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The interdiscursive construction of irresponsibility as a defence strategy in the Belgian Assize Court

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ABSTRACT

Research on intertextuality in criminal trials postulates a dynamic view of legal text and demonstrates how discourse takes on different meanings at various stages in the legal process. This article examines how these intertextual dynamics affect the negotiation of issues relating to the moral responsibility of defendants in the Belgian Assize Court. Linguistic-ethnographic analysis of the defence counsel's argumentation in a strangling trial demonstrates how the ambiguity in Belgian criminal law of legal concepts related to moral responsibility opens up enormous potential for negotiation and multiple interpretations of these concepts. This article considers the implications of local constructions of *irresponsibility* for the assessment of criminal culpability and reflects on the relation between lay and professional input in the adjudication process.

1. Introduction

The insanity defence is a criminal defence strategy with a long and turbulent history (Robinson, 1996). It has been the subject of numerous studies in the fields of criminal law (Goldstein, 1967; Morse, 1985; Perlin, 1994, 2000) and forensic psychiatry (Szasz, 1961; Reznek, 1997; Gutheil, 1998), which investigate how the law defines the concept of insanity and in what ways it relies on extra-legal authorities—medical, psychological, religious—to develop its own legal categories of mental disorder. The legal conception of insanity implies that a defendant should not be held criminally responsible for breaking the law because s/he was legally insane, and thus incapable of making free and rational choices at the time of committing the crime. In many parts of the world today—the US, the UK and several European countries—use of the insanity defence is rare and jurisdiction generally applies to a state of 'diminished responsibility' or temporary mental impairment. Empirical research has indicated that in the US, the insanity defence is used for only one percent of felony offences (Grachek, 2006; Hirstein and Sifferd, 2011; Zwerner, 2013).

Belgian criminal law, however, does not provide this grey area between liability and non-liability: either a defendant is insane—and is interned to receive psychological treatment—or s/he is criminally liable and sent to prison. Although Belgian jurisprudence leaves little room for manoeuvre on issues of moral responsibility, it is a commonly used defence strategy in the Belgian Assize Court, which is the highest criminal court in Belgium, for which a jury is summoned to judge the most serious offences such as murder and rape. Even within the boundaries of my research corpus, the irresponsibility of the defendant is a central theme in all but one of the trials analysed. The popularity of this strategy among assize defence lawyers in Belgium can in the first place be related to the fact that the majority of assize cases deal with confessing defendants. In these cases, compelling evidence forces the defence to plead guilty to the core material facts (the physical act of killing someone), but not to the moral implications of the charges. This explains why many assize trials in Belgium today deal with

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the moral responsibilities of the defendant, laid down by law as legal grounds for immunity (insanity, self-defence), premeditation and mitigation (remorse, clean record). Still, while the mental condition of the defendant is often thematised by the defence as a core argument to minimize their client's culpability, the legal concept of accountability itself lacks transparency. Although Belgian criminal law provides the abstract-doctrinal setting for some core judicial concepts related to issues of moral responsibility (cf. Section 2 for an elaborate discussion), the actual implementation of these categories is at the discretion of the court (Declercq, 2007).

This conceptual indeterminacy, however, is not unique to Belgian criminal law, but has been at the forefront of public and jurisprudential debate in other continental code law countries and in several Anglo-Saxon common law systems. Besides, much public discourse on the medicalization of criminal responsibility (such as the famous Hinckley insanity acquittal) goes hand in hand with increased scholarly attention in international law journals and mental health publications. Perlin (1990, 1991, 1994, 2000, 2003) and Morse (1999, 2008) address the incoherence of insanity defence jurisprudence in Anglo-Saxon common law, considering the impact of evolving social science research on current views of culpability and raising questions about the ways in which legislators and jurors "read social science data" (Perlin, 1991: 131). From a forensic psychiatric perspective, Reznek (1997) scrutinizes the moral authority of the law and addresses the tension between legal and medical paradigms by analysing how the concepts of irrationality, causality, ignorance, compulsion, automatism and disease can serve as excuses in criminal cases. Slovenko (1995) and Gutheil (1998) explore the causal relation between mental illness and criminal behaviour, focusing on the role of the forensic psychiatrist as expert witness in court. Also in the more recent forensic psychiatric research (Hodgins et al., 2008; Anckarsäter et al., 2009; Höglund et al., 2009), it is argued that "[a]ttributing causes to complex behaviours such as crimes is not an unbiased process" (Anckarsäter et al., 2009: 342).

Interestingly, all of these studies directly or implicitly bring to the fore one fundamental point: that the elementary and often ambiguous definitions used in the statutes are subservient to the actual meanings attributed to these concepts in legal practice. Perlin (1990, 1991), for instance, explains how legal practitioners bring in all sorts of heuristic reasoning devices in discussing the culpability of criminal defendants. And this is where legal psychiatric research expands into the competence of forensic linguistics. Besides, perhaps the most obvious meeting point between these disciplines in the criminal law is where the ambiguity that characterises legal and psychiatric concepts and expertise opens up a space for virtuous interdiscursive play that empowers legal practitioners to ventilate their preferred interpretations of these concepts in the legal space. I define the concept of *interdiscursivity* as an interactional achievement, by which social meanings are expressed and interpreted in relation to local and translocal contexts of semiotic behavior. This process involves mobility and applicability of a wide range of socio-semiotic resources—including textual, generic and pragmatic modes—across local and translocal spaces of interaction. The concept of interdiscursivity addresses the implicit interrelations between discourse modes, types and genres, including but not limited to the explicit intertextual connections between texts realised through discourse representation and metadiscourse (Fairclough, 1992; Candlin and Maley, 1997; Sarangi, 2000; Bhatia, 2004; Candlin, 2006). Visibility of the interdiscursive anchoring of these semiotic forms decreases as soon as these forms are performed and entextualized as seemingly objectified and iterable discourses (Bauman and Briggs, 1990; Silverstein and Urban, 1996). This concern with the replicability of discursive context can also be traced elsewhere in this special issue: Alison Johnson points to the constitutive power of the discourse context in reproducing others' voices and speech styles. Similarly, van Charldorp (2014) argues that the intertextual is not confined to a representation of text but also involves the context of its production.

The Belgian Assize procedure, like many other legal procedures, leans on interdiscursive reconstructions of legal facticity (Matoesian, 1999; Heffer et al., 2013). The inherently variable and therefore manipulative nature of these interdiscursive linkages, however, is generally not addressed in sociolegal inquiry. It is the purpose of this article, therefore, to examine specifically those constitutive interdiscursive practices that tend to remain invisible in an internal legal approach. The following questions will be discussed: how are issues relating to criminal accountability interdiscursively constructed in situated courtroom interaction? How malleable is the legal interpretation of these issues and how negotiable is the authority and the expert status of psychiatric expert witnesses? What are the implications of a far-reaching discursive erosion of concepts related to moral responsibility for the assessment of evidence and identities in the Belgian Assize Court? To answer these questions, this article takes a linguistic-ethnographic approach that assumes a dynamic conception of text and context (Pascual, 2006, 2008), allowing the performance of evidence in legal cases to be analysed as a deeply contextualized, interdiscursive activity. Data for this research was obtained from the Assize Courts of Ghent and Antwerp, where I was given permission to make audio and video-recordings of the trial proceedings. Microanalysis of several data excerpts from a strangling case demonstrates that the ambiguity in Belgian criminal law of legal concepts related to moral responsibility opens up enormous possibilities for multiple interpretations and redefinitions of these concepts. It also shows how courtroom participants deploy all sorts of interdiscursive strategies—including everyday conversational mechanisms—in developing a lay perspective on the issue of moral responsibility. Interdiscursivity involves implicit socio-semiotic processes by which mundane semiotic features that characterize the genre of everyday conversation (dialectal speech, direct forms of address, expressing close affiliation with interlocutors) are deployed to articulate specifically selected interpretations of criminal conduct. More specifically, the data demonstrate how these interdiscursive mechanisms are used by the defence counsel in particular, not only to defend their client, but also to question the epistemic authority of the forensic psychiatrist and eventually even to challenge the proper functioning of the legal apparatus.

In the next section, I provide some background on the context in which I collected my data. This section discusses the working of the Belgian Assize procedure and elaborates on the concept of *irresponsibility* in Belgian criminal law. After