

White Magic and Black Gown*

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*The participants in this panel are described as follows: André Bompard - psychiatrist, psychoanalyst; Michel Foucault - Professor at the Collège de France and author of books on madness; Pierre Gay - psychiatrist who always refused to be officially listed as an expert-specialist in psychiatry; Jacques Hassoun - director of the publication *Garde-Fous*; J. Lafon - Head psychiatrist at Sainte-Anne Hospital, specialist in psychiatry and professor at the Institute of Criminology in Paris; Philippe Sphyras - lawyer, Court of Appeals, Paris.

MICHEL FOUCAULT: Experts are attacked. I do not want to defend experts, but I wonder if there is not a question to ask psychiatry in general. What is striking in the history of psychiatric expertise in criminal matters is the fact that psychiatrists were the ones who absolutely imposed themselves on the penal system which wanted nothing to do with it and which tried everything to get rid of them. Psychiatrists forced themselves on it and now have it under their thumb. But what is this desire for the criminal on the part of the psychiatrist? In psychiatry, there has been a desire to annex criminality for two centuries now. And we cannot understand how psychiatric expertise functions today if we do not account, on the one hand, for the criminal justice system, but, also, on the other hand, for psychiatry and the need psychiatric practice in general has for medical-legal expertise. Psychiatric practice as a whole needs there to be experts, psychiatric interventions as such in the area of criminal justice.

And I think that the reason, mentioned before (the law of 1838), is that at the time when psychiatrists gave themselves the right to confine an individual as dangerous, they had to show that madness was dangerous... They established that at the heart of every crime there was a bit of madness and, from the moment one shows that behind the crime, there is the danger of madness, reciprocally, behind madness, there is the danger of crime.

But, between the law of 1838 and medical-legal expertise, there is mutual reinforcement. One must account for that, and consider the experts necessary for the law to function.

There are two institutions which are in charge of the dangers represented by individuals: medicine and law. The psychiatrist is the person in charge of individual dangers.

LAFON: Now, lawyers run after psychiatrists and judges systematically ask for expert testimony.

FOUCAULT: Crime has become a privileged object for psychiatric analysis, it is a clear, constant fact. Psychiatry needs to annex criminality for itself in order to function as it does.

PIERRE GAY: Except if one introduces a kind of psychiatry that no longer needs to prove that madness is dangerous.

JACQUES HASSOUN: It is something that may seem unpleasant, this accusation against the expert. But I think that psychiatric expertise is the symptom of psychiatry. If one formulates the problem in political terms, psychiatry tries to stick to events, medical psychiatry is repressive.

LAFON: Expert = the de facto judge - therefore in what way can the lawyer organize his defense in terms of omnipresence of the de facto judge who is the expert and dominates the legal judge?

Q: Question: to what degree, disguised as psychiatric expertise, does one end up having the expert play a traditionally repressive role, without any of the guarantees provided for in the Penal Code?

PHILIPPE SPHYRAS: The accused has the same feelings for the expert as for a judge, and so, shouldn't there be another kind of expertise practised differently?

COSSARD: Down deep, what appalls lawyers, trial lawyers in particular, is to see themselves dispossessed of some of their power because they can assist their clients the day of the interrogation, but the day of the psychiatric evaluation, they are not there. We attack the expert evaluations because we are completely dispossessed by them.

LAFON: What lawyers accuse us the most, is not of automatically coming on the side of the defense.

COSSARD: Not necessarily. But a number of guarantees for the defense no longer exist.

LAFON: One has to know the facts. The way in which facts are presented has a great deal of importance for psychological and psychiatric determinations as well as the way in which they were lived.

COSSARD: I do not see the connection between this and the answers you have to give in your psychiatric evaluations and which are the three questions the judges asks you for in his binding order, that is: 1. to specify if the accused presents any mental, psychic or character anomalies. And if so, to describe them and specify the afflictions linked to them; 2. to say if the accused was in a state of dementia (insane) as per article 64 of the Penal Code, at the moment of the crime; and if not, to say if the anomalies observed are of the sort which can attenuate his responsibility; 3. to say if (the accused) has access to a criminal punishment, if he is curable and can be rehabilitated, if his placement in a psychiatric hospital is advisable, either in his interest or in that of the general public.

LAFON: What is access to criminal punishment? Definition: it is the fact of knowing whether an individual is capable of understanding that he has committed an anti-social act and that this act is theoretically punished under the penal code. Hence people who are not insane are "accessible" to criminal punishment.

FOUCAULT: In the beginning in the practice of psychiatric expertise (article 64) the question asked was: was the individual insane at the moment when the act was committed? In the case, there is no longer a crime; in the beginning, the psychiatrist never intervened at the level of sentencing, but simply at the procedural level. Bit by bit, he started to intervene at the level of attenuating circumstances to eventually modulate the sentence, and starting in 1832, the psychiatrist's report modulates the sentence, then it intervenes, since he has to say whether the responsibility of the individual is attenuated, which juridically speaking makes no sense, and begins not to make sense medically, when previously insanity made sense. Therefore, attenuated responsibility has no juridical meaning and no medical meaning, and we arrive at the three questions of 1958 which are dangerousness, accessibility to the sentence, the possibility of rehabilitation or adaptability. These three notions are neither psychiatric notions nor are they juridical notions, but their effect within the criminal justice system is enormous.

Q: What can indicate whether someone can be rehabilitated or not? Or rather, what does it mean to be "unadaptable"?

LAFON: There are many, many people about which one cannot say that they cannot be rehabilitated. They are, on the contrary, very well adapted to their careers (mobsters for example), but of course not according to society's norms. There are also people who have never been "unadaptable". The psychiatrist is there to sort out the "crazies" and to protect them from the influence of justice. That is the initial idea which was later modified, and in the end, psychiatrists were asked to do something else. And, as long as they are in the free will system, they have to proceed in this fashion. If one accepts being an expert in court, one cannot sabotage expert evaluations. One must admit that a priori people are responsible for their actions, with the exception of those who are mad.

FOUCAULT: We have to get back to an important question raised by lawyers: does the accused belong to justice or not? If the expert answers yes, he goes to court; if the expert answers no, the accused is taken out of the hands of justice. But, once again since 1832, the psychiatrist intervenes in order to say what kind of sentence there will be. Therefore, he has a judiciary role within the very unfolding of justice, and the discomfort of lawyers is linked to just this fact. For the lawyer is now dealing with two judges, including the pseudojudge who is going to modify the sentence, and, the greater the role of the modulator of the sentencing in penal psychiatry, the less the concepts utilized by these psychiatrists are medical ones.

LAFON: That is precisely what makes psychiatric expertise so difficult. A good expert evaluation is one which does not attempt to take sides, one which remains as objective as possible.

DUPONT MONOD: I think that expert testimony as such has retarded and perhaps even prevented justice from becoming aware of its own repressive character. It allows the judge to say in an extremely easy way: you are the defender, I am not the one responsible for my appreciation of the facts, it's the expert. The expert is a screen for the judge.

COSSARD: Down deep, the judge's dream would be to leave it entirely up to the experts.

HASSOUN: Psychiatry as a whole handles concepts such as readaptability, dangerousness, responsibility. Psychiatry is now entirely molded by these concepts.

FOUCAULT: Where do these notions of dangerousness, accessibility to sentencing and rehabilitation come from after all? They aren't from medicine or law. These notions are neither juridical, nor psychiatric or medical, but rather disciplinary. There are all those little disciplines in school, in the barracks, in reform schools, the factory, which have taken on greater and greater importance. All these institutions, by proliferating, expanding, ramifying their networks throughout society, have made these notions emerge which were originally unbelievably empirical and which are now found to be doubly sacred. On one hand, through the psychiatric and medical discourse, therefore apparently scientific, which uses them and on the other hand, by the judiciary effect they have, since it is in their name that someone is condemned. I think that criminology drags along these notions.

LAFON: These notions which you call disciplinary, I will simply call them ideological. These are notions which refer to a dominant ideology, and therefore, the expert, the judge, the lawyer, all play exactly the same role, which is that of society defending itself. There is clearly no mentally ill person, no delinquent, there is, each time, the product of a society.

FOUCAULT: It's the word "ideology" and how you use it that I don't agree with at all. If it were simply a question of rehashing an ideology, that wouldn't be too serious. The word "disciplinary" is more important a type of power. In inscribing these notions in law and in psychiatry, one authenticates them, makes the sacred.

ANDRÉ BOMPART: Can what Mr. Foucault is saying be connected to Legendre's work on canonical law?

FOUCAULT: That interesting book does not touch on this human materiality of mechanisms of power.

Translated by Lysa Hochroth