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The psychiatric report as moral tool: A case study in a French district court

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A B S T R A C T

Mental health evaluation within a legal setting is widely seen as a power to judge. The aim of this paper is to challenge this current thesis, which was popularised by Michel Foucault, who encapsulated the notion in a brief sentence: "The sordid business of punishing is thus converted into the fine profession of curing" (Foucault, 2003: 23). On the basis of an ethnography of a French district court (between September 2008 and May 2009, $n = 60$ trials) including interviews with judges ($n = 10$) and psychiatrists ($n = 10$), we study the everyday *penal treatment* of sexual offenders using psychiatric reports. Our findings show how (i.) the *expectations* of the judges select the psychiatrists' skills (based on the following criteria for their reports: accessibility of knowledge, singularization and individualization of content) and (ii.) reframe the psychiatric report as a moral tool. The clinical reasoning of forensic psychiatrists in their reports offer moral affordances due to their clinical caution regarding the risk of recidivism (therapeutic and criminological reversal, moral prevention). Both the judges' *evaluation* and the psychiatrists' clinical authority are shaped by a *moral economy* of dangerousness, which eclipses the idea of lack of criminal responsibility. In conclusion, we show that these unintended effects are necessarily of interest to most clinical practitioners engaged in work as expert witnesses.

1. Introduction

While traditional approaches in the sociology of health have considered the expert knowledge of psychiatric reports to be an avatar of power (Freidson, 1970), with medicine implicitly considered as a form of expert knowledge (Parsons, 1951), most research has played down the differences between the act of providing an expert evaluation and the act of providing treatment (Fernandez et al., 2010). The case of psychiatric reports is particularly paradigmatic of this confusion: research, criticisms and controversies essentially focus on the legal impact of expert witness evaluations, concentrating on the univocal relationship between expert witnesses and judges. Social science judgements, more than descriptions, look at the determining role of the expert witness as a figure of social control (Hakeem, 1958; Steadman, 1972); at the weakness of forensic psychiatrists in terms of predicting dangerousness (Lazerges, Giudicelli-Delage, 2011; McCallum, 2001); at agreement or disagreements between expert witnesses (Nielssen et al., 2010); and at the dominance of a "therapeutic ethos" (Nolan, 1998) or Governementality (Garland, 1997; Rose and al. 2006). And these critiques are similar to those made by certain criminologists, legal experts and psychiatrists (Bourcier and Bonis, 1999; Landry, 1999; Schweitzer and Puig-Verges, 2006) regarding the lack of scientificity in the reports produced by forensic psychiatrists. In a legal setting, evaluating mental health is therefore widely seen as the power to judge. The contribution made by the bulk of this literature can be summarised in a simple statement made sarcastically by Michel Foucault in one of his lectures at the Collège de France: "The sordid business of punishing is thus converted into the fine profession of curing" (Foucault, 2003: 23). The central axiom is therefore that the law has become "psychiatrised" or that a pre-established harmony exists between psychiatry and the law. According to this reading, the expert witness has power over the judge's decision and therefore over the defendant's social fate.

This article takes a step back from the positions taken by work such as the "law in action" programme directed by German sociologist Thomas Scheffer, which takes an ethnographic and comparative perspective (between England, Germany and the United States) (Scheffer, 2010), or the work of historians on

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psychiatric evaluations (Goldstein, 1987). The aim of this article is to question the thesis of the impact of psychiatric expertise on the law, on the basis of a case study taking into consideration not only the local context of practical rationales and the concrete work carried out by legal and psychiatric professionals, but also the more general context in France. In the framework of the French legal system and the social construction of a new criterion for identifying unacceptable practices (Fassin and Bourdelais, 2005), which promotes the prevention of dangerousness, how does an individual accused of a crime become a potential and disturbing dangerous person? How is the clinical authority of the psychiatric report actually used in the legal context?

In this perspective, we seek to understand how political consensus and moral self-evidence concerning the appropriate attitude to be adopted towards sexual offenders are performed within the production and the actions of a *moral economy*. We define this notion as the art of managing or treating populations through moral sentiments and as a way of understanding the unequal distribution of attention and human worth in contemporary societies (Fassin and Rechtman, 2009; Fernandez and Lézé, 2011).

2. Background

Before outlining the specific context of our inquiry, a few brief remarks are worth making about the French legal system to clarify some of the different terms that will be used throughout this article. The French judiciary works according to an inquisitorial system, based on the separation of powers between police authorities, public prosecutors and criminal courts. When we refer to "judges" in English in this article, we will therefore be referring to actors who fulfil a number of different roles within this system that do not always equate to the role of judges in other countries: as well as judges in the commonly accepted sense of the term, our study also includes *juges d'instruction* (examining judges or magistrates responsible for investigating charges), *procureurs* (public prosecutors), *juges d'application des peines* (specialised judges responsible for convicts during and after their prison sentence) and *avocat généraux* (judges that work for the public prosecutor's office in the *Cours d'Assises* – the equivalent of the Crown Court/Court of Assizes). In France, offences are separated into *crimes* [major felonies, subject to more than 10 years' imprisonment] and *délits* [minor felonies, subject to under 10 years' imprisonment]. *Crimes* fall under the jurisdiction of the *Cours d'Assises*, while *délits* are tried in the *tribunal correctional* [criminal division] of the *Tribunal de Grande Instance* [literally, Court of First instance, dealing with general civil suits].

2.1. French forensic psychiatry

The scope of forensic psychiatry as a field is defined by the application of psychiatry to questions of justice. Its mission is to study and evaluate the relationships between mental illness and criminality and violence. Traditionally, the mission of the psychiatric expert witness is to make a clear distinction between sanity and insanity. The psychiatrist's role differs within each of the four main legal systems that currently exist in the world: Roman law, Common Law, Bijuridical Law and Religious Law. Roman law favours one "impartial" court psychiatrist whereas Common Law favours "the adversary process", which implies the use of two forensic experts, one for the prosecution and one for the defence. However, in all systems, if the defendant is judged to be exempt from criminal responsibility at the time of the events, he falls under the province of psychiatric treatment rather than imprisonment.

In the French legal context, there are several types of expert reports and each fulfils a very precise function according to the stages of the legal investigation. A distinction is generally made between three different types of evaluation. First, there is the evaluation carried out while the suspect is being held for questioning (also known as an *examen de comportement*, i.e. an assessment of behaviour), which aims above all to determine whether the person's health allows him to be held in custody. Second, there is the pre-sentencing report (also known as the *expertise durant l'instruction*, i.e. the evaluation during the investigation), which focuses on a past act (and on retrospective imputability) and which can include instructions regarding the sentence. Third, there is the post-sentencing report (also known as the *expertise en application des peines*, i.e. an evaluation during and/or after the prison sentence), which aims to evaluate a future risk (prospective dangerousness, indication of the possibilities for early release or regarding preventive retention measures). The pre-sentencing evaluation upon which this research focused is supposed to answer seven standardised questions: Does an examination of the subject reveal mental or psychological anomalies? If applicable, describe these and specify to which affection they are related. Is the subject in a dangerous state? Is the subject fit for criminal sentencing? Can the subject be cured or rehabilitated? At the time of events, was the subject suffering from a psychological or neuropsychological disorder that prevented or altered his judgement or impaired his control of his actions? Specify the possibility for a medical treatment injunction in the context of someone sentenced to social and legal supervision as defined by article 28 of the Loi n° 98-468 of 17th June 1998.

2.2. The French political situation

At the interface of the medical and legal spheres, mental health evaluations have held a paradoxical position within the contemporary political context in France for fifteen years now.

As the policy initiated in the 1960s of removing psychiatric care from the hospital context continues to run its course, the deficit of means allocated to public psychiatry can be seen in both the shortage of court appointed forensic psychiatrists (700 for the whole of France) and the shortage of hospital beds in prisons (Fernandez and Lézé, 2011).

In this context, the prevalence of mentally ill people in ordinary detention has recently been rated as particularly high in the French prison system (Brahmy, 2005): 8 out of 10 incarcerated men have a mental disorder. The accuracy of this prevalence estimate for mental disorder is challenged, but what is most relevant is the social and political uses of such data in order to highlight a social problem in prison. This high level is usually explained by the fact that lack of criminal responsibility by reason of mental disorder is an increasingly rare court sentence (HAS, 2007: 17). It is indeed increasingly rare that the forensic psychiatric report acts as a filter and a regulatory tool aimed at identifying the mentally ill in order to provide them with appropriate treatment.

Of course, mental health evaluations do not enjoy the same scientific and technical aura of objectivity that is conferred upon the work of forensic accountants or ballistics experts (the questions continually raised by forensic psychiatry reports show that the forensic psychiatrist is the only expert who seems to be fallible by definition) (Théry, 1993). And paradoxically, at the same time forensic psychiatry has now extended beyond questions of criminal responsibility to questions of dangerousness e.g. with the law of the 25th February 2008 relative to *rétention de sûreté* (preventive detention after a prison sentence has been expunged) and *irresponsabilité pénale* (lack of criminal responsibility) (Senninger, 2006).

Finally, various news items either concerning released prisoners – mainly sexual delinquents – who have reoffended or concerning miscarriages of justice, have been subject to media attention and highly politicised. In the spotlight of controversy, these confront the