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ORIGINAL ARTICLE

Intermediaries in the criminal justice system and the 'neutrality paradox'

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Abstract

The intermediary special measure was introduced by the Youth Justice and Criminal Evidence Act 1999 (YJCEA) to assist vulnerable witnesses to give evidence in court. This article focuses on the role's relationship with its underpinning value of neutrality. Findings from 31 interviews with intermediaries in England and Wales and Northern Ireland, as well as judges in Northern Ireland, suggest that this aspect of the role is problematic and deserves critical examination. Though there is a broad commitment to neutrality among intermediaries, the role's practice reveals latent tensions and contradictions that contribute towards what I term the 'neutrality paradox'. This article uses the Bourdieusian concept of 'illusio' as an explanatory tool to examine deviations from the normative expectation of neutrality. It focuses on how intermediaries experience and conceptualize their own neutrality and explores how this can aid understanding of the role's scope and position within the criminal justice system.

1 | INTRODUCTION

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced a range of special measures to facilitate the evidence-gathering process in criminal courts in England and Wales

for those considered vulnerable.[1] Collectively, the measures sought to maximize the quality of evidence and reduce the stress associated with the criminal justice process.[2] One of these special measures is known as the intermediary, a role that has effected a 'culture change' in the treatment of vulnerable witnesses.[3] The intermediary, a communication specialist, is the only special measure that can be imposed between the questioner (usually the judge or a lawyer) and the witness. The function of intermediaries is to communicate 'questions put to the witness' and 'to any person asking such questions, the answers given by the witness in reply to them'.[4] The intermediary role is increasingly recognized throughout the criminal justice system and is gaining support among police, judges, and lawyers.[5] Furthermore, it is gaining international attention, with other jurisdictions using it as a model for their own communication assistance schemes.[6] Intermediaries are consistently represented as impartial, neutral, and objective.[7] As officers of the court, they share a responsibility for the administration of justice and the proper functioning of the judicial system.[8]

This article draws on the findings of an empirical, socio-legal enquiry based on 31 interviews with practising intermediaries in England and Wales and Northern Ireland as well as members of the judiciary of Northern Ireland. It centres on the key finding that intermediaries are embroiled in an ongoing struggle in terms of how they conceptualize and negotiate their neutrality in practice. The result of this struggle is what I term the 'neutrality paradox', which sees intermediaries defend the role's neutrality yet often struggle with its normative demands. After providing some background to the intermediary role and the normative basis of its neutrality, I briefly outline Bourdieu's concept of 'illusio'. The article then explores the notions of 'congruent' and 'weak' illusio in the context of intermediary work and how those performing the role conceptualize their neutrality 'at the coalface'. I argue that the normative underpinnings of the role are ripe for examination, which should take place within a wider recognition of intermediaries' work with witnesses on the one hand and defendants on the other.

This article contributes towards a greater understanding of neutrality within the criminal justice system and the nature of the relationships between criminal justice actors. The issues covered are of particular relevance for intermediaries reflecting on and coping with the tensions and challenges involved in their work. The article is also aimed at criminal justice actors such as lawyers and judges who interact with intermediaries and seek to better understand the scope and nature of the role. Finally, the issue of intermediary neutrality is relevant for policymakers in terms of how

[1] YJCEA, ss 23–30.

[2] Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (2011) para. 2.117, at <https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf>.

[3] P. Cooper and H. Norton, *Vulnerable People and the Criminal Justice System* (2017) 364.

[4] YJCEA, s. 29.

[5] P. Cooper and M. Mattison, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21 *International J. of Evidence and Proof* 351.

[6] See K. Howard et al., 'What Is Communication Assistance? Describing a New and Emerging Profession in the New Zealand Youth Justice System' (2020) 27 *Psychiatry, Psychology and Law* 300.

[7] Ministry of Justice, *Registered Intermediary Procedural Guidance* (2020) 6, at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/955316/registered-intermediary-procedural-guidance-manual.pdf>; Department of Justice of Northern Ireland, *The Registered Intermediaries Procedural Guidance Manual (Northern Ireland)* (2019) 14; J. Plotnikoff and R. Woolfson, *Intermediaries in the Criminal Justice System* (2015) 11.

[8] J. Plotnikoff and R. Woolfson, *Registered Intermediaries in Action: Messages for the CJS from the WIS SmartSite* (2011), at <https://www.researchgate.net/publication/344219882_'Registered_Intermediaries_in_action'_Messages_for_the_CJS_from_the_Witness_Intermediary_Scheme_SmartSite>.

the role is organized, governed, and detailed in the relevant legal rules and procedural guidance. For example, Her Majesty's Courts and Tribunals Service (HMCTS), as an executive agency of the Ministry of Justice (MoJ), recently awarded contracts to a selection of suppliers for the provision of new intermediary services. The 'HMCTS Court Appointed Intermediary Services' (HAIS) will allow vulnerable individuals who fall outside the remit of the MoJ's existing intermediary scheme to access specialist communication assistance.[9] As intermediaries are introduced into new justice settings, understanding of the role's nature and scope becomes increasingly important.

2 | BACKGROUND

The intermediary role was created by the YJCEA and was first implemented by the Witness Intermediary Scheme (WIS) in 2004 through a pilot scheme. The WIS was eventually implemented nationally in 2008 and matches vulnerable witnesses with an intermediary based on their communication needs. These intermediaries are trained, registered, and regulated by the MoJ and are known as 'registered intermediaries'. Defendants, however, are excluded from the YCJEA's special measures regime. As a result, any application for intermediary assistance for a vulnerable defendant must be dealt with under common law, applying the court's inherent powers to ensure a fair trial.[10] Intermediaries who assist defendants through this route are termed 'non-registered intermediaries'. In other words, a two-tier intermediary provision has emerged.[11] Non-registered intermediary appointments are decided on a case-by-case basis, but there exists a presumption against the use of an intermediary for a defendant at trial.[12] Registered intermediaries in England and Wales routinely attend police stations, as well as other locations such as schools or homes, to assess vulnerable witnesses. They also work with police to plan interviews and can facilitate communication during interviews. Non-registered intermediaries rarely assist suspects at the police station, though when they do, it is on an ad-hoc basis. At court, registered intermediaries facilitate communication during the period of oral testimony. While non-registered intermediaries may be appointed to assist a defendant throughout the duration of a trial, the *Criminal Practice Directions* note that this should be 'extremely rare'.[13] The majority of intermediaries on the MoJ register are speech and language therapists; however, there has been an increase in numbers from other backgrounds, such as teaching, nursing, social work, psychology, and occupational therapy.[14]

[9] HMCTS, 'New Contracts Awarded to Support Vulnerable Court and Tribunal Users' *Gov.uk*, 26 January 2022, at <https://www.gov.uk/government/news/new-contracts-awarded-to-support-vulnerable-court-and-tribunal-users>.

[10] Section 104 of the Coroners and Justice Act 2009 amended the YJCEA to provide a statutory basis for defendant access to intermediaries; however, this has never been implemented.

[11] E. Henderson, 'A Very Valuable Tool: Judges, Advocates and Intermediaries Discuss the Intermediary System in England and Wales' (2015) 19 *International J. of Evidence and Proof* 154, at 157.

[12] Ministry of Justice, *Criminal Practice Directions* (2015 edn, amended 2021) 3F.13, at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938588/crim-practice-directions-I-general-matters-2015.pdf>. The *Criminal Practice Directions* also state that the court should be 'satisfied that a non-registered intermediary has expertise suitable to meet the defendant's communication needs' (3F.17).

[13] Id., 3F.14.

[14] 58.8 per cent of registered intermediaries in England and Wales list their profession as 'speech and language therapist', 19.6 per cent list 'education', 3.5 per cent list 'psychologist', 2.5 per cent list 'nurse', and 2.0 per cent list 'social worker'. A further 5.5 per cent list some variation on 'intermediary' as their profession, with 2 per cent of the total intermediary population identifying specifically as a 'deaf intermediary'. Email correspondence from Ministry of Justice to author, 6 September 2021.

In 2013, the Department of Justice of Northern Ireland (DoJ) developed a model for the provision of intermediaries for vulnerable complainants and witnesses in the criminal justice system. This was based on the provisions of the Criminal Evidence (NI) Order 1999,[15] which mirror the provisions of Section 29 of the YJCEA. The function of these specialists would be to 'facilitate communication during the police investigation and at trial between a person with significant communication deficits and others in the criminal justice process'.[16] Intermediaries in Northern Ireland are all trained, registered, and regulated by the DoJ. As in England and Wales, the vast majority of those on the Registered Intermediary Scheme (RIS) register are speech and language therapists, with a number hailing from a social work background.[17] The DoJ concluded that respect for the principle of equality of arms demanded that all vulnerable individuals – including defendants – should be eligible for intermediary assistance.[18] The RIS was subsequently established to allow end users – in other words, police, prosecutors, and defence solicitors – to access intermediary services. Intermediaries can assist both witnesses and suspects at the police station, assist with the planning of interviews, and attend interviews to facilitate communication.[19] Intermediaries in Northern Ireland are appointed on an 'evidence-only' basis; in other words, they are appointed to assist during the period of testimony only.[20] The court can, however, appoint a 'court defendant supporter', who typically also works as an 'appropriate adult', to provide emotional and general support to the defendant for the periods when an intermediary is not present.[21] Appropriate adults support, assist, and advise vulnerable suspects in custody, ensure that police are acting fairly, and enable suspects to understand their rights and entitlements.[22] While both appropriate adults and intermediaries facilitate communication, appropriate adults are not ordinarily communication experts like intermediaries and operate mostly in a voluntary capacity.[23]

3 | EXPLORING THE NORMATIVE BASIS OF NEUTRALITY

Neutrality is recognized as a critical dimension of procedural justice and is closely linked to the concept of legitimacy.[24] The view that the criminal justice system must constantly demonstrate

[15] Criminal Evidence (NI) Order 1999, Arts 17 and 21BA.

[16] Department of Justice of Northern Ireland, *Northern Ireland RIS Pilot Project: Post-Project Review* (2015) 5, at <https://www.justice-ni.gov.uk/sites/default/files/publications/doj/registered-intermediaries-post-project-review-feb15.pdf>.

[17] Email correspondence from Department of Justice of Northern Ireland to author, 21 August 2020.

[18] Id.

[19] Department of Justice of Northern Ireland, op. cit., n. 16, p. 3.

[20] See Lord Chief Justice's Office, *Crown Court Practice Direction No. 2/2019: Case Management in the Crown Court Including Protocols for Vulnerable Witnesses and Defendants* (2019) A5.4, at <https://www.judiciaryni.uk/sites/judiciary/files/decisions/Case%20Management%20in%20the%20Crown%20court%20inlcuding%20Protocols%20for%20Vulnerable%20Witnesses%20and%20Defendants_0.pdf>.

[21] Department of Justice of Northern Ireland, op. cit., n. 16, p. 21.

[22] *Home Office, Code C: Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (2019) 1.7A, at* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903473/pace-code-c-2019.pdf>.

[23] For further discussion on how the appropriate adult role is framed, see R. Dehaghani, 'Defining the "Appropriate" in "Appropriate Adult": Restrictions and Opportunities for Reform' (2020) 12 *Criminal Law Rev*. 1137.

[24] T. Tyler, *Why People Obey the Law* (1990); M. Boone and M. Kox, 'Neutrality as an Element of Perceived Justice in Prison: Consistency versus Individualization' (2014) 10 *Utrecht Law Rev*. 118; M. Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center* (2006).

its legitimacy to the public reflects the imperative that decisions are seen to be taken in a genuinely unbiased and neutral way.[25] Within the criminal justice literature, discussion of neutrality has often been dominated by a focus on adjudication.[26] Even within the jurisprudential debate between legal positivism and natural law, judicial neutrality is a shared concern.[27] Definitionally, however, there is some uncertainty over the relationship between the values of neutrality, impartiality, and objectivity. While the terms are viewed as individually distinctive by some academic commentators, others use them interchangeably. For example, in the field of mediation, 'impartiality' often connotes even-handedness and freedom from favouritism, whereas 'neutrality' more often refers to decision makers not taking a position regarding the dispute or the parties.[28] By contrast, others see little difference between the terms and criticize attempts to distinguish them as lacking direction and substance.[29] In any case, a significant degree of overlap exists in the usage of the terms in the criminal justice literature.[30]

Neutrality is a core tenet of the intermediary role. Both the MoJ and the DoJ outline that registered intermediaries owe their duty not to the defence or the prosecution, but rather to the court and the criminal justice system.[31] While intermediaries for defendants and intermediaries for witnesses are organized differently in England and Wales, the *Criminal Practice Directions* outline that both roles are underpinned by a focus on facilitating communication and that intermediaries must 'ensure they act impartially'.[32] The *Equal Treatment Bench Book* also describes intermediaries as 'impartial, neutral officers of the court'.[33] In Northern Ireland, the decision to limit intermediary involvement to oral evidence only was premised on the need to ensure impartiality.[34] The DoJ reasoned that the provision of intermediary assistance for the whole trial risked the role being perceived as acting for the defence.[35] Indeed, witness supporters and appropriate adults for defendants exist to provide, inter alia, the type of emotional support that falls outside the scope of the intermediary role. For purposes of this article, the term 'neutrality' refers to the objective, non-biased status of intermediaries as officers of the court.[36] This means that

[25] Lord Neuberger, 'Fairness in the Courts: The Best We Can Do', address to the Criminal Justice Alliance, 10 April 2015, at <https://www.supremecourt.uk/docs/speech-150410.pdf>.

[26] There is a separate, albeit related, discussion of judicial independence amid concerns that the judiciary, as an institution, is not detached from other arms of the state. See M. McConville and L. Marsh, *The Myth of Judicial Independence* (2020).

[27] O. Raban, *Modern Legal Theory and Judicial Impartiality* (2003).

[28] D. Girolamo, 'The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice' (2019) 39 *Oxford J. of Legal Studies* 834, at 841.

[29] L. Moseley, 'Alan Montefiore (ed.), *Neutrality and Impartiality: The University and Political Commitment*, Cambridge University Press' (1976) 5 *J. of Social Policy* 317.

[30] See for example S. Bibos, *The Machinery of Justice* (2020) 106.

[31] Ministry of Justice, op. cit., n. 7, p. 7; Department of Justice of Northern Ireland, op. cit., n. 7, p. 79.

[32] *Criminal Practice Directions*, op. cit., n. 12, 3F.2.

[33] Judicial College, *Equal Treatment Bench Book* (2018 edn, revised 2020) 58, at <https://www.judiciary.uk/wp-content/uploads/2018/02/ETBB-February-2018-amended-March-2020.pdf>.

[34] Department of Justice of Northern Ireland, op cit., n. 16, p. 6.

[35] Id.

[36] The MoJ's *Registered Intermediary Procedural Guidance Manual* from 2015 uses the terms 'impartial' and 'neutral'. Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (2015), at <https://zakon.co.uk/admin/resources/downloads/registered-intermediary-procedural-guidance-manual-2015.pdf>. By contrast, the updated 2020 version simply uses 'impartial'. Ministry of Justice, op. cit., n. 7. Correspondence between the author and the MoJ in May 2020 confirmed that this change was made merely for the sake of brevity.

intermediaries do not have a support role and that they act independently of the defence and the prosecution.[37]

The position of the court interpreter is a useful analogue when examining the neutrality of the intermediary role.[38] Despite the differing interests of the parties within the adversarial system, court interpreters are required to adhere to the principle of neutrality at all times.[39] The value attached to neutrality in both roles appears broadly the same; any allegation of partiality or undue proximity to either the prosecution or the defence is capable of undermining judicial proceedings. Both interpreters and intermediaries participate in interpreted events between individuals and the criminal justice system, such as during police interviews, consultations with lawyers, or court testimony. My interview data, explored below, reveals that the formal recommendations that intermediaries make, as well as the more informal, often unrecognized steps that they take to facilitate communication, stem directly and inevitably from their own interpretation of communicative situations. These interpretations can – at least in theory – never be finite or fixed but are necessarily the result of a hermeneutic process.[40] From a sociological perspective, a 'thick' understanding of intermediaries' conditions of practice and social interactions is central to an analysis of their neutrality.[41] As is explored below, the role's neutrality is intrinsically relational and functions interactively and dynamically based on the social norms and rules of particular criminal justice settings.[42] This is a critical point of departure for the analysis in this article, since neutrality is recognized as contextual and multifaceted. More broadly, this supports the argument that neutrality should be viewed as a process rather than an inherent quality – a point further developed in Part 9 below.

The next part briefly introduces Bourdieu's conception of the social world. It considers the ideas of habitus, field and, most importantly for the purposes of the present article, illusio.

4 | BOURDIEU'S SOCIAL WORLD

This article utilizes Bourdieu's concept of illusio as an explanatory tool for examining the intermediary role's neutrality. First, it is necessary to introduce two other central organizing concepts of Bourdieu's work: 'field' and 'habitus'. As an increasingly recognized actor within the criminal justice system, intermediaries and their work constitute a field. Viewing fields as networks of agents occupying symbolic social spaces, each of which possesses unique attributes and power dynamics, enables us to locate intermediaries within the social world of the criminal justice system.[43] The physical manifestations of the field, including courtrooms, consultation rooms, police stations, and interview suites, are all social spaces where conflict and struggle play out between intermediaries and other criminal justice actors. For example, more peripheral criminal justice actors such as interpreters also inhabit criminal justice settings but adhere to their own internal

[37] Department of Justice of Northern Ireland, 'Registered Intermediary Schemes' *Department of Justice of Northern Ireland*, 26 February 2021, at <https://www.justice-ni.gov.uk/publications/registered-intermediary-schemes>.

[38] J. Eisenstein and H. Jacob, *Felony Justice: An Organisational Analysis of Criminal Courts* (1977).

[39] R. Gonzalez et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* (1991) 495.

[40] M. Rudvin, 'How Neutral Is Neutral? Issues in Interaction and Participation in Community Interpreting' in *Perspectives on Interpreting*, eds. G. Garzone and M. Viezzi (2002) 3.

[41] C. Wadensjö, *Interpreting as Interaction* (2013) 17.

[42] J. Touchie, 'On the Possibility of Impartiality in Decision-Making' (2001) 1 *Macquarie Law J*. 21, at 30.

[43] P. Bourdieu, 'Social Space and Symbolic Power' (1989) 7 *Sociological Theory* 14.

logic and principles of organization.[44] Having identified intermediaries' field, it follows that the role is strongly influenced by its habitus. This habitus is objectively structured by the role's relative position in the field but also by the subjective experiences of individual practitioners.[45] We are concerned here with how intermediaries' habitus is adapted to the field and their 'predisposed way of thinking, acting and moving in and through the social environment'.[46] How intermediaries present themselves to other criminal justice actors, most of whom have more established roles and are more familiar with criminal proceedings, is constitutive of their habitus. All criminal justice actors apprehend the social world of the criminal justice system through their own habitus, and intermediaries are no different.

The concepts of field and habitus are inextricably linked to illusio. How the field functions and is conditioned is reliant on a collective belief of its members demonstrated through participation in internal struggles.[47] By demonstrating a 'visceral commitment' to their membership of the field, members take an interest in its stakes and are taken in by it.[48] This is what Bourdieu refers to as illusio, which is created through repeated action and routines and represents an unreflexive commitment to reproducing and enforcing the rules of the game.[49] In this article, I use illusio as a tool to explore what I have termed the neutrality paradox of the intermediary role. As briefly discussed above, examining neutrality can be conceptually problematic, particularly when the principle is viewed as integral to the intermediary role.[50] The neutrality paradox centres on the internal struggles and apparent contradictions that play out in how intermediaries practise their neutrality and ultimately justify their actions. It reflects the strong attachment that intermediaries have to the ideals of neutrality on the one hand and their willingness to view these principles as malleable and open to reconceptualization on the other. This dynamic allows us to critically examine neutrality as a core tenet of the intermediary role and to question its conceptual underpinnings.

5 | THE CURRENT STUDY: DATA AND METHODS

This article forms part of a broader socio-legal examination of intermediaries within the criminal justice system. It is the first empirical study focusing on the nature and scope of the intermediary role working with both witnesses and defendants. It draws on 31 in-depth, semi-structured interviews with intermediaries and judges in both England and Wales and Northern Ireland. All intermediaries had experience of working with both (1) witnesses and complainants and (2) suspects/defendants.[51] Of the 27 intermediaries interviewed, 20 were based in England and Wales and seven in Northern Ireland. The sample was accessed in several ways. Interviewees responded

[44] M. Inghilleri, 'Habitus, Field and Discourse: Interpreting as a Socially Situated Activity' (2003) 15 *Target* 243.

[45] P. Bourdieu, *In Other Words* (1990).

[46] P. Sweetman, 'Twenty-First Century Dis-Ease? Habitual Reflexivity or the Reflexive Habitus' (2003) 51 *Sociological Rev*. 528, at 532.

[47] L. Wacquant, 'Towards a Reflexive Sociology: A Workshop with Pierre Bourdieu' (1989) 7 *Sociological Theory* 26, at 40.

[48] P. Bourdieu, *Pascalian Meditations* (2000) 102.

[49] I. Lupu and L. Empson, 'Illusio and Overwork: Playing the Game in the Accounting Field' (2015) 28 *Accounting, Auditing and Accountability J*. 1310.

[50] Vidal Claramonte recognizes similar issues regarding the neutrality of legal interpreters. See M. Vidal Claramonte, 'Re-Presenting the "Real"' (2005) 11 *The Translator* 259.

[51] This was to ensure that interviewees could reflect on potential differences between their work with witnesses on one hand and defendants on the other.

to a request sent on my behalf by Intermediaries for Justice (IFJ), a registered charity promoting and supporting the work of intermediaries. Further requests were sent via the Registered Intermediaries Online (RIO) portal, an information-sharing platform for those working in a registered capacity. In Northern Ireland, interviews were arranged in collaboration with the Intermediaries Schemes Secretariat (ISS), who disseminated information to all registered intermediaries on my behalf. In Northern Ireland, four judges were interviewed (two district judges who sit in the magistrates' court and two Crown Court judges) through the Lord Chief Justice's Office. These judges were selected based on their experiences of working with intermediaries in the criminal justice system.

Over one-third of the total intermediary cohort in Northern Ireland were interviewed.[52] In England and Wales, I sought to interview intermediaries who had worked in both a registered and a non-registered capacity. It is difficult to be sure how many practising intermediaries fall into this particular category. When interviews started in November 2018, there were 115 intermediaries on the MoJ register actively taking cases.[53] Interviews in England and Wales were conducted in almost every main regional area.[54] Interviewees had a mixture of experience, with some having worked in the role for over 11 years and others having qualified less than a year prior to interview. Of the 27 intermediaries interviewed, 15 came from a speech and language therapy background, three from social work, three from nursing, two from occupational therapy, two from psychology, one from teaching, and one from working with deaf people as a sign language interpreter.

Interviews were conducted between December 2018 and July 2019 and lasted for an average of 90 minutes. The use of semi-structured interviews allowed for an open-ended and emergent approach that suited my choice of grounded theory methodology.[55] Prior to commencing interviews, I created an interview guide containing themes that emerged from my early doctoral research, including relevant case law and literature.[56] The interviews were digitally recorded and I transcribed them myself to help to spot potential avenues of exploration missed during interview.[57] All interviewees were provided with an information sheet prior to interview and signed a consent form agreeing to their participation. I anonymized each interviewee and used the prefixes 'NI-' to identify interviewees in Northern Ireland and 'E&W-' for those based in England and Wales. I used 'CCJ-' to denote Crown Court judges and 'MCJ-' to denote judges in the magistrates' court. Ethical approval was obtained from the London School of Economics.

[52] Department of Justice of Northern Ireland, *Northern Ireland Registered Intermediaries Schemes Pilot Project: Phase II Review* (2016) 11, at <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/registered-intermediaries-phase-2.pdf>.

[53] Email correspondence from IFJ to author, 26 April 2018. Anecdotal evidence from the field suggested that less than half of those intermediaries would be in a position to comment on working in both a registered and a non-registered capacity.

[54] Interviews took place in all nine English administrative regions. No intermediary resident in Wales replied to any interview requests but several interviewees had attended court there. The Victim's Commissioner highlighted in 2019 that there exists a severe shortage of registered intermediaries across Wales and that there is significant regional disparity across England and Wales. Victims' Commissioner, *A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses* (2019), at <https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cxo1dnrmkg14/uploads/sites/6/2021/12/VC-Registered-Intermediaries-Review-2018.pdf>.

[55] K. Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (2006) 28.

[56] The interview guide is available on request: j.taggart@lse.ac.uk.

[57] Charmaz, op. cit., n. 55, p. 70.

The data is presented to provide a 'snapshot' of practitioner experiences and is sufficient to ground an explanatory analysis.[58] Though effort was made to make the sample as representative as possible, the findings cannot be generalized to the entire intermediary population. Qualitative data is not generalizable, and objectivity and transparency are difficult to achieve. However, using qualitative methods allows interviewees to explore individual experiences and construct their own meanings in a way in which quantitative methods does not.[59] I organized and coded the interview data by identifying 12 initial codes that were generated inductively using Charmaz's coding approach, beginning with line-by-line coding, then focused coding, and finally theoretical coding.[60] The coding process was the 'pivotal link' between my interview data and the generation of theoretical concepts to explain the data.[61] This enabled me to raise analytic questions about the data and begin 'denoting concepts to stand for meaning'.[62] I distilled the initial 12 codes into four core codes aided by a process of memoing that helped me to compare categories and sub-categories, as well as identifying beliefs and assumptions in the data.[63] This process involved rereading all codes and combining those that were similar and discarding those that were unrelated to the research questions. I also consulted my field notes and post-interview reflections in refining these codes. The theme of neutrality emerged from the data as one of the core codes.

6 | CONGRUENT ILLUSIO

The centrality of neutrality to the intermediary role has been discussed above. Now we examine how neutrality as a component of the role's practice is partly revealed through what I term congruent illusio.[64] Bourdieu contended that membership of a particular field involves a belief in its claims and compliance with its necessities.[65] Congruent illusio refers to the extent to which intermediaries view the principle of neutrality as a necessary, non-derogable component of their work. We examine whether, and to what extent, intermediaries adhere to their official stance of neutrality and do not question its underlying principles.[66] This examination is concerned with how invested intermediaries are in maintaining and reinforcing their neutral status when interacting with other criminal justice actors and facilitating communication.

In almost every interview with intermediaries, the issue of neutrality arose, not through a question posed, but rather from interviewees describing their work: 'I am there as a neutral party' (E&W-3), 'Our role is neutral' (NI-3), 'You have to be very mindful that we are neutral' (E&W-16), 'You have to be a neutral person or you can't do the job properly' (NI-1). Unsurprisingly, a

[58] F. Garland and J. McEwan, 'Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate' (2012) 16 *International J. of Evidence and Proof* 233, at 239.

[59] L. Carminati, 'Generalizability in Qualitative Research: A Tale of Two Traditions' (2018) 28 *Qualitative Health Research* 2094.

[60] Charmaz, op. cit., n. 55, pp. 42–71.

[61] Id., p. 46.

[62] J. Corbin and A. Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2015) 57.

[63] Charmaz, op. cit., n. 55, p. 81.

[64] Vidal Claramonte, op. cit., n. 50, p. 263.

[65] Bourdieu, op. cit., n. 43, p. 66; P. Bourdieu and L. Wacquant, *An Invitation to Reflexive Sociology* (1992) 115.

[66] P. Bourdieu, *Practical Reason: On the Theory of Action* (1998).

focal part of initial intermediary induction and training in both England and Wales and Northern Ireland emphasizes the neutrality of the role, and thus the value appears ingrained in new recruits from an early stage. In this way, the illusio surrounding the neutrality of intermediaries is viewed as what Bourdieu called a 'precondition for successful entry into the field'.[67] NI-7 and NI-3 explained this:

> I remember from the training that we need to be there with a poker face and we need to keep a professional hat on and sometimes it is difficult. (NI-7)

> [I]n our training, we were just told about the whole neutrality, the importance of that … [W]e were given guidance as to where you are supposed to stand for Ground Rules Hearings and things – we are supposed to be at the back, sort of, and you try to sit maybe in between but more often than not I am called up into the witness box. (NI-3)

These comments are redolent of the illusio implicitly assumed by all who undergo intermediary training and prepare themselves to perform their neutrality in the court environment.[68] When examining neutrality, we are primarily concerned with subjective experiences of intermediaries performing their role and how the rules and expected behaviour are internalized. It is at this point that we begin to see one side of the neutrality paradox develop. My interviewees expressed a high degree of compliance with the official line requiring strict adherence to the oath of neutrality. More strikingly, the individual reflections that emerged from the interviews never seemed superficial or perfunctory. On the contrary, interviewees often took the time to carefully explain and justify the rationale behind their neutral stance:

> You are there for the courts, you are there to help the barristers ask questions in a way that somebody understands, and you are there to ensure that person can give information and answer the questions in a way that is understood, so you are there for that two-way process … and you are more like a vehicle, an instrument to support that … [T]hat's why we work for the court. We are not there to support that person to give their story or their version of events – you are there to make sure the court process flows. (NI-1)

It is important to be reflexive about such responses. It is possible that interviewees saw me as someone who was actively looking for instances of their neutrality being compromised or, as Goffman termed it, a 'slip of the mask'.[69] When faced with questions about their neutrality, interviewees reaffirmed their belief in its virtue often as if reading from an official script. The cost of their integrity being called into question appeared too high and no interviewee spoke of the requirement to remain neutral being a burden or a hindrance.[70] This reflects the investment that intermediaries make in their neutrality, as opposed to being indifferent to it. While the analysis later in this chapter questions how committed intermediaries are to performing neutrality in practice,

[67] P. Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (1996) 170.

[68] This is similar to the judicial commitment to impartiality, which Roach Anleu and Mack explain is deeply ingrained in both legal training and judicial work. See S. Roach Anleu and K. Mack, *Performing Judicial Authority in the Lower Courts* (2017) 61.

[69] E. Goffman, *The Presentation of Self in Everyday Life* (1956) 73.

[70] E. Goffman, *Interaction Ritual: Essays on Face-to-Face Behaviour* (1967) 261.

it is apparent that giving the impression of attachment to the principle is viewed as crucial for the role's credibility among other actors.[71]

Intermediaries were more vocal describing situations in which their neutrality was questioned. Some occasionally received such accusations, explicitly or implicitly, from other criminal justice actors. When such instances occurred, intermediaries often appeared annoyed that their attitude to neutrality might have been mistaken for 'indifference'.[72] E&W-1 expressed this position strongly:

> There was one barrister who, let's say, accused me of 'over-egging' things in my report because I had sympathy for the defendant, which is really offensive. I was really, really angry because it is offensive, because I am there as a neutral party and because it is calling into question the integrity of my opinion, and my response was that I categorically disagreed.

More common than explicit questioning of the role's neutrality was the perception that police or defence legal representatives may seek to bring intermediaries on board or into a particular 'team' (E&W-14). This seems to happen most frequently at court when defendant intermediaries spend long periods with the defendant and their legal representatives. In Northern Ireland, where intermediary appointments are generally for the duration of the defendant's evidence only, it is not surprising that this is less common. Further, the DoJ explicitly prohibits intermediaries from attending consultations between the defendant and their lawyers.[73]

Social encounters between intermediaries and other actors present an opportunity to reaffirm the attachment to neutrality and demonstrate a congruent illusio.[74] E&W-20 explained how maintaining the illusio translates into practice:

> If you're seen to be in and out of these meetings [and] consultation rooms … I have had counsel say negative things about police to me and it's those sort of things that can breach those boundaries and you've got to be very, very clear in the intermediary role about that. I am not here for that discussion, I am here to facilitate communication. It's a difficult area being a human being, being absolutely non-partisan in your role, and being explicit about what you can and cannot do.

Building on this, many intermediaries commented on the need to proactively perform neutrality and also be seen to do so. In Bourdieusian terms, this fosters a visceral commitment to the oath of neutrality and rationalizes the participant's investment in it.[75] It is the illusio that helps to explain why intermediaries submit unequivocally to the underlying principles of their neutrality and proceed to externalize it.[76] In some cases, this operates as a defence mechanism to protect the role and the individual from any accusations or perceptions of partiality. E&W-17 explained how engaging with the so-called 'other side' of the case is crucial:

[71] P. Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field* (1996) 227–228.

[72] Id.

[73] Department of Justice of Northern Ireland, op. cit., n. 7, p. 26.

[74] Bourdieu, op. cit., n. 66, p. 153.

[75] Id., p. 102.

[76] Id., p. 103.

> I make a big point of arriving in court on the first day and finding the prosecution barrister to say hello. Because if you don't do that, and they see you all the time walking around with the defendant and his team, then you look like you're part of the team. So, for instance, I always make sure that I sit halfway when I am sitting on the back of the benches, I sit halfway between the two. I don't sit behind the barrister.

This deliberate positioning of oneself in a neutral space was a common theme in interview. It appeared most pronounced in Northern Ireland where intermediaries were firmly of the view that the role operates independently of any side in the criminal process. A strong attachment to neutrality was apparent from all Northern Irish intermediaries. NI-2's comments exemplify this position:

> I am not beholden to anyone. I am an independent provider of a service and I work to my standard … I am not working for a lawyer, I am not working for the police. I consider myself to be an officer of the court and, as such, an officer of the criminal justice system.

In England and Wales, one phenomenon that encapsulates the notion of a congruent illusio relates to the preparedness of intermediaries to work on both sides of the two-tier system during the same trial. In other words, as an independent, neutral communication expert, an intermediary could be appointed to facilitate communication for a number of individuals rather than for one witness or defendant. However, in England and Wales, there is currently no provision for such an appointment in the legislation, the *Criminal Procedure Rules*,[77] or the *Criminal Practice Directions* and it is instead a case management issue for the sitting judge. This practice, of which three interviewees had direct experience, may be described as 'crossing the court'. This term was coined by E&W-7, who had been asked by the judge to assist a vulnerable defendant after the commercial organization providing an intermediary withdrew.[78] E&W-7 admitted feeling initially unsure about the idea but rationalized that 'the job was no different, sitting next to the witness, listening to the questioning, reading questions, intervening, simplifying the language'. E&W-7 went on to explain in more detail why their decision to cross the court was justifiable and, ultimately, utilitarian:

> I think I can switch from one to the other. Some intermediaries think that is unethical. If the court has agreed and I have been asked to do that, I can't see why anyone is going to object. I am just there assisting the court.

The topic of crossing the court prompted other intermediaries to reflect on and evaluate their attitudes towards the role's neutrality. This often revealed a sense of ambivalence. While there was a recognition that assisting communication should transcend notions of 'sides', interviewees generally concluded that it would not be good practice and was best avoided. Despite intermediaries in Northern Ireland routinely working with both defendants and witnesses, one magistrate considered that an intermediary crossing the court could prove problematic 'in a sensitively charged

[77] Ministry of Justice, *Criminal Procedure Rules and Practice Directions 2020* (2020), at <https://www.gov.uk/guidance/rules-and-practice-directions-2020>.

[78] This seems to be a relatively common occurrence due to the policy of one commercial provider to provide intermediaries for full trial appointments only. See *R* v. *Biddle* [2019] EWCA Crim 86.

case … [and would be] best avoided if possible' (MCJ-2). It was suggested by some intermediaries that vulnerable witnesses and defendants may struggle to cope with seeing the person with whom they have developed a rapport now sitting on the other side. As E&W-15 explained, the risk of the witness (or defendant) feeling let down by such a practice may be more than merely superficial and could adversely affect the ability to communicate:

> It would depend on that witness and if they would have that knowledge before giving evidence or at all because I think it could jeopardize them and the support I give to them if they saw me on the 'other side', because frequently while we say we are not on anyone's side, the witness will see us as 'theirs' and it's a fine line.

It is useful to reflect on how these individual perceptions of neutrality map onto our broader understanding of the intermediary role and its nature. On the one hand, these statements resonate with much of what I observed about intermediary culture. Despite the often isolated nature of the role and the high levels of autonomy that practitioners enjoy, there are many issues within the intermediary community that generate debate and internal discussion. Some of these are extremely contentious, such as the divide between the speech and language therapy cohort of intermediaries and the 'nouveau' intermediaries who predominately hail from social work, nursing, and teaching backgrounds.[79] On the other hand, the lack of discussion between intermediaries around the issue of neutrality and its potentially blurry edges was surprising. I initially drew the conclusion that the role's neutrality must be a taboo subject that is personally navigated but not externalized. While O'Mahony and colleagues identified the potential for conflict between individual intermediary practices and the value of neutrality,[80] I saw little evidence of this in interview.

Yet it was also clear that intermediaries were acutely aware of the underpinning rationale of their neutrality and its centrality to the role.[81] The acceptance of illusio is not depicted in the literature as a deliberate choice; rather, individuals perceive the relevant norms and principles as natural and obvious.[82] How can we reconcile this with the accounts emerging from the interview data? Illusio is premised on the inculcation of norms, principles, and beliefs through action and routine. Importantly, these go unquestioned because they are perceived as immemorial and embedded. They are done 'and have always been done that way'.[83] The newness of the intermediary profession must be considered here, since the role's nature and scope has not been examined and is, consequently, relatively poorly understood.[84] The role lacks clear pre-prescribed occupational norms and is still embryonic, particularly compared with long-standing professions with established hierarchical structures. For example, Bourdieu explicates numerous types of 'conservation strategies' used by those in dominant positions to preserve hierarchies and enhance their

[79] For example, one intermediary in Northern Ireland with a background in speech and language therapy (NI-7) suggested that some other intermediaries struggle to assess communication and 'just don't know the terminology'.

[80] B. O'Mahony et al., 'Developing a Professional Identity in a New Work Environment: The Views of Defendant Intermediaries Working in the Criminal Courts' (2016) 18 *J. of Forensic Practice* 155.

[81] Bourdieu, op. cit., n. 66, p. 171.

[82] K. Donskov Felter, 'Breaking with Illusio: The Sociology of Pierre Bourdieu as a Challenge to Theology' (2012) 66 *Studia Theologica* 86, at 102.

[83] Bourdieu, op. cit., n. 48, p. 102.

[84] A discussion of intermediaries' status as 'professionals' is beyond the scope of this article, though the terms 'professional' and 'professionalism' are used by both the DoJ and the MoJ when describing the organization of intermediaries.

positions.[85] The dearth of academic research into the intermediary role and its organization and governance means that conducting such an examination is extremely difficult.[86] Newcomers to any field must learn and play by the unarticulated rules and conventions, but if these are in flux, then it is not surprising that the nature and significance of a key principle such as neutrality is also unresolved.

7 | WEAK ILLUSIO

As the above discussion explains, intermediaries demonstrate a commitment to the principle of neutrality and its performance in their role. In this regard, my data suggests a congruence between the official standards and protocols of the role and the belief that intermediaries have in them. The reverse side of the neutrality paradox reveals a conflict with this congruent account, as intermediaries appear to resist the constraints imposed on them by their neutrality. Defining resistance within a discussion of illusio can be a difficult task. While some authors have focused on the inseparability of resistance and power,[87] there has been little elaboration on how resistance operates. Other research has conceptualized resistance as refusal or challenge to prevailing ideas that enable people to comprehend the dominant order.[88] However, I found the patterns of resistance among intermediaries difficult to reconcile with accounts of resistance in other empirical settings. For example, the idea that individuals 'must try individually or collectively, to subvert' norms and rules in order to mount a resistance[89] did not resonate with my data. The conceptualization of resistance as associated with strategic manoeuvres and premeditated strategies to undermine occupational practices may be more applicable to traditional workplace settings with bureaucratic institutions and complex professional hierarchies.[90] Instead, any resistance among intermediaries appears to be individually driven without any obvious ideological motive. The type of collective resistance that is often embodied through organizations such as trade unions was noticeably absent among intermediaries.[91] Yet, while there was no indication of a coordinated resistance strategy, resistance among intermediaries was evident in a more subtle way. Though not vocally disavowing their neutrality, intermediaries experienced an ongoing struggle between the practical challenges of their often emotionally demanding work, their professional backgrounds, and their need to remain detached and objective.

While illusio assumes that players have a belief in the *necessity* of the game, my interview data provides an insight into how intermediaries view the relationship between the role's overarching function of facilitating communication and the norms and principles that constitute their illusio. In terms of neutrality, a disconnect is evident between the narrative that intermediaries subscribe

[85] P. Bourdieu, *Sociology in Question* (1993) 73. See also A. Tatli et al., *Pierre Bourdieu, Organization and Management* (2015) 211.

[86] P. Bourdieu, *The Logic of Practice* (1992) 66.

[87] D. Reed-Danahay, *Locating Bourdieu* (2004) 64.

[88] P. Dick, 'Resistance, Gender and Bourdieu's Notion of Field' (2008) 21 *Management Communication* 327.

[89] Id., p. 337.

[90] S. Ybema and M. Horvers, 'Resistance through Compliance: The Strategic and Subversive Potential of Frontstage and Backstage Resistance' (2017) 38 *Organization Studies* 1233; S. Kalfa et al., 'The Academic Game: Compliance and Resistance in Universities' (2019) 32 *Work, Employment and Society* 274.

[91] Tatli et al., op. cit., n. 85, p. 127.

to and reproduce, and the strategies, tactics, and methods employed in the facilitation of communication. This may be termed weak illusio, defined by the simultaneity of belief in the role's neutrality and a willingness to often compromise its integrity. A sustained process of 'toggling' ensues between a desire to protect the legitimacy of the role and the need to ensure that communication is effectively facilitated.[92] My interviews are replete with examples of this tension throughout the stages of intermediary involvement in a case. E&W-2 gave an example of a witness contradicting themselves during an Achieving Best Evidence (ABE) interview and the interviewing officer not picking up on the discrepancy. E&W-2 later raised the issue with the officer but sought to justify their actions:

> E&W-2: [S]o they may contradict themselves or say something that doesn't quite make sense and I'll be wanting to ask something just so they understand what they are telling me. I will say to the officer afterwards. So, if someone is describing something that happened at night and then they might say 'He had sunglasses on', I will think 'Why has he got sunglasses on at night?'
>
> Interviewer: But you might say to the officer afterwards?
>
> E&W-2: Afterwards, yeah, but not on camera and not with the witness there. But that's me asking it kind of as [name] and not as the intermediary.

In a similar vein, E&W-13 suggested that intermediaries necessarily concern themselves with the emerging evidential picture at police interview and must assess the evidence 'like a juror would'. In these two examples, the intermediaries developed and implemented strategies and tactics when navigating their own neutrality.[93] These seemingly innocuous comments and informal chats with the interviewing officer inform what Sweetman terms the 'predisposed way of thinking, acting and moving in and through the social environment'.[94] The comments of E&W-2 and E&W-13 suggest that through reconceptualizing their own neutrality, intermediaries reconcile the principle with their primary function of facilitating communication. By viewing their neutrality as complementary to, rather than restrictive of, their core functions, intermediaries can justify their actions within the scope of their role.

The type of social interactions that provide the context for the above quotes are important to understanding the intermediary illusio and its fragility. Criminal justice sites such as interview suites, consultation rooms, and courtrooms are where investment in the illusio begins and is reinforced.[95] For example, the criminal court initially bewilders many intermediaries, who slowly become accustomed to its rituals and customs.[96] Yet the social relations that develop in the field often challenge the neutrality of the intermediary role. The working relationships that intermediaries foster often threaten to 'shatter' the illusio and the commitment to and investment in the value of neutrality.[97] This is essentially the other side of the congruent illusio explained above,

[92] C. Calhoun and R. Sennett, *Practicing Culture* (2007) 165.

[93] Bourdieu, op. cit., n. 66, p. 77.

[94] Sweetman, op. cit., n. 46, p. 532.

[95] Bourdieu, op. cit., n. 66, p. 166.

[96] P. Cooper, *Tell Me What's Happening 3: Registered Intermediary Survey 2011* (2012).

[97] H. Colley, 'Not Learning in the Workplace: Austerity and the Shattering of Illusio in Public Service' (2012) 24 *J. of Workplace Learning* 317.

whereby intermediaries vehemently defend their neutrality and want to be seen to be neutral. The neutrality paradox sees intermediaries sometimes drawn to sides, most notably to police during ABE interviews and to the defence at court. As early as the police station, achieving best evidence can be viewed as a collective goal that demands a coordinated approach:

> I think [police] feel like you're working with them, and in a way you are because they want to get the best evidence from the witness and that's what you're both trying to do … [T]here is a feeling that you have got to be on the same page or otherwise you couldn't really do it, you've got to be a bit of a team. (E&W-9)

E&W-6 used a similar analogy of working as a 'team' to describe a joint effort with police during an ABE interview:

> Last year, I worked with two police officers over a very significant period of time: nine months. I would say we had a very professional but very supportive relationship … [W]e all had a role to play and obviously I remained objective to help the witness give evidence but it was like the boundaries became blurred almost because I would go afterwards, not in front of the witness, … 'You know what she said there? …', which I suppose in a way was stepping out of my role – kind of going 'I don't get this – she said that then and then she said that?' – but I think we formed a good team.

This latter quote encapsulates the nature of the neutrality paradox. Though initially emphasizing the objective approach to their work, E&W-6 then recognized how discussion of the witness' evidence with the police officer compromised the integrity of their role. The contrast between the enclosed, more intimate setting of the interview suite and the open, public setting of the criminal court also appears to influence the conceptualization and performance of neutrality. When 'backstage', intermediaries seem more willing to risk their neutrality than on the public stage of the criminal courtroom.[98] The concentration and effort required to be seen as neutral by the judge, lawyers, and general audience contrasts sharply with the off-camera moments when an intermediary may, for example, raise evidential issues with the interviewing officer. We may view these incidents as deviations from the 'official stance' of neutrality as 'the impression fostered by the presentation is knowingly contradicted as a matter of course'.[99] The emotional energy expended by intermediaries in such cases is evidenced by the fact that several remarked in interview that they no longer accepted defendant cases due to the nature of allegations involved.

The notion of intermediaries being 'pulled' into the 'defence camp' was frequently mentioned in interview, though many considered that this was based more on perception than reality. Two Northern Ireland judges noted the risk of intermediaries being assimilated into the defence legal team and the collegiality associated with it, though both stressed that they had seen no evidence of this. In England and Wales, these fears appear to have some foundation. Intermediaries explained that their close involvement with defence representatives throughout a case when assisting a suspect/defendant led to a sense of collegiality. This contrasts with the experience of assisting a witness, which tends to be brief and limited purely to the period of their examination. Plotnikoff and Woolfson highlighted how the 'behind-the-scenes work' of defendant intermediaries often

[98] Goffman, op. cit., n. 69, p. 114.

[99] Id., p. 112.

goes unnoticed by judges.[100] This backstage role often involves close proximity to defence legal representatives and can lead to a lack of appreciation of intermediaries' neutrality. This places a unique strain on the neutrality of the defendant intermediary role, which practitioners must be aware of to avoid 'cross[ing] the boundary into a support role'.[101] O'Mahony and colleagues found that intermediaries felt excluded by the setting of legal consultations, and even by informal conversations between opposing counsel, and were reluctantly drawn into discussing case details, which they recognized threatened their neutral stance.[102]

The gravitation of intermediaries towards defence representatives, or the 'defence camp', as explained by the above quotes requires closer examination. A theme running through my broader doctoral research project is that intermediaries generally identify as outsiders to the world of the criminal justice system. In terms of special configuration at least, this is not surprising. As Mulcahy and Rowden outline, modern court design in the United Kingdom is engineered to separate different groups of users.[103] Intermediaries in interview spoke of the discomfort of 'hanging around' the precincts of the courthouse, often without anywhere to sit, read, or even eat (E&W-11; E&W-7). The lack of space for intermediaries within the court is, however, more pronounced when working with defendants. Most interviewees spoke about liaising with Victim Support (or the Witness Service in Northern Ireland) when working with witnesses and becoming accustomed to the surroundings of the Witness Support Suite. When working in a non-registered intermediary capacity, the same intermediaries reported feeling excluded and had no similar physically separate space to occupy (unless in the cells with a defendant in custody). Instead, they mostly inhabited 'shallow spaces' such as public and circulation areas.[104] E&W-3's experience reflects this difference:

> [I]t's bloody awkward when there is nowhere to put your bag … When assisting a defendant, it's even more awkward because you don't even have the Witness Service to help. I have my coat and bag with me and they get shoved under the bench. Where do I go? With the defendant cases, I just hang out in the corridor.

E&W-10 discussed the problem of 'small talk' with witnesses but said that they are often able to 'leave that to the Witness Service'. In a non-registered intermediary capacity, this is not an option, and the prolonged periods spent with the defendant and their legal representatives may understandably lead to a spirit of camaraderie. Just as the differences in intermediary provision can affect perceptions of and approaches to neutrality among intermediaries, so too can the built environment in which intermediaries operate. As Rowden notes, spacial configuration can dictate how individuals are expected to behave and (of particular relevance to intermediaries) perceive their own role and its parameters.[105]

It is instructive at this stage to return to the concept of resistance in the context of the empirical data presented. It is perhaps misleading to examine the reconceptualization of neutrality

[100] Plotnikoff and Woolfson, op. cit., n. 8, p. 271.

[101] Id., p. 276.

[102] O'Mahony et al., op. cit., n. 80, p. 160.

[103] L. Mulcahy and E. Rowden, *The Democratic Courthouse: A Modern History of Design, Due Process and Dignity* (2020) 13.

[104] Id., p. 87.

[105] E. Rowden, 'Remote Participation and the Distributed Court: An Approach to Court Architecture in the Age of Video-Mediated Communication' (2011) PhD thesis, University of Melbourne.

in terms of resistance at all.[106] Rather than constituting resistance to occupational norms and directives, the process of reconceptualizing neutrality reveals a hierarchy of values that guides intermediaries in their practice. This mirrors the findings of Colley and Guéry, who concluded that public-service interpreters invest more in the stakes of what drove the role's creation in the first place than in the profession's official rubrics.[107] Where broad objects of value are not deemed to be best served by the profession's official code, the personal judgement of interpreters supplants it. This was also evident in my data, as intermediaries appeared to prioritize the facilitation of communication above all else, oblivious to the collateral risks to their neutrality. For example, one intermediary (NI-2) insisted on attending a legal consultation without prior approval from the DoJ because of the imperative that the defendant could 'understand the advice being given and that the barrister was getting clear instructions'. Colley and Guéry contend that public-service interpreters demonstrate a weak illusio by distancing themselves from official protocols through their practice. While intermediaries risk compromising their neutral position, this may not necessarily equate to a lack of investment in the role and its underpinning rationale.[108] As is discussed further below, reconceptualizing neutrality in light of the unique demands of the intermediary role can help to contribute to a better understanding of the role and its nature.

8 | WITNESS WORK VERSUS DEFENDANT WORK

Thus far, the two-tier provision of intermediaries in England and Wales has been explained and its effects on intermediary practice acknowledged. Yet apart from O'Mahony, who has researched the identities of defendant intermediaries,[109] relevant guidance and associated literature tend to view intermediary work as homogeneous. For example, the *Criminal Practice Directions* outline the 'roles and functions' of intermediaries as a unified group.[110] The inability of some judges to differentiate registered intermediaries from non-registered intermediaries has been highlighted with some concern.[111] My interview data suggests that intermediaries do recognize the differing demands of working with witnesses on the one hand and defendants on the other. I term these concepts 'witness work' and 'defendant work' respectively. This finding is significant and should cause us to reflect on the state of the two-tier system of intermediaries in England and Wales and consider its viability and desirability. For the purposes of the current article, the focus is on the principle of neutrality and how different approaches to intermediary work may impact its conceptualization.

Several intermediaries stated their preference for defendant work over witness work. Two reasons cited were the increased autonomy of non-registered work and a desire to balance out the

[106] For a discussion of multiple forms of resistance including 'subtle', 'ineffective', and 'counterproductive' resistance, see Ybema and Horvers, op. cit., n. 90.

[107] H. Colley and F. Guéry, 'Understanding New Hybrid Professions: Bourdieu, Illusio and the Case of Public Service' (2015) 45 *Cambridge J. of Education* 113.

[108] Id.

[109] B. O'Mahony, 'How Do Intermediaries Experience Their Role in Facilitating Communication for Vulnerable Defendants?' (2013) DCrimJ thesis, University of Portsmouth.

[110] *Criminal Practice Directions*, op. cit., n. 12, 3F.2.

[111] J. Plotnikoff and R. Woolfson, *Falling Short? A Snapshot of Young Witness Policy and Practice: A Report for the NSPCC, Revisiting Measuring Up? Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings' (2009)* (2019) 124, at <https://learning.nspcc.org.uk/media/1672/falling-short-snapshot-young-witness-policy-practice-full-report.pdf>.

perceived injustices that defendants face throughout the criminal justice system.[112] For example, the plight of vulnerable defendants enclosed in the dock and unable to follow proceedings was highlighted. E&W-6 described the experience of one defendant confined to a 'glass thing, with two security guards either side of us – it didn't feel conducive to communication'. When intermediaries spoke about vulnerable defendants, the emotionally charged nature of intermediary work was apparent. E&W-17 explained how sentencing can often be the most difficult stage for intermediaries to remain detached:

> What I really care about is their sentence. I really worry about vulnerable people who have done something wrong and then people don't take into account their vulnerability. That is what bothers me … I want them to be treated fairly. When I find out there's no pre-sentencing report, when I find out that people take them straight to the cells, and they have no time to say goodbye to their wife of 60 years who's dying of cancer, that's when I get upset.

The potential blurring of the boundaries between neutral communication conduit and sympathetic supporter here is evident. This links with the finding of O'Mahony and colleagues that some defendant intermediaries may form an emotional attachment to defendants and feel a sense of loss when a trial concludes, particularly when a defendant is convicted and imprisoned.[113] In their court report, intermediaries are required to explain the recommended duration of their involvement in a case. However, E&W-17's quote above points to the risk of intermediaries recommending their involvement for purposes that are not directly tied to the facilitation of communication. As mentioned above, several intermediaries in England and Wales noted that vulnerable defendants have no dedicated support provision and no designated space within the court building. The lack of court familiarization visits for vulnerable defendants was also noted as plainly unfair, especially considering that these routinely take place for witnesses.[114] Despite this, many intermediaries took the initiative to organize a viewing of the court for defendants even in the absence of a judicial direction or policy requiring them to do so. These reflections reveal how intermediaries negotiate their own neutrality and are prepared to act beyond its scope based on perceived inequalities.

In Northern Ireland, the unitary system of intermediaries has meant that such a sharp distinction has not emerged. Intermediaries in Northern Ireland recognized the right of defendants to effective participation and how defendants have a different stake in the criminal process compared to witnesses.[115] Indeed, they noted procedural differences between witness work and defendant work in terms of interview format and the length of time physically spent in the courtroom. However, there was no obvious divergence in how the fundamentals of the role were approached,

[112] For further discussion on equality of treatment between defendants and other witnesses, see D. Birch, 'Evidence: Evidence via Television Link and Video Recording of Interview with Child' (2001) *Criminal Law Rev*. 473, at 477; L. Hoyano, 'Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' (2001) *Criminal Law Rev*. 948, at 968; J. Jacobson and J. Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (2009) 50.

[113] O'Mahony et al., op. cit., n. 80, p. 162.

[114] The *Criminal Practice Directions* provide that it 'may be appropriate' for a vulnerable defendant to visit the courtroom prior to trial, sentencing, or appeal, but in the experience of interviewees this rarely happens. *Criminal Practice Directions*, op. cit., n. 12, 3G.2.

[115] For an in-depth discussion of effective participation, see A. Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22 *International J. of Evidence and Proof* 321.

whether it was a vulnerable witness or a suspect/defendant being assisted. Interestingly, intermediaries in both jurisdictions felt that they were treated differently when working with defendants. E&W-3, who had extensive experience of both witness and defendant work, described this difference in treatment:

> Yeah, [the roles] are quite different. Well, I would say the role is similar but the way that it is perceived is so different – the way that you have to present the role has to be different, if that makes sense? … [T]here's a lot more resistance [towards] intermediates for defendants than for witnesses … a lot more, so I think you have to be a lot more persuasive as a non-registered intermediary.

Despite interviewees in both systems acknowledging this disparity in treatment, the notion of having to consciously perform the role differently when working with defendants was only apparent in England and Wales. When I mentioned the concepts of witness work and defendant work to intermediaries in Northern Ireland, they were viewed with a mixture of alarm and incredulity. Intermediaries in Northern Ireland spoke more about differences between individual courts and judges than about differences in their own approach to witnesses and defendants. Significantly, the judges interviewed in Northern Ireland echoed this conception of a unitary intermediary role: '[E]verybody is clear they are professional experts who are providing an independent role within the trial … I haven't noticed any difference and I have seen some intermediaries who have worked in both roles. I haven't discerned any difference' (MCJ-2). NI-3 explained how the unitary system is firmly embedded in the role's culture: 'We were told right from the beginning, I think it was the Lord Chief Justice who said this service will be available for witnesses and has to be for defendants too. From the get-go, I haven't known anything else.'

As a hallmark of the intermediary role, neutrality defines and shapes our understanding of its nature and its scope. The finding that intermediaries in England and Wales conceptualize and operationalize the principle differently is significant as we begin to understand the complexities of the role and the factors that affect its performance. Equally, the finding that intermediary provision in Northern Ireland has not generated this issue is important and invites comparison between the two jurisdictions.[116] The rollout of the HAIS scheme by the MoJ in 2022 looks set to formalize the two-tier system of intermediaries in England and Wales. How intermediaries conceptualize their neutrality within the parameters of this new scheme, and whether it differs from the current ad-hoc provision, remains to be seen.

The next part seeks to problematize the value of neutrality and its application within intermediary praxis.

9 | RECONCEPTUALIZING NEUTRALITY

The findings explored in this article suggest that the normative underpinnings of the intermediary role are ripe for examination. This is premised on the tension that intermediaries experience between the commitment to the value of neutrality and the struggle to work within its parameters. This part does not propose a normative model of intermediary

[116] For a comparison of intermediary provision between England and Wales and Northern Ireland, see J. Taggart, '"I Am Not Beholden to Anyone … I Consider Myself to Be an Officer of the Court": A Comparison of the Intermediary Role in England and Wales and Northern Ireland' (2021) 25 *International J. of Evidence and Proof* 141.

neutrality; rather, it highlights some key considerations that should inform future debate and discussion.[117]

As has been explored, the approach that intermediaries adopt towards their neutrality varies considerably, and individual practices often reveal internal inconsistencies and contradictions. The fact that intermediaries demonstrate what I have termed congruent and weak illusio simultaneously, and often interchangeably, is significant. Questioning the normative basis of neutrality allows for a recognition that complete consistency among practitioners is both unrealistic and undesirable.[118] The principle of neutrality may instead be viewed as reflexive in a way that allows for the diverse attitudes and experiences of those performing the intermediary role. This would enable the specific demands of the role to be considered, separate from standard accounts of neutrality, which tend to focus on the complex processes of adjudication and dispute resolution.[119]

A more dynamic and relational approach rejects the notion of neutrality as a fixed, stable quality in favour of viewing it as a principle realized through striving towards a normative ideal.[120] It also echoes Kramer's theorization of neutrality as an 'endeavour' by which individuals reach decisions prescribed by legal norms within a liberal-democratic system of law.[121] Such a model fits the realities of intermediary work and the nature of the role as unattached and autonomous yet simultaneously involved in the emotionally loaded details of a case and of the individuals involved. Drawing on the court interpreter comparison, this conception of neutrality could allow the social skills of practitioners to be brought to the foreground during all communicative events.[122] Viewing these communicative events as co-constructed between intermediaries and vulnerable individuals (as indeed any other participating parties) enables the complexity of communication barriers to be recognized.[123]

The empirical data explored in this article reveals how intermediaries balance conflicting demands to uphold a neutral presentation. This often requires what Bergman Blix and Wettergren describe as 'skillful inter-professional emotional attuning'.[124] The same authors use the concept of 'objectivity work' to explain the nature of neutrality among differing courtroom actors.[125] For example, they argue that adjudication requires judges to emphasize their neutral demeanour, whereas prosecutors experience a 'contingent and shifting' objectivity due to their case involvement and interaction with witnesses.[126] Acknowledging that criminal justice actors experience and perform neutrality differently allows a focus on the interactional and emotional aspects of intermediary work that can often be viewed with suspicion.[127] This does not mean that intermediaries are excused from neutrality as a duty, but that its value should be understood through the

[117] Similarly, Mulcahy has questioned the desirability and possibility of mediator neutrality: L. Mulcahy, 'The Possibility and Desirability of Mediator Neutrality: Towards an Ethic of Partiality? (2001) 10 *Social and Legal Studies* 505.

[118] B. Tamanaha, *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (2010).

[119] W. Lucy, 'The Possibility of Impartiality' (2005) 25 *Oxford J. of Legal Studies* 3.

[120] Touchie, op. cit., n. 42; Roach Anleu and Mack, op. cit., n. 68, p. 9.

[121] M. Kramer, *Objectivity and the Rule of Law* (2009) 64.

[122] Wadensjö, op. cit., n. 41.

[123] Id.

[124] S. Bergman Blix and A. Wettergren, 'The Emotional Interaction of Judicial Objectivity' (2019) 9 *Oñati Socio-Legal Series* 726, at 735.

[125] Id., p. 734.

[126] S. Bergman Blix and A. Wettergren, *Professional Emotions in Court: A Sociological Perspective* (2018) 161.

[127] Lucy, op. cit., n. 119, p. 30.

lens of a role that has a unique status within the criminal process and is performed by individuals with varied occupational backgrounds.

It is perhaps unsurprising that the quotes from intermediaries that point to a weak illusio relate to conduct that would be deemed uncontroversial in fields such as speech and language therapy, social work, or teaching. For example, while both speech and language therapists and intermediaries are encouraged to build rapport with a vulnerable individual, the former may achieve this through empathetic concern and emotional support.[128] Intermediaries may make recommendations based on emotional issues affecting communication; however, any emotional support must be left to the court defendant support (in Northern Ireland) or a friend or family member.[129] Similarly, Carlen and Powell have pointed to a preference among social workers and probation officers for avoiding interprofessional conflict through the use of 'courtroom lore', which involves close working relationships with lawyers and following informal rules.[130] This resonates with the interactions between some intermediaries and police officers described above that arguably undermine the intermediary role's neutrality. Just as the craft of judging involves deeply ingrained values that judges are rarely asked to reflect on and critically examine, intermediaries are recruited from backgrounds with their own sets of norms, values, and unquestioned practices.[131] Indeed, O'Mahony and colleagues identified potential conflict in roles resulting from some intermediaries 'wearing more than one professional hat'.[132] As noted above, Bergman Blix and Wettergren argue for greater understanding of the heterogeneity among court professionals in terms of their objectivity and its performance. It seems odd not to examine intermediaries' relationship with neutrality in a similar vein.

10 | CONCLUSION

The WIS in England and Wales is gaining international attention as the benefits of the intermediary role are increasingly recognized.[133] Yet the role is under-researched and its scope and nature need significantly more empirical investigation.[134] This article reveals the neutrality paradox experienced by intermediaries at the coalface of the criminal justice system and argues that it warrants further attention. While there exists a strong commitment to the normative principle of neutrality among all intermediaries, the role often transcends that of an objective communication conduit as framed by the relevant procedural guidance and case law. The normative expectation of the role as a detached, objective communication facilitator indicates a lack of understanding of intermediary work and its nature. Bourdieu's concept of illusio operates as a useful explanatory tool for investigating how intermediaries conceptualize their own neutrality and how they negotiate its nature. Reflecting on the strength (or weakness) of the illusio generated by intermediaries helps to locate them within the social world of the criminal justice system. How and why intermediaries

[128] W. Papir-Bernstein, *The Practitioner's Path in Speech-Language Pathology: The Art of School-Based Practice* (2018) 122.

[129] Ministry of Justice, op. cit., n. 7, p. 13.

[130] P. Carlen and M. Powell, 'Professionals in the Magistrates' Courts: The Courtroom Lore of Probation Officers and Social Workers' in *Social Work and the Courts*, ed. H. Parker (1979) 97.

[131] Roach Anleu and Mack, op. cit., n. 68, p. 61.

[132] O'Mahony et al., op. cit., n. 80, p. 160.

[133] Cooper and Mattison, op. cit., n. 5.

[134] J. Taggart, 'Intermediaries in Criminal Proceedings: A Role in Need of Clarification?' (2021) 1 *Archbold Rev*. 6.

demonstrate indifference or lack of commitment to these values is instructive to understanding the role's scope in practice.

How should these findings influence the provision and organization of intermediaries? A starting point must be a recognition of what O'Mahony and colleagues term the 'intricacies of the non-partisan relationship' between intermediaries and the vulnerable individuals whom they assist.[135] This should be a feature of intermediary training so that practitioners are aware of how their commitment to neutrality may be challenged at different stages. Yet a hurdle to even initiating a discussion around intermediary neutrality is the relatively poor understanding of the role among lawyers and judges, who rarely see the 'behind-the-scenes' work involved. The urgent need for collaboration between judges, advocates, and intermediaries has already been highlighted by Plotnikoff and Woolfson.[136] The unique challenges associated with intermediary neutrality must first be recognized before the viability of neutrality as an ethical standard can be seriously debated.

Finally, examining the intermediary role through the prism of neutrality reinforces a key theme emerging from my data: the roles of registered intermediaries and non-registered intermediaries in England and Wales are qualitatively different. In Northern Ireland, where a unitary system of intermediaries exists, such a distinction has not emerged, and neutrality appears to be a less complicated and contested aspect of the role. This finding should be instructive to the MoJ as it rolls out the HAIS scheme in 2022. Based on current proposals, this will cover intermediary provision for vulnerable defendants to replace the current unregulated, ad-hoc system of non-registered intermediaries. At first glance, this proposal maintains the two-tier intermediary provision that has led to the emergence of what this article terms witness work and defendant work.[137] The MoJ must seriously consider how the perception of intermediary neutrality will be affected by the formalization of this distinction in intermediary work. Based on the experience in Northern Ireland, a unitary system of registered intermediaries who work with both witnesses and defendants appears best placed to avoid such a distinction emerging.

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[135] O'Mahony et al., op. cit., n. 80, p. 164.

[136] Plotnikoff and Woolfson, op. cit., n. 111, p. 23.

[137] Henderson, op. cit., n. 11.