsibility and seek help.

Finally, we want to point out that the explosive couple narrative is related to broader notions about first the role of the state in the domestic sphere of families and second to the interpretation of male violence against their female partners. Concerning the latter,

forms of male abuse can, in extremis, be seen as forms of conflict management between two partners in which the state should not intervene or they can be seen as forms of 'patriarchal terrorism' that do require state intervention to protect female victims (see Johnson 1995). With regard to the former aspect, the explosive couple narrative is also related to a discourse about the role of the state as guardian of public safety mainly, as it is in public space that citizens might unwillingly encounter other citizens that may harm them, whereas encounters between citizens in the domestic sphere is seen as a matter of individual choices.

## Concluding discussion

In the previous pages, we have outlined an approach to remorse that treats it as (1) a local performance in court, which may fail due to the court's sometimes contrasting legal and moral requirements and (2) a performance that assumes variable weight depending on the typified whole-case narrative that provides the context: defendants' performances of remorse tend to be doomed to fail altogether in the typified whole-case narrative of the drugs addict, require the denial of distributed responsibility in the angry young man narrative, and involve distributed responsibility and suspended remorse in the explosive couple narrative. Our contribution to the literature is, firstly, that we have pointed out that the court's dual function as a both legal (truth-finding) and moral space has important consequences for the ways remorse, as an interactional event, is performed. We have shown defendants face a catch-22 situation, within which factual answers to judges' factual questions may fail to express and demonstrate sufficient levels of remorse. Secondly, we have also demonstrated that these typified whole-case narratives serve not just cognitive but moral purposes as well, as they provide narrative templates that help judges answer questions such as, 'what was really going on there?' and 'how culpable is, in fact, the defendant?'. Situating our discussion of remorse within these three typified whole-case narratives shows that performances of remorse that 'check the boxes' may nevertheless fail to mitigate a sentence – in the case of 'typical' drug addicts – and that sentences may be mitigated in the very absence of performances of remorse – in the case of 'explosive couples'.

Our data, based on ethnographic fieldwork, even though they are suggestive of the interactional and narrative complexities that attend to judges' evaluations of defendants' remorsefulness, may not merit broad and sweeping generalizations to other legal or national contexts. Furthermore, it must be noted that the typified whole-case narratives we have discerned in our data themselves may be challenged over the course of the criminal proceedings (for instance, when new information proffered during the court session complicates narrative judges' typifications) and that the specific cases we have presented here are selected for their demonstrative value – not as representative of the full population of cases but rather as exemplifications of logics and narratives that structure judges' interpretative work. As an exploration of the situatedness of remorse, our data nevertheless raise important questions with regard to the role of remorse in sentencing practices. Politically, it may be desirable to reflect on the taken-for-granted assumptions that underlie these typified whole-case narratives. For instance, may the failure to attribute to drug-addicted defendants a moral, self-reflexive agency amount to



a denial of their subjectivity at all? Or, while the (moral) character of the victim does not tend to feature in judges' evaluations of violence outside of the domestic sphere, it *does* seem to play a role in their attributions of responsibility, and hence in their demand for 'remorse', in cases of relational violence, lending support to studies showing the existence of persistent gender biases within sentencing practices (Bond and Jeffries, 2014). In any case, while criminal justice practices may display a concern with the 'soul' of the defendant (Foucault, 1977), this concern is by no means evenly distributed over the defendant population. *Whose* 'soul' becomes a locus of (criminal) intent and moral responsibility comes to matter, and how we can understand these varying levels of importance attached to that 'soul' – these are questions to explore further.

Aside from these more immediately political concerns, there are important avenues to explore empirically. First, the judges we worked with seem hesitant to comment on defendants' demeanour. Therefore, we have not included this issue in our discussion of judges' perceptions of remorsefulness. However, at times they did permit themselves one small phrase. That is, judges would rarely say something about how the defendant dressed or acted, but they would in some cases comment that 'he was just sitting there' (in Dutch: *hij zat er maar een beetje bij*). The Dutch phrasing, even more so than English translation, conveys a sense of indifference, listlessness, an absence of urgency. Such remarks seem to offer a glimpse of judges' more immediately affective response to defendants in court and suggest that physically demonstrated indifference – 'just sitting there' – is an important aspect of their appraisals of the defendant (see also Duncan, 2002). However, we found little empirical evidence that defendants' 'indifference' directly influenced judges' sentencing decisions (unlike, for instance, Ward, 2006), but future research might unpack this affective dimension to performances of remorse in more detail (see e.g. Bandes, 1999, 2016).

A second question we would like to raise given our data pertain to the interactional catch-22 facing defendants in court. While our data do not allow conclusions on these matters, one does wonder whether the ability to navigate the potentially competing legal and moral demands in court is distributed evenly over the defendant population or whether it is concentrated in some groups rather than others. For instance, it is no stretch of the imagination to suggest that repeat offenders are more familiar with the court setting, and in particular with its moralizing function, and in that sense perhaps face less difficulty in both telling a factual story and displaying the requisite levels of remorse. Indeed, while Weisman (2009) suggests that remorse is desired, in legal settings, precisely because it is conceptualized as more difficult to 'fake' than simple apology, it is important to realize that remorse may become part and parcel of defendants' (and lawyers') defence strategy. Assuming, on the other hand, that most defendants in actual fact want to demonstrate remorse, another question to be explored is their capacity to do so. If decision makers' attributions of respectability and responsibility to defendants is bound up with defendants' social class (as suggested by e.g. Wodak, 1980), could the same relation hold for defendants' demonstrations of remorse? Or, could racial and/or ethnic stereotyping affect judges' attributions of remorse to defendants (Bandes, 2016; Everett and Nienstedt, 1999)? Considering the quite intricate interactional demands placed on defendants in court, a Bourdieusian vocabulary (see e.g. Bourdieu, 1986), in particular the notion of symbolic capital, could help to understand the greater

conversational ease with which some defendant populations may navigate the tricky waters of the court session as well.

As an exploration that aims to attend to the interactional and narrative complexities accompanying the negotiation and consequences of remorse in a Lower Criminal Court, this study indicates that remorse is not a ‘sign’, but the outcome of every day interactions and typifications. *Pace* existentialist protestations to the contrary, the judging of remorse is a routine activity in judicial contexts and in that capacity a fruitful site of further empirical study.

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