The Sanitization of Criminal Justice? The Use of Illness in Criminal Trials

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Abstract. This article examines the inclusion of a health approach in judicial decisions through an analysis of legal proceedings whereby defendants, judges and lawyers use health issues during criminal trials. Based on observations conducted over the course of a year in three sections of a summary trial (magistrates') court and the creation of a database from these observations (n = 290), this article shows that illness is an approach explored by magistrates who, following a rationale of individualizing punishment, encourage defendants to reveal their "health problems." Those who are shown to be ill are then systematically questioned on whether or not they are receiving medical care. Regression analysis reveals that this care strongly determines the criminal punishment. Defendants undergoing medical treatment are "protected" from prison while those who are not receiving treatment are more often sent straight to prison at the end of their trials. These results and the analysis of arguments in which "health problems" are used in the course of hearings, emphasize the suppositions on which judges base their decisions, and which take the form of three normative imperatives affecting all defendants. This leads to the over-incarceration of the most marginalized, and among them, the sick who are not undergoing treatment.

Keywords. PENAL JUSTICE—HEALTH—SENTENCING—INDIVIDUALISATION OF PUNISHMENT–NORMATIVE IMPERATIVES

November 2010, Palais de Justice, Paris. In the criminal court where summary trial (magistrates' court)* cases are being heard, a man stands clinging to the railing of the dock. He does not take his eyes off the three judges who face him. He is single, aged forty-six years and his only resources are in-work welfare benefits (RSA, *revenu de solidarité active*), and he is accused of a robbery on two counts: for the use of violence (which did not result in total disability) and for recidivism. The presiding judge reads out loud the details of the fifteen convictions that make up his criminal record then summarizes the alleged case against him. The latter had taken place the day before; a 25 year old student was walking down a street in Paris, carrying his computer in a bag, when a man suddenly appeared before him, threw him to the ground and snatched the bag from his hands. The man was caught in the act and the computer and the bag were returned to the student.

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* Translators note: This article deals with summary justice ("*comparution immédiate*") courts in France, which are similar in certain respects to magistrates courts in the UK, and thus their French counterparts are referred to as "magistrates courts" throughout the article.

When the right to speak was given to the accused so that he could answer the charges against him, he acknowledged responsibility for the theft. Then, worried by the sentence which would follow, he begged the court: "Do not put me in prison, I am HIV positive and I need to look after myself." The president asked: "Are you being treated for this?" and he replied, "No, I decided I do not want treatment." The judge then gave the floor to the victim's lawyer, who explained that his client, who was present at the hearing, had assessed his damages at between two and three thousand euros the previous day but that, given the difficulties of his attacker, he only required a symbolic euro from him. The deputy prosecutor called for "two years imprisonment of which six months would be suspended." The defence lawyer said in her final arguments that her client was not currently receiving any medical treatment for his condition but emphasised that he was being regularly monitored by a hospital in the Paris region and specified the name of his doctor. She concluded her case by asking that the sentence pronounced on her client "should not be accompanied by a committal order, so that he can get to a scheduled medical appointment tomorrow." After withdrawing to discuss the case, the judges declare the man guilty and sentence him to a term of one year in prison with a committal order. The court officers handcuff him. He will be taken directly to the prison at Fleury-Merogis to complete his sentence.

In France, theft is punishable by five years imprisonment and a fine of 75,000 euros where it is preceded, accompanied or followed by violence against others which has not resulted in their total incapacity for work (Article 311—4 of the criminal Code). This is the maximum sentence.[1] Since the introduction of the principle of "individualized sentencing" in the Criminal Code in 1810, judges have had a range of sanctions at their disposal to determine the terms of the sentence (fine, imprisonment, suspended sentence, criminal coercion, etc.) and its type and nature. They determine the sentence by taking into account two types of factors (Green 1961): legal factors—the offence, its circumstances, etc.—and non-legal factors that refer to what they call the "personality" of the accused and that means, broadly, their social characteristics. How old is the person? Do they work? Are they married? Or even, do they have a home? So why was this man given a custodial sentence of a year in prison and not a heavier (or lighter) sentence? How do the legal and non-legal factors fit together in sentencing?

Researchers have been trying to answer this question since the 1970s.[2] Their work, collectively known as *sentencing studies*, aims to identify the logic of criminal sanction through a deconstruction of sentencing. This field is still the subject of numerous studies, especially in North America, centred mainly on racial discrimination.[3] In France, apart from surveys conducted on how treatment of the offender varies by gender (Mary-Portas 1996; Cardi 2007; Lelièvre and Leonard 2012; Vuattoux 2014), social situation (Robert *et al* 1976; Herpin 1977; Gautron and Retière 2013) and ethnicity (Levy 1984; Robert and Tournier 1989; Jobard and Névanen 2007; Léonard 2010), fewer researchers address these questions.

1. The maximum prison sentences and fines incurred are doubled when, as is the case with this man, the acts committed constituted recidivism.

2. See Kellens (1978) for a review of the international literature concerning early research on sentencing.

3. See especially Kleck (1981); Myers and Talarico (1987); Zatz (1987); Gross and Mauro (1989); Hood (1992); Chiricos and Crawford (1995); Steffensmeier *et al*. (1998); Stith and Cabranes (1998); Spohn (2000); Kaluta-Crumpton (2012) and Light *et al*. (2014).

Such work has shown that men, working-class people and foreigners receive heavier sentences at trial compared to women, people from the upper classes and French nationals. Such heavier sentencing has an impact on the composition of the prison population: men, people from the working classes and foreigners are over-represented in prison (INSEE 2002). This is also the case of the sick, who are over-represented in prison particularly as regards psychiatric disorders (Lamb *et al*. 1998; Diamond *et al*. 2001; Fazel and Danesh 2002; Rouillon *et al*. 2004) and addictions (Fazel *et al*. 2006; Haesebaert-Way *et al*. 2008) as well as for some chronic somatic conditions[4] (Binswanger *et al*. 2009; Fazel and Baillargeon 2011; Chiron *et al*. 2013).

But when it comes to health issues, mental health monopolizes the debate concerning judicial institutions. Studies have thus focused on the processes of labelling people as "delinquent" or as "mentally ill" that lead to referral to either the criminal or medical channels (Laberge *et al*. 1995), on the uses and criteria for psychiatric assessments in trials (Thys and Korn 1992; Saetta *et al*. 2010), on the reception by jurors of a defence based on criminal irresponsibility (Butler and Wasserman 2006), on how mental health is determined for those facing a conviction that carries the death penalty (Stites and Dahlsgaard 2015), on the internment of defendants considered not to be criminally responsible (Cartuyvels *et al*. 2010), and on the carceralization of psychiatric care (Bérard and Chantraine 2008). We know little, however, about how those health events not involving questions about the criminal responsibility of individuals can affect judicial decisions.

In addition to objectifying how these health events have an impact on judgments, this article proposes to explore the argumentative processes by which participants in a trial (defendants, defence lawyers, prosecutors and judges)[5] use "illness." Except in the case of psychological or neuropsychiatric disorders, the legal system does not provide for the use of medical expertise when defendants are reporting other events introduced and/or questioned as being "health problems" such as cancer, addiction or diabetes. Courtroom debates thus give rise to a confrontation between the lay and normative representations of "illness" understood by the various participants in the trial. Building on studies which question the incorporation of "normative repertoires" within the judicial arena (Barbot and Dodier 2014, 2015), this article hypothesizes that analysis of the argumentative processes by which "illness" is used in the courtroom enables us to grasp the expectations which underpin how judges construct their decisions, thus bringing to light the *normative imperatives* faced by defendants.

4. The latter have however been the subject of very few epidemiological studies in prisons. Since the prison population is rarely included in national health surveys in France, the prevalence of chronic conditions such as diabetes, hypertension, asthma or forms of cancer are not known (Godin-Blandeau *et al*. 2013). Only the prevalence of HIV and hepatitis C have been the subject of recent research. Their prevalence is six times higher in prison than that observed in the general population (Chiron *et al*. 2013). However, these results do not control for those effects related to the structure of the prison population (age, gender, social class, etc.) that is not the same as that of the general population. In the US, one study targeting the prison population has included this structural effect and highlighted that "all other things being equal," prisoners are more likely than the general population to present with hypertension, asthma, arthritis, some forms of cancer and viral hepatitis (Binswanger *et al*. 2009).

5. There are rarely any claimants for criminal damages in the trials analysed in this article.

Box 1.—*Methodology*

This article is based on observation of summary trials in magistrates' courts at the High Court (*tribunalr de grande instance (TGI)*) in Paris. In this court trials are judged in a criminal courtroom divided into three sections (due to the number of defendants facing this form of trial daily), but which operate under the same public prosecutor's office. Two of these sections operate simultaneously every day except the weekend and the third operates only on weekends. These observations were made in the three sections of this court, between September 2010 and August 2011. The author introduced herself as a sociologist to the clerks and bailiffs of the different sections and observed the proceedings from the seating reserved for journalists and trainees, and followed 342 criminal trials involving 376 defendants.[1] 290 of these defendants were convicted after trial. The remaining 86 defendants were either acquitted (4 of them) or had their trial postponed to a later date (for 82 of them).

During the trial observations, the author took notes of the full hearings, supplemented with descriptive information.[3] A database was created from the transcripts of those trials which resulted in a conviction[4] (n = 290). This database consists of thirty-three variables (without recoding) divided into three groups (Appendix 1). The first group includes variables related to the "personality" of the convicted (age, sex, family status, health events, etc.), the second those relating to the offences for which they were convicted and their circumstances, and the third concerns the sentence (demands and criminal convictions). "Ethnographic statistics" (Cayouette-Remblière 2011) were constructed by linking a database—based on the author's observations—with ethnographic material.

After the observation phase, interviews were requested with the four presidents of the magistrates' court chamber.[5] Only one of them agreed to meet[6] with the author to discuss their professional practices and representations. This material was supplemented with repeated observations and interviews conducted in three French prisons, between November 2011 and June 2013, with care-workers and with 74 people who were detained and ill.

1. Several defendants can be tried for the same case in a trial. For example, co-authors of "group assault" offences.
2. In such cases, judges must determine the terms of reference. In other words, they must decide the conditions under which the accused will await their judgment: at liberty under judicial supervision or on remand.
3. The notes were taken during observations and then supplemented at the end of them.
4. The coding of ethnographic observations has rarely been the subject of methodological reflections. For this work, it has two main advantages: it enables the author, on the one hand, to objectify characteristics of the hearings, as already emphasized by Collectif Onze (2013) in its research on hearings in family courts, and, on the other, to highlight statistical links tin order to grasp how the sentence has been constructed.
5. The first two sections of the court are each chaired by two magistrates who alternate their hearing days. For each court case, they are advised by two assessors.
6. This magistrate's readiness to meet can be explained by the significant efforts at reflexivity he had developed during his unusual life trajectory. From a working class background, he had abandoned his legal studies because he did not feel "comfortable" with "all these lawyers' sons": "I quickly realized I would not be able to become a part of this world." Attracted by the profession of magistrate, he explains that he initially abandoned this ambition too because, following his experience at the Bar School, he "didn't want to study at the Bordeaux school (Ecole Nationale de la Magistrature, ENM)" He decided to switch to being a chief bailiff, a profession he pursued for twelve years. At the age of 40, he was able to request "direct entry [to the judiciary], on the basis of qualifications, age and professional career." Although direct entry opens the possibility of following the same career paths as graduating from the ENM, it is in his view: "a marginal route that inspires scorn in my colleagues, it is not very telling or flattering." Since taking office as president of one of the sections of the magistrates' court, he has kept notebooks in which he writes his feelings and emotions after judgments. He has also responded to external requests to improve the conditions of such trials, such as the reformulation of the "rapid social survey" questionnaire completed by social workers concerning the social situation of the defendant at the time of the alleged offence in order to make it more readable at the time of the hearing.

The focus here is on summary trials in magistrates' courts, that is to say, on a mode of justice intended for the most socially excluded litigants. These analyses are combined within a broader reflection on the forms of hybridization and tensions between the penal system and the health system. While positioning this as a continuation of work that argued for a process of "criminalization of the social" (Wacquant 1999, 2009; Mary 2001; Gustafson 2009), for the years 1970–1980, the position argued here is the converse of debates concerning the legalisation of the social in that it questions the sanitarization of the criminal (or in other words how his or her health has an impact on sentencing). Using this latter approach, Farges (2006) highlighted the development of a public health rationale in French prisons, following the implementation of the reform of 18 January 1994,[6] that he presents as the "sanitarization of the penitentiary institution." This process is also observed in other national contexts: the doctors Glaser and Greifinger (1993) suggested more than twenty years ago that the health services of US prisons should be considered as a "public health opportunity" for the poor, and Megan Comfort (2007) concluded, more recently, that prisons have become the primary suppliers of health and social services to the poorest populations. What these works have in common is that their focus is solely concerned with correctional institutions. This article proposes to turn our gaze upstream from prison to explore how a health perspective informs the construction of judicial decisions.

"Mass" Justice designed for the poorest

The magistrates' court hearings appear to be a form of "mass justice" (Fassin *et al*. 2013, p. 30), which processes dozens of defendants and cases every afternoon in Paris, and as an "emergency justice" (Bastard and Mouhanna 2007; Christin 2008, p. 10), whose trials rarely last more than thirty minutes and often lead to a sentence of imprisonment. The defendants come before the bar at a steady pace. At the end of police custody and in the hours before their trial, they successively encounter a prosecutor who informs them of their alleged offence, a social worker carrying out a "rapid social survey" on them, and their lawyer—often the lawyer appointed by the court—who will ensure their defence. Magistrates' court trials are distinguished by the limited range of crimes being tried in these cases and the significant poverty of the individuals brought before these courts.

The cases dealt with during these hearings are regularly referred to as "simple" ones by the judges in the sense that they did not require a preliminary investigation and hearing. They are usually[7] theft (damage to property), violence (attacks on people) and offences against narcotics legislation (Appendix 2). More than one in three in this sample had been convicted of a violation of property ('*atteinte aux biens*'). This category essentially comprises theft and destruction. Nearly one in four was

6. Since the implementation of this law, the treatment areas of prisons are no longer managed by the prison administration but by the public hospital service.

7. This study has chosen to concentrate on the main offence pursued by the prosecution. Although this choice helps to show what types of evidence are most often the focus of discussion during the hearing, it nevertheless has the disadvantage of making secondary offenses inconspicuous—particularly infringements of the legislation on foreigners—for which defendants are also regularly prosecuted.

convicted of a serious personal assault. This was mainly violence and, in much lower proportions, sexual assault. Offences against narcotics legislation—be it acquisition, use, transport, possession or supply or sale—represented a little more than a tenth of the main offences leading to a criminal conviction.

The population that appears in front of the summary courts is not representative of the general population or of the prison population as a whole (Welzer-Lang and Castex 2012, p. 53). If we look at the socio-demographic profile of convicted defendants in our sample (Appendix 3), it appears that this population is largely male (92.8%) and young (70% under 35 years). The majority of individuals have children (64.1%), but they are also for the most part, single (81.4%) at the time of trial. These are the "regular customers"[8] of the courtrooms: only one out of three (36.6%) of those convicted had no criminal record before their trial.

The defendants who are subject to this rapid justice procedure do, nonetheless, exhibit a number of problems. Almost half of this population are foreigners of whom one third are illegally on French territory. Nearly half of those found guilty in the sample were unemployed, and of those that are working, one in five occupies an undeclared job. These are most often people living off street-trading or working in the building industry. Their low employability leads to marginalized housing: more than one in five of those convicted was homeless at the time of their trial. If we look now at the health of these individuals, almost one in three of those convicted declared an event described as a "health problem" or an "illness" during the trial.[9] Those most often cited in the course of the trial are drug addiction, alcoholism, cancer, HIV and hepatitis C (Appendix 4). The frequency with which these health problems are cited is well above their prevalence in the general population.[10]

Defendants encouraged to use the vocabulary of illness

We will see that for social investigators and magistrates illness is a "vocabulary of exploration" (Dodier 1993) of the "personality" of defendants, that they investigate from the perspective of individualizing penalties. The questions they ask defendants, both before the trial and during the hearing, encourage the latter to report the health problems affecting them.

8. This expression is taken from F. Jobard and S. Névanen (2007).

9. The concern throughout this article is with events involving the body, not germane to questions of criminal responsibility—excluding psychiatric and neuropsychiatric disorders—which are introduced and / or questioned as "health problems" or "illness". For the sake of legibility—and despite the fact that I am describing /how certain events are constructed as "health problems"—these terms are used without quotation marks in the following section.

10. The prevalence rate of "problem drug use" was estimated at 7.5 ‰ in 2011 (Janssen and Bastianic 2013) and that of "alcohol dependence" at 3‰ in 2003 (Lepine *et al*. 2005). The cancer prevalence rate was estimated in 2010 to be 14.8 ‰ for men and to be 13.3 ‰ for women (INCA 2010). The HIV prevalence rate was estimated at 0.023 ‰ in 2008 (Yeni 2010) and that of hepatitis C at 8.44 ‰ in 2004 (Meffre 2006).

Collect, verify, make into a story

All defendants are questioned about their possible medical problems during a "rapid social survey"[11] ("RSR" in the rest of the article) carried out before the criminal trial. Defendants are taken by escorts to face social investigators (social workers and psychologists) in the hours or even minutes before their trial. In the High Court of Paris, a charitable "*association*" (*Association de politique criminelle appliquée et de réinsertion sociale* [APCARS], "Charity for applied criminal policy and social reintegration") is responsible for conducting these surveys which consist of a structured interview on the social, financial, familial, occupational and health situation of the accused. Interviews are conducted face-to-face in glass boxes of about four square meters located in the hall of the public prosecutor's office.[12] Social investigators conduct their interviews using a two-page form, divided into five sections, that they complete from both the responses of the accused and by giving their own impressions on the course of the interview and of the circumstances of the defendants.

In the section "Other information" in the fourth part of the RSR, entitled "Employment, training, studies, other," information about the defendants' state of health is transcribed. In the RSR on Alphonse[13] (Appendix 5), it is stated that he "suffers from tendinitis," he "suffers from stomach pain following periods of stress" and that he has "no special consumption—i.e. specific drug-use problem." The social investigator who spoke with Alfonso emphasised two of these items of information, highlighting the "tendonitis" and lack of "special consumption." However the "stomach pains" are not highlighted. As for each of the five categories, a blank space is provided on the left side of the form for the social investigators to specify whether this information was confirmed by a third party or not. Parents or spouses are contacted to confirm the information about the family situation, employers (current and previous) to confirm career information, and caregivers (general practitioner, psychiatrist, psychologist) to confirm health information. For the judges, such checks are essential as they provide evidence of the veracity of what the accused has said:

> Some [defendants] play sick. In terms of diseases, I've had hepatitis, cancer … We try to find out where they are being treated. In principle, it is verified, they talk about it to the social worker, they are able to name the hospital and then the social investigator calls the hospital and that makes it possible to verify the information. That's very important for us when it says 'verified.' When that is not written, we assume that it is not necessarily true. […] When the APCARS can confirm the statements of the person, that's really very important. When it is not verified … that's not good. But in any case, I do ask: 'Why don't you want them to call your mother, your sister … why?' Sometimes it's because they do not want them to know or because they do not want to be talked about.
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> (Albert, 53, president of a magistrate's court).

11. The "rapid social survey" is defined by Article 41 paragraph 6 of the Code of Criminal Procedure: "The prosecutor may also entrust the persons authorized in accordance with Article 81, sixth paragraph, with the duty of noting the material, social and family situation of a person subject to an investigation and inform him on the measures required to promote the social integration of the person concerned."

12. RSR interviews were not attended by the author. They are currently the subject of research conducted by Natalène Millet-Taunay as part of her Master's thesis at the *École des hautes études en sciences sociales*.

13. All names and initial letters of surnames, as well as some secondary information which may enable identification of those in question (the names of hospitals, addresses, etc.) have been changed.

Thus, in the investigation of Alphonse, the interviewer states that information on his somatic health status is "not confirmed." However, a psychiatrist had confirmed having treated him in the past in a mental health centre. As with the other third parties who have confirmed the information supplied, the psychiatrist's name and phone number are written on the RSR form. After the interview, the sheet is duplicated and attached to the case file handed over to the various participants in the trial:[14] the presiding judge, the prosecutor, the defence attorney and the lawyer for the civil party (when a person is being represented). It is this document that judges rely on to examine the "personality" of the accused during the hearing. However, the use of illness in the trial is not confined to the point at which the "personality" is inserted into the narrative; it can be mentioned verbally or even widely discussed in one (or more) of the twelve parts of the trial that I distinguish.

> The trial begins with the verification of the identity of the accused. [1] The presiding judge or one of his assistants asks the accused to stand up (if in the dock) or to approach the bar (if they appear as a free person). They state their name, date and place of birth, nationality, marital status, employment status, and their address: 'Monsieur D., you were born February 11, 1963 in Lyon, you are French, single, you have a child under the age of nineteen, you sometimes work as a maintenance technician and you reside at 3 rue des Plantes in the fourteenth *arrondissement* of Paris.'
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> After asking the accused for confirmation of this information, the President gives notification of the charges brought against him. [2] He reminds the accused that he is charged with an attempted theft with two aggravating circumstances (damage to property and recidivism). He then asks: 'Do you wish to be tried now or are you asking for time to prepare your defence?' [3] The man says he prefers to be tried on the same day.
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> The judge then summarizes the information contained in section one of the criminal records of the accused [4]: 'Your criminal record has thirty convictions, so I will only take the last one, in 2007, it was a theft also, as in 2006 …,' and then he turns to his 'personality' via a number of questions which echo those of the RSR. He asks, 'Are you working now?' The man replies, 'No, I no longer work because I'm sick. I am HIV positive and I have diabetes. I'm waiting for my Cotorep file (Commission Technique d'Orientation et de Reclassement Professionnel—organisation concerned with classifying and aiding handicapped workers, *trans.*) on that. I cannot stand for long periods, may I sit down here?' The president signals to him a 'yes'—the man sits down—then, browsing through the RSR, he asks: 'So … we've looked at your home, your work too … Are you being treated for the illness?' The accused stands up: 'I'm being treated at [the hospital] Saint Joseph but I'm waiting for a bed. In fact, I have a year to live which doesn't do much for my morale.' The judge continues reading: 'So … So he lives with his ex-girlfriend … it's unreadable! He's waiting to get RSA, CMU [health insurance] … And what treatment are you getting?' The accused replies: 'I have a triple therapy. I was a drug addict. But since 2007, I've sorted myself out.' The judge continues: 'Oh, and you also have hepatitis C?' The man nods.
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> The judge then states his summary of the evidence [6]:[15] 'The incident occurred [yesterday] at 0:10am in the thirteenth arrondissement, you were seen by people who called the police while you were hitting the lock of a bicycle with an iron bar. The police noted the damage on the bike. They made you do a breath test which revealed a BAC of 0.47 milligrams of alcohol per litre of exhaled air.' Then he gave the floor to the accused [7] so that he can explain the charges against him, 'What do you have to say about the evidence, Monsieur?' asks the president. The accused explains: 'I mean, in the morning I was at a job

14. Except where the trial has been postponed, when they only get to see the RSR a few minutes before the start of the trial, although in some cases it is brought to them by a court officer after the trial has already begun.

15. Some judges deal first with the evidence, and then the "personality."

interview that didn't work out because of an illness. So I was angry. But the bike … but the bike's spokes, they were broken. I acknowledge that I kicked …' The president interrupted: 'Oh, you already acknowledge the damage!'; the accused continues: 'But I didn't want the bike myself. If I had wanted to steal it, I wouldn't have broken it!' When a person announces that they are the *partie civile* (plaintiff), the judge also asks her to deliver her summary of the evidence and then the lawyer for the plaintiff [8] makes their case.

The President gives the floor to the prosecutor for his submissions.[9] He stands up and delivers his version of the affair: 'Monsieur D. is a repeat offender, who is not working, and is a recidivist. This gentleman is well known to the public prosecutor. I do not see why I should not ask for the minimum sentence. Unfortunately, prison seems to be a solution for this type of person. I ask you to enter a conviction against Mr D., to sentence him to two years in prison and place him in custody.' The public prosecutor sits down. In the dock, the man drops his head into his hands.

The three judges take note of the *requisitions* (sentences demanded by the public prosecutor) and then the president gives the floor to the defence counsel. He argues: 'Monsieur D. does not admit attempted theft. Yes, he was upset. Yes, he hit the bike with an iron bar. But let us exercise common sense: he had an iron bar, so how could he steal the bicycle? And what could he do with the broken bicycle? […] I request his discharge on the charge of theft. Since 2007, Mr D. has not committed any crime. He has tried to work. He is sick, he is undergoing treatment, he has accommodation. Prison would not be suitable at all. I beg your indulgence for the acts of *degradation*.' The presiding judge calls the accused [11] to say the last words in his trial; he turns again to the defendant: 'Do you want to add something to what was said by your lawyer?' The man speaks: 'I would say that my life expectancy is short. If you give me time to look after myself a bit … Prison will do nothing for me. I do not want to die in prison! I do not know all of the judicial options, but if you could first allow me time to get myself treated.' The president concludes: 'Thank you Monsieur' and takes up the next file.

The court officer opens a backdoor that connects the dock to the Public Prosecutor's office, handcuffs the prisoner and leads him out of the courtroom. After an adjournment, the President announces the verdict: 'Monsieur D., after deliberation, the court finds you guilty, and as punishment, condemns you to a sentence of twelve months imprisonment suspended for six months.' The Judges do not order custody; the man can leave the court a free man.

Illness can thus be used at several points in these twelve stages of the court case identified above. Judges routinely ask defendants about their potential health problems when they deal with their "personality," either directly or by picking up on the information contained in the RSR and asking them to confirm it. While stressing regularly that individuals are not obliged to do so, judges encourage them to construct a narrative about their health by asking certain questions such as "do you want to tell us more?" or "do you want to provide details about your health problems?" Illness can next be put into play when defendants are allowed to speak so that they can respond to the evidence, and then during the indictments, the legal arguments, and when the accused is allowed to pronounce the final words in the trial. Finally, although this was not the case in the trial described above, the health of the accused may also be raised when the verdict is pronounced. Thus, in the context of another trial, and after a custody order had been made, the judge said to the clerk of the court: "It would be nice if he could be detained in Fresnes in view of his health problems." The man who had just been sentenced protested: "I'd rather be in Fleury!" To which the judge replied: "Well it will still be Fresnes for you so that you can be given treatment."

Health problems are also sometimes suggested in a physical manner. During a hearing, one man takes off his bandage to show the scars of a recent intubation whilst another spits loudly and at regular intervals into his handkerchief. Such

physical demonstrations are regularly discouraged by the judges; when a defendant pulls up his tee-shirt to show the scars of a recent operation, the president exclaims, "No, keep your shirt on, we don't need to see!"

Although defendants are encouraged to disclose health problems at different stages of the criminal trial, the emphasis given to such problems by the judges and the time they devote to the exploration of this dimension differ according to the nature of the alleged offence.

Some offences are more likely to lead judges to question litigants about their health

Some types of offence lead the magistrates into further emphasis on the question of illness, even when the defendants' RSR makes no mention of a health problem. In the case of a breach of the law on narcotics, driving a motor vehicle under the influence of alcohol or petty theft, for example, they try to establish causal links between criminal issues and medical problems:

> When there is no indication [of a health problem in the RSR of a potential drug user], I think to myself that I can still test the ground. In cases of addiction we know how it is, they do not have the means to pay for their fix, so it is important to address this issue. And then, to take it into account for the length of the sentence.
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> (Albert, 53, president of a magistrates' court).

They suspect the accused of being "addicts" or of having a "drinking problem" which could lead them to consider a sentence that would take the form of a legal obligation to follow appropriate treatment.[16] Defendants position themselves in two distinct ways when faced with the questions put to them by the judges. Some will present themselves as "sick people," while others will tell the court that they are merely "casual users."

In the first type of situation, defendants introduce the fact that they have an illness in the same manner as if it were a mitigating circumstance—despite the disappearance of such a plea from the Penal Code in 1994. For example, while being tried for the transportation, possession, supply or transfer, acquisition and use of cocaine and cannabis, a thirty-two year old man explained to the judges: "I am not a drug dealer, I'm an addict who cannot afford to finance his consumption of drugs." Similarly, Amin, repeatedly found guilty of narcotics offences and already in jail when he appears in court, maintains that a person prosecuted for theft or for the offer or sale of narcotic drugs has good reasons to appear to be an addict:

> [In my trial] I only talked about addiction [and not hepatitis C]. They wanted to know … Whereas before addiction was a mitigating circumstance, it is now an aggravating circumstance so … For these guys, it is better that they keep silent, except if they are traffickers.

16. At the time when this survey was conducted this only concerned suspended sentences with probation involving compulsory care. On August 15, 2014, a new form of punishment—criminal coercion—was introduced; it may also include an obligation for defendants to "submit to measures of medical examination, treatment or care." The use of criminal penalties whose main component is care are not discussed in this article; however they should certainly be further investigated.

> In that case they have to say they sell to fund their own drug habit. If the person has stolen … then he has to say that it was for his drug habit too.
>
> (Amin, 38, substance abuse and hepatitis C, serving a six month sentence in prison).

In the second type of situation, and although they are sometimes encouraged by the judges to talk about a health problem, the defendants refuse to be considered "sick." They isolate certain facts as rare (if not unique) occurrences of what have been represented as regular practices. This is the position taken by a thirty-seven year old man prosecuted for driving a motor vehicle under the influence of alcohol. Having been sentenced fifteen times for similar offences, he had asked for time to prepare his defence, three weeks earlier, and the judges had ruled that he should be held in provisional detention. He therefore appears as a prisoner on the day of his trial. The president, after asking him if he has been able to keep his job despite his detention, says to him: "You obviously have a problem with alcohol." He replies:" No, it's only on festive occasions." Nevertheless she continues: "But are you being treated for this addiction?" The man maintains his position: "I'm not being treated because I'm not dependent on it."

Although illness is an issue that judges systematically explore as part of their concern with the individualization of punishment, certain offences and/or aggravating circumstances cause them to dwell further on it. The defendants' answers to questions that are asked about their potential health problems do not contrast sick defendants and healthy defendants but they do distinguish between those defendants who present themselves as "sick people" and those who present themselves as "in good health."

Hiding an illness: Three modes of retrospective justification of the non-disclosure of an illness during trial

Among those defendants who state that they have no health problems during their trials there are some who have been diagnosed with an illness by their doctors. One can distinguish three modes of retrospective justification, by defendants, for the non-disclosure of illness during the course of a criminal trial: the claim of a right to privacy, a refusal to be pitied, and fear of stigma.

Some defendants declare that they have no health problems in order to claim their right to privacy: they believe that the judicial system has no need to know about their condition. Christine, a twenty-four year old female asthmatic suffering from several years of pain following a motorcycle accident, says during a meeting with the author in the prison where she is held that she has been "in court six times," and always in the magistrates' court since turning 18, and has "never spoken of [her] health problems" because "it's nothing to do with them!" Others refuse to talk about their illness so as not to arouse pity and receive preferential treatment. Ahmed, who has been imprisoned for four months, justifies the fact of not having talked about his asthma during his trial in these terms. He believes that this would amount to "using sob stories"[17] so as to beg for "mercy" from his judges.

17. In French, the expression actually used in this case "*sortir une disquette*" which can mean both telling a lie or giving an excuse that is difficult to believe. Here Ahmed uses the latter.

> I don't want [my asthma] to be brought up [during the trial]. […] When there is a will to kill someone, yeah they'll look at someone's psychological history, yeah he was mistreated by his father who hit him, they always bring out the sob stories. I don't want anybody to know my sob stories so that just because I'm sick they will have mercy on me. So, if I'm sick should I not go back to prison? No. I did it, I'm like everyone else, I have to pay my debt and that's it.
>
> (Ahmed, 35, in prison for four months).

The third type of retrospective justification of the non-disclosure of health problems during the trial is part of a desire to keep control of the information to protect one's personal identity (Goffman 1963, 1975) against the potential for their condition to discredit the defendant. This involves hiding a health event which, being associated in its representations with stigmatized behaviour, is perceived as potentially weighing negatively on the sentencing outcome. Evelyn, forty-eight, suffers from cardiovascular disease and HIV. She did not want this to be revealed during the trial because it is "not something that helps."

> They talked about HIV. Yes, I say 'they' because I didn't. The prosecutor talked about it. Obviously! I don't think it should be mentioned, it is not something that helps, obviously.
>
> (Evelyne, 48, cardiovascular disease and HIV, in prison for six years in a detention centre).

In the case of diseases associated in their representations with stigmatized behaviour, such as HIV/AIDS or hepatitis C, and when the defendants have admitted during their RSR to having a health problem, the judges may also find it difficult to address this potentially stigmatising issue during the course of the hearings.

> I am very careful when we see in the social survey form that the person has AIDS. And we get that regularly. I had one of them this week moreover, a guy with AIDS. And I've asked … I take this … With the image that AIDS has got, that person will be catalogued as either a homo or junkie, so I think it has to be put in the correct way to get to the point […] I think it's always embarrassing to talk about it in public.
>
> (Albert, 53, president of a magistrates' court).

Conversely, and probably to a lesser extent, some defendants who consider themselves to be in good health will nevertheless tell the judges that they are sick in the hope of obtaining a more lenient sentence. The experiences of people who have used this strategy were not found in this study. It is nevertheless an approach implied by one of the judges who remarked in a suspicious tone during a hearing: "Doesn't it seem strange that there are all these Georgians without any papers who say they have hepatitis C and have come to France to get treatment for themselves? Have they passed the word among themselves or something?" According to him, they are hoping to justify their illegal presence on French soil by inventing an illness requiring medical treatment that was unavailable in their countries of origin at the time of the trial.

Patients who are receiving treatment are "protected" from prison, patients who are not receiving treatment are usually sent there directly

Using quantitative analysis, this study proposes to objectify the effects of declaring illness during the trial on the criminal sentence. Reported health status is closely related to many variables. Among the general population, the elderly (Célant *et al*. 2014), migrants (Jusot *et al*. 2009), and the poor (Ross and Mirowsky 1995; Cambois 2004, pp. 108–9) report that they suffer more illnesses than the young, French nationals and the more affluent. The same holds for behaviour when ill. The frequency of use of medical services—and therefore also of biomedical diagnosis—is not the same for men and women (Nathanson 1977; Verbrugge 1989; Mormiche 1993, p. 48), nor for immigrants and French nationals (Delbecchi *et al*. 1999; Dourgnon *et al*. 2009; Berchet and Jusot 2012) and is intrinsically linked to the social environment (Boltanski 1971, p. 210; Parizot 2003; Despres *et al*. 2011; Despres 2013). Regarding the criminal population in particular, studies have shown that people declaring that they have a health issue (psychiatric, somatic or an addiction) during a magistrates' court trial are also overrepresented among those with longer criminal records (Welzer-Lang and Castex 2012, p. 71). Therefore, a bivariate analysis of the link between the state of health and the criminal sanction could only reveal the effects of other variables that affect the sentencing such as criminal history, gender, nationality or the social environment to which they belong.

Regression models were constructed in order to control for the effects of variables, other than those of health, weighing on the determination of the criminal sentence. Because it is central to the trial procedure, the immediately implemented prison sentence has been taken as the dichotomous dependent variable with which to distinguish between two trial outcomes in these statistical models.

In the first type of outcome (or modality), defendants are free to leave the court following the verdict; they are not sentenced to an immediately enforced term in prison. This covers two thirds of those found guilty (Appendix 6). Half of them are given a lesser sentence instead of prison (fine, suspended sentence, suspended sentence with probation, etc.) and the other half are sentenced to a suspended term of imprisonment (some of whom also receive a second sentence other than imprisonment). The latter may still have to go before a Sentencing Judge (*juge de l'application des peines*) who may later change their prison sentence into another penalty.

In the second type of outcome (or modality), defendants are sentenced to a directly enforced prison term. The judges issue a warrant (in the case of defendants who were not previously detained) or order the detention to be continued (in the case of defendants who, following remand were already being detained). In both cases, they go to prison after the announcement of their conviction. One convict in three leaves court in handcuffs, under escort, and is taken directly to a prison to serve their sentence.

In addition to health events, the independent variables included in the models relate to socio-demographic characteristics (sex, age, nationality, family, job and home situations) and criminal characteristics (nature of criminal records, number of offences and aggravating circumstances) of the defendants.

A first model (Table 1) shows that having (or not) revealed a health issue at trial has no significant effect on being (or not) directly transferred to custody after the

TABLE 1.—***Effects of state of health on the risk of being directly imprisoned after the pronouncement of a criminal conviction***

Parameters	Modalities	Type of sentence *(free to leave the court)* Placed directly in detention to serve their sentence	
		Odds ratios	Wald IC at 95%
Sex	Male	*Ref.*	*Ref.*
	Female	1.2	[0.3–3.6]
Age	18–20 years	**0.4****	**[0.1–0.9]**
	21–25 years	0.8	[0.3–1.8]
	26–35 years	*Ref.*	*Ref.*
	36–45 years	1.1	[0.4–2.4]
	+ 45 years	0.9	[0.3–2.7]
Family situation 1	Unmarried	*Ref.*	*Ref.*
	cohabiting couple	1	[0.4–2.5]
Family situation 2	*No children*	*Ref.*	*Ref.*
	One or more children	0.7	[0.3–1.3]
Work	*Is working*	*Ref.*	*Ref.*
	Is not working	**2.1****	**[1.1–3.8]**
Home	*Has a home*	*Ref.*	*Ref.*
	Has no home	1.3	[0.5–2.9]
Nationality	*French*	*Ref.*	*Ref.*
	Foreigner	**4.6*****	**[2.2–9.5]**
Health problems	No “health problem»	*Ref.*	*Ref.*
	One or more health problems	0.5	[0.2–1.1]
Number of items on criminal record	None	**0.1*****	**[0–0.2]**
	One or two	**0.2*****	**[0–0.5]**
	Between three and nine	**0.4****	**[0.1–0.9]**
	Ten or more	*Ref.*	*Ref.*
Number of offences	One	0.4**	[0.1–0.9]
	Two	0.6	[0.2–1.4]
	Three or more	*Ref.*	*Ref.*
Aggravating circumstances	*No aggravating circumstance*	*Ref.*	*Ref.*
	Offence aggravated by at least one circumstance	**2.2****	**[1.1–4]**
Recidivism	*No recidivism*	*Ref.*	*Ref.*
	Repeat offender	1.5	[0.7–2.9]
Per cent agreement		78.9	

Field: Persons convicted in magistrates’ court trials between September 2010 and August 2011 in Paris.
Interpretation: Significance threshold * =10%, ** = 5%, *** = 1% The significant results are shown in bold.

pronouncement of the judgment. The determinants of criminal sanctions highlighted in earlier studies can be seen in this table.[18] "All things being equal," foreigners are more often transferred directly into custody after the pronouncement of their sentence than French nationals. In contrast, young adults (18–20 years) are relatively protected from a directly implemented prison sentence, as are those defendants who have an occupation. The possession of a criminal record is highly discriminating: the greater the number of convictions a defendant has on their record the higher the likelihood of being taken directly to prison. During the course of a trial where a defendant has revealed a health problem, the judges routinely ask them questions about whether they are receiving medical care.

> [When a defendant tells me he is ill] I want to know if he has the opportunity to be treated, and that he should tell me if he is under treatment. Is this an appointment every six months or … I don't know. But he needs to tell me about his life in relation to his illness.
>
> (Albert, 53, president of a magistrate's court).

The judge's questions to the defendant concerning their medical care fall into two main types; firstly on their regular intake of medication and secondly on medical monitoring.

> A forty-two year old man is appearing on a charge of theft (of cash and cash drawer) from a tobacconists, with two aggravating circumstances (burglary and recidivism). After reading about him and the charges brought against him, the president looked up from his file and said, 'With your description, it was not hard to find you!' The man is wearing colourful swimming shorts despite the cold weather. After reading the first part of his criminal record, the judge comes back to him, 'Your mother says you are currently homeless and she houses you from time to time. You haven't been in your care home for [three months]. I read here that you have hepatitis C and you are a former poly drug user. Want to tell us more?' The defendant replied: 'I am an outpatient.' The president continued: 'And you've had no treatment, right?' The man nods. The President then asks: 'Do you want to add something?' and the defendant replies: 'Yes, I want to tell you that I need care, so could you put me under judicial supervision?'[19] The judge asks him, 'Then why did you leave the care home?' The defendant explains: 'Because I was kicked out. I let my girlfriend live in the apartment.'

Judges' interest in the defendants' medical management of health problems leads us to distinguish three situations in a second model (Table 2) according to whether 1) they declare they have no health problem; 2) they declare that they have a health problem which is being medically monitored;[20]

18. This is not the case of sex, which has no significant effect on the outcome of the trial results. This can be explained by this sample (n = 290) which only contained 21 women which may not be sufficient to draw out significant differences. One can also assume that the selection process performed upstream of cases tried in the magistrates' court partly removes those women who conform to social roles associated with femininity from this mode of justice, and that they are, as a result, given greater protection from penal control (Cardi 2009). Finally, a significant proportion of women in this sample were from Eastern Europe; these women might undergo treatment similar to that observed by Vuattoux (2015) in his research on juvenile justice and, in the words he uses, be considered by the judges as being "like men."

19. As this is a trial hearing (and not a hearing concerning the conditions for remand) and as judicial supervision is not a form of criminal punishment, this man is seeking a court decision that cannot legally be applied to him.

20. In those cases where defendants revealed several health problems during their trials, this has been coded as them stating that they have been receiving medical treatment when this was the case for at least one of their reported health problems.

TABLE 2.–***Effects of receiving medical care on the risk of being directly placed in custody after pronouncement of a criminal conviction***

Parameters	Modalities	Type of sentence *(free to leave the court)* Taken directly into custody to serve their sentence	
		Odds ratios	Wald IC at 95%
Sex	*Male*	*Ref.*	*Ref.*
	Female	1.1	[0.3–3.7]
Age	18–20 years	**0.4****	**[0.1–0.9]**
	21–25 years	0.9	[0.3–2]
	26–35 years	*Ref.*	*Ref.*
	36–45 years	1	[0.4–2.3]
	+ 45 years	1	[0.3–3.1]
Family situation 1	*Unmarried*	*Ref.*	*Ref.*
	cohabiting couple	0.9	[0.3–2.2]
Family situation 2	*No children*	*Ref.*	*Ref.*
	One or more children	0.9	[0.4–1.8]
Work	*Is working*	*Ref.*	*Ref.*
	Is not working	**2.2****	**[1.1–4.1]**
Home	*Has a home*	*Ref.*	*Ref.*
	Has no home	1.3	[0.5–2.9]
Nationality	*French*	*Ref.*	*Ref.*
	Foreigner	**4*****	**[1.8–8.4]**
Health events and medical treatment	No “health problem»	**3****	**[1.2–6.9]**
	“health problem» without medical treatment	**7*****	**[1.7–27.8]**
	One or more health problems	*Ref.*	*Ref.*
Number of items on criminal record	None	**0.1*****	**[0–0.3]**
	One or two	**0.2*****	**[0–0.6]**
	Between three and nine	0.45	[0.1–1.2]
	Ten or more	*Ref.*	*Ref.*
Number of offences	One	**0.4***	**[0.1–1]**
	Two	0.5	[0.2–1.3]
	Three or more	*Ref.*	*Ref.*
Aggravating circumstances	*No aggravating circumstance*	*Ref.*	*Ref.*
	Offence aggravated by at least one circumstance	**2.4*****	**[1.2–4.4]**
Recidivism	*No recidivism*	*Ref.*	*Ref.*
	Repeat offender	1.5	[0.7–2.9]
Per cent agreement		80.5	

Field: Persons convicted in magistrates’ court trials between September 2010 and August 2011 in Paris.
Interpretation: Significance threshold * =10%, ** = 5%, *** = 1% The significant results are shown in bold.

3) they declare that they have a health problem and are not receiving medical care. A specific effect emerges.[21]

A person reporting no health problem is three times more likely to be sentenced (rather than not sentenced) to a directly enforced prison term than a person revealing a health problem which is being medically monitored. A person revealing a health problem and a lack of medical monitoring is, in turn, seven times more likely to be sentenced (rather than not) to a directly enforced prison sentence than a person revealing a medical condition and medical care.

Those defendants who reveal that they have a health issue and medical care are "protected" from prison compared to those declaring the absence of a health problem, while those defendants who reveal a health problem and a lack of medical care for it are usually sent to prison immediately by comparison with those who have declared the absence of a health problem. Medical treatment "protects" against a transfer to prison whilst it is ongoing whereas, when absent, it "aggravates" the punishment. These results raise the question of the processes by which lawyers and judges use illness both in their pleas and their indictments, and to justify the sentences passed.

Illness as an argumentative process in the negotiation and justification of punishment

Illness is used as an argument in the negotiation and justification of punishment by defence lawyers and judges. By analysing their arguments, their indictments and their justifications of sanctions when verdicts are declared,[22] it is possible to distinguish four argumentative processes that relate, in each case, to a separate representation of illness as a priority, as suffering, or as constraint, and of prison as the ultimate point of care.

Illness as a priority: caring for a patient rather than punishing an offender

The first argumentative method associates health problems with a priority. The defence lawyers argue that their clients are not criminals but they are above all sick people and that we must therefore not penalize them but treat them.

21. The effect of the health status of defendants on determination of the sentence is zero when considering the variable "Health Problems" at the global level (Table 1) but a specific effect emerges when one considers the sentence to be conditional on whether (or not) the defendant is receiving medical treatment (Table 2). The mode "One or more health problems" separates two populations for whom the criminal justice response is highly differentiated and conditional on another variable (whether they are receiving medical treatment or not). At a global level, these two situations compensate for one another, so the actual effect is zero; at the conditional level a specific effect emerges.

22. Such justification is rare, however. Following an adjournment of the trial for their deliberations on the verdicts, the judges announce the sentences at a rapid rate to all defendants and without comment for the most part. It is commonly the case that defendants do not understand or do not hear their sentence. Relatives and friends of the defendants who attended the hearing often do not have sufficient time to get back into the courtroom between the moment when the judges return to the hearing and when they finish announcing all of their verdicts.

In some cases, it is because health problems are introduced as being the causes of criminal acts that they are presented as a priority. The lawyer of a man charged with violence while intoxicated, argues that he "has big problems with alcohol" and suggests "perhaps we might be able to consider whether my client is owed a duty of care and that he should see a specialist treating alcohol addiction." Similarly, a lawyer pleads: "This man is sick! He is in a state of craving, you can clearly see it today in the dock. […] Today, I think that what he needs most is to be made to continue his treatment. It is essential to make him heal himself." Via this argumentative process, defence lawyers highlight the addiction and /or alcoholism of their clients to support a conviction with a suspended sentence, with probation including requirements for care, rather than a prison sentence.

In other cases, illness is introduced as having a higher priority on a severity scale than the offence, but without it being associated with a cause and effect link. A lawyer argues: "Monsieur M. undoubtedly has thirty-eight convictions on his criminal record but he also has serious health problems. […] We are not doctors! Mr. M. would probably be better off in hospital." The defence lawyers move the cursor of the crime towards illness and plead for hospital rather than prison. This process is never used by the prosecutors.

Illness as suffering: arousing the judges' compassion

A second argumentative process by which health problems are used revolves around the suffering that they entail. This process is also used exclusively by defence lawyers who argue that a sentence of imprisonment would be an additional form of suffering for sick defendants. The lawyer of a 34 year old man prosecuted for repeated crimes of receiving stolen goods and driving while under the influence of alcohol argued that prison is "not at all suitable for this man who has a number of ailments, who suffers from epilepsy and is 80% handicapped." He concludes his comments by asking, "Do you really think that prison is an appropriate place for him?"

This process is often used by lawyers when their clients are already held on remand. A judge, addressing the lawyer of a 39 year old Bosnian woman who had been on remand after the dismissal of her trial six weeks earlier, notes: "I think she has serious health problems. Would she agree to tell us about them or does she prefer to stay silent? It is not obligatory but …" The woman replies: "I have cancer. I had an operation." The lawyer who is defending her comes back, during his argument of the case for the defence, to the conditions of her detention, "Madame the Prosecutor wants a prison sentence! Yet detention would be extremely difficult. Her treatment has been interrupted for six weeks because her prescription has to come from Belgium. They have done some tests in prison but the results are not yet known. Let it be said, everyone makes fun of this Mrs. M. who has cancer. Prison is a huge shock for this woman. She has been in prison for a month and a half! I only ask for one thing: increase the length of her sentence but let her out at the end of this hearing."

This argumentative process is part of a desire to arouse the compassion of judges. It is sometimes also reflected through the way lawyers describe or refer to their clients in their arguments. The lawyer of a man described as "very ill" by the President of the Chamber appeals to the judges exclaiming: "Look at him, he

can only just stand up!" and when the lawyer of two men accused in the same case distinguishes them in his address he describes one as "this man is the father of two children" and refers to the other as "the one who is handicapped."

Illness as a constraint: avoiding a prison sentence that would end medical care

A third argumentative process relies on the binding nature of the medical management of the health problem. This is the only argumentative process that is used as much by the defence as by the prosecution in arguing that a transfer to custody would interrupt their medical care.

This form of argument is regularly employed by prosecutors and lawyers in the case of defendants who have only begun their treatment after years of vagrancy and numerous convictions. In her closing arguments, a deputy prosecutor referred to the difficulties she had encountered in asking for a sentence against a man with over thirty convictions and who had recently been treated for his addiction and hepatitis C by a social worker and the medical staff of a hospital: "Will it be tonight that Monsieur E. will sleep in prison and lose the follow-up care he managed to put in place? Sometimes as prosecutors, one wonders: 'But what sentence am I going to request?' So I am asking you to record a conviction against Monsieur E. and to sentence him to four months in prison of which two are suspended, and to put him on probation with conditions on his work, housing and care. And not to take him into custody." Another deputy prosecutor sums up this line of argument thus : "I am not asking for Mr D. to be put in custody because he is being looked after. Prison would be tragic [for him]." Both the defence and the prosecution associate receiving medical care with a form of "rehabilitation" or "reintegration" [into society]. One lawyer argues that his client "has a long criminal record but it is now out of date. For the last three years, he has tried to keep his head above water. He is a former drug addict, someone who was addicted to heroin. He is being hosted and assisted by a charity (*association*). He's also following a course of treatment with methadone. If imprisoned, he would lose the benefit of being involved with this charity and the [medical] follow-up he's managed to arrange." He concludes his argument by stressing that "my client shouldn't be judged by the black gowns but treated by the white coats" then he asks the judges "to issue a suspended sentence so he can continue his reintegration."

This process of argumentation is not however only used in the cases of those defendants in situations of poverty. When defendants declare other forms of "integration," their lawyers highlight the daily constraints that their medical care represents. A lawyer argues: "He has told you he has cancer of the larynx, and told you which hospital he has been treated by and the name of the doctor who is looking after him. He told me that he has had several scans. I ask you to take a step that would allow him to be cared for."

Prison as a place of care: imprisonment as treatment

A fourth argumentative process is based on the promotion of the opportunity for obtaining treatment in prisons. This process is exclusively used by prosecutors to request a prison sentence and by judges to justify a prison sentence. In his submissions

against a drug user accused of several robberies and recidivism, a deputy prosecutor insists that "the prison can hold Monsieur J. by proposing a course of treatment that will [wean him off his drug habit] and get him back on course," and he continues "he will be able to enjoy the very plush SMPR [Regional medical and psychological service] of the Santé [prison], which looks after its patients very well." Similarly, the magistrates sometimes justify imprisonment in order "to heal" prisoners:

> A 44 year old man is accused of recidivism in and violations of the law on narcotics (acquisition, possession, transfer and use of cocaine). The presiding judge reads his RSR in silence and then remarks: 'Oh you have asthma? Well! With all the cocaine you use, that doesn't help!' She continues reading aloud: 'physically and mentally tired,' looks up from the file, and comments: 'it shows!' While the prosecutor asks that the minimum sentence—four years in prison—is implemented 'because [he] has no guarantee of rehabilitation,' the defence lawyer stresses that 'Monsieur V.'s condition will only deteriorate further if he is incarcerated.' After the adjournment of the trial, the man is found guilty and sentenced to four years in prison with eight months suspended and accompanied by probation. At the announcement of the sentence, he exclaims: 'Thirty months![23] That's a lot for someone who needs to be cured!' The President replied: 'Well exactly! That way you can be cured in prison.'

This procedure is sometimes based on requests by the accused themselves. The situation described in the extract from the trial that follows (below) is nonetheless a rare one; a man pleads to be incarcerated by the court because he considers that this is his last chance to obtain treatment. The public prosecutor takes the same tack in her case for the prosecution:

> Two days before his trial, a man of 31 contacted the police himself asking to be arrested so he could 'cease [his] use of crack cocaine' which is 'about five grams of crack per week' as he explained to the judges. At the time of his arrest, 'the police found one gram of the substance at [his] home,' recounts the president. Surprised by the way he has behaved, he asks: 'But did you never try anything to wean yourself off it?' The man replies, 'No, I don't know how to go about it; this was the only solution for me.' The deputy prosecutor observes that: 'Yet [he] was on probation from a previous case, with a penal obligation to get treatment.' The accused says: 'I had an appointment [in a week's time], but nothing before and I was exhausted.' In his submissions, the prosecutor reveals: 'I have no explanation for this. Monsieur W. told me clearly that he wanted to go to prison so I request three months with a custody order.' The defence lawyer makes an argument in which he does not address the situation or his client's case, but argues for a change in the architecture of the courtroom that would give a fairer balance between that of the prosecution, positioned on a platform at the same height as the judges, and that of the defence, which is placed at ground level. The man is sentenced as demanded by the prosecution.

In their arguments, the defence lawyers combine the first three argumentative processes identified here[24] to the same purpose: to avoid their clients being sentenced to a prison term. They plead both for illness—as a priority and as suffering—and for medical care, as constraints on penal servitude. However, the judges use illness [with two of these methods] for seemingly contradictory reasons: to save a defendant who is receiving medical care from a prison sentence, and to support the notion that prison can be a place of healing. Unlike the lawyers, the judges only use the concept of illness in terms of medical treatment.

23. He was actually sentenced to forty months, not thirty months in prison.

24. See in Appendix 7 the full transcript of a legal argument that reflects the successive use of these three argumentative processes.

Normative imperatives: the protective or aggravating effects of medical care

The processes by which the various participants in the trial use illness and its potentially "protective" or "aggravating" effects on the criminal sentence—depending on whether or not it is associated with medical treatment—reveal three *normative imperatives* hanging over all defendants arraigned before such courts and from which judges construct their decisions: an imperative of credibility, an imperative of "social integration" and an imperative of controllability or monitoring.

An imperative of credibility

The imperative of credibility emerges from the injunction hanging over defendants to prove their claims. Not all of the supporting evidence which they could use to prove what they say—and thereby build their credibility—is allowed in the arena; as we have seen, it is, for example, not permitted to provide evidence of a health problem by physical demonstration of bodily stigmata. Two administrative processes for proving their claims are accepted in magistrates' courts.

Producing documentary proof is one of these processes. The conditions and the timings of the procedures of magistrates' courts makes it complicated for defendants, who do not have the opportunity to get together all of the documents on which they would expect to rely (work contract, proof of accommodation, medical certificate, etc.) from the cell where they are detained and the remand centre where they are awaiting trial. Only the least socially isolated defendants would be able to rely on relatives to send their lawyers a number of these supporting documents. Confirmation by others—another administrative operation of proof—is conducted by social investigators, who (as has been seen) make telephone contact with the employers of defendants to check on their work, with spouses or parents to check on their marital status, and with their doctors to verify the health problems they are claiming, etc.

Whatever the process used for proving the evidence, only those defendants who are being treated would thus be able to demonstrate that they are ill, by producing a medical certificate and/or through confirmation of the information by their doctor. Medical authority supports their statements; they appear to be credible: they are "really ill." However, individuals who claim to be ill but who are not being treated cannot produce information to prove their claim. By revealing this information without being able to prove it, they will not only be considered as potentially "healthy" people but also as "malingerers," and usurpers. They lose credibility.

A "social integration" imperative

The imperative of "social integration (rehabilitation)" is without doubt the normative imperative that weighs most heavily on defendants because it is formulated in that way by the various professionals (social investigators, magistrates, lawyers) who question defendants. After referring to a number of areas—such as health, work, housing, etc.—they highlight the defendants' "efforts at social reintegration" or, by contrast, they stress their "problems with social inclusion."

Commitment to medical care is interpreted in this arena as a "sign of social integration" (or of "social rehabilitation"), to the same extent as being married or having an employment contract. These institutions—medical, family, work, etc.—are seen by judges as social integration mechanisms that can be undermined by being confined to prison (Vanhamme 2009, p. 206). Those defendants perceived as socially integrated are more often spared a prison sentence.

Thus by taking into account the extent of defendants' "social integration" in their decision-making, judges impose lighter sentences on a defendant who is ill and who, by resorting to treatment, is engaged in what they understand as a form of participation in society. Conversely, defendants who explain that they are ill and are not receiving medical treatment show themselves to be lacking in this imperative.

A monitoring and controlling imperative

The imperative of controllability is more implicit. It refers to the monitoring and control dimension (actual or potential) that institutions have (or could exercise) over defendants. It stems from magistrates' concern with any factor that constrains defendants or may exercise constraint over them. Do they regularly visit a hospital for treatment? Do they have working hours and an employment contract? An address where they live?

The more that defendants report the different forms of control and monitoring exerted over them, the more they are spared penal control. Through the control and monitoring exercised by medical institutions over them, those defendants who are being treated reveal their greater controllability. Conversely, defendants whose hearings reveal low controllability—such as defendants who are ill but do not seek medical treatment, who have no employment, no spouse, no home, etc.—are more frequently sent directly to jail. Penal control is expressed with even greater force where the controllability of defendants is lower.

These three imperatives each refer to a different level: the imperative of credibility at an individual level, the imperative of social inclusion at an interactional level and the imperative of controllability at an institutional level. Thus being under medical supervision protects defendants who receive medical treatment at three levels: through the evidence supplied by the medical authority concerning their illness which makes them credible defendants, through the "social inclusion" that defendants display by having regular interactions with one (or more) caregiver(s) and through the increased potential for monitoring defendants involved with the medical institution. Conversely, defendants who report being ill but are not having medical treatment combine three faults in respect of these requirements: they lose credibility, they reveal a lack of "social inclusion" and a low controllability.

*
* *

This article set out to examine the integration of a health approach in the criminal arena through the analysis of the processes by which illness is used in magistrates' court trials and its effect on sentencing.

It has been shown that as a matter of course defendants have to answer questions from a social investigator concerning their possible medical problems a few

minutes before the hearing, and then during the trial when judges examine their "personality." All are thus encouraged to reveal a "health problem." Faced with this injunction to talk about any medical problems they may have, defendants develop different strategies (i.e., talking, showing, discussing their "consumption," silence). These strategies ultimately tell us about the room for manoeuvre that they have—or seek to have—over the decision that the judges will take.

Drug addiction and alcoholism are the most discussed health events during these hearings. Both raise additional questions for judges who consider them to be the cause of some crimes, and lead them to consider sanctions in which care is the primary element. However, defendants who appear to have cancer, hepatitis C or asthma have to answer the same question as those who talk about their drug or alcohol abuse: have they sought treatment for this? In fact, statistical analyses show that illness has a potentially "protective" effect on the risk of being directly sent to prison after the trial when associated with medical care and has a potentially "aggravating" effect when defendants are not involved in a process of treatment.

Every day, judges see defendants with similar characteristics file through the dock (male, young, single, foreign, unemployed, etc.) against whom they must impose a penalty or whom they must judge for what they see as "simple" cases. To reproduce the logic of individualization of punishment which their occupational culture espouses, they explore different themes. Illness is only one of them, in the same way as the defendants' employment status or housing conditions. These themes are then used as arguments justifying how defendants can be given one particular sentence rather than another. They thus reveal the expectations which lie behind the court's decision. They take the form of three *normative imperatives* affecting all defendants brought before the courts: a credibility imperative, a "social integration" imperative and a monitoring imperative. These three imperatives automatically reinforce inequalities leading to over-incarceration of the most disaffiliated defendants, including those who suffer from an illness but are not receiving medical care.

Lara Mahi

Sociologie, Philosophie et Socio-anthropologie Politiques (SOPHIAPOL)
Université Paris Ouest Nanterre-La Défense
200 avenue de la République
92000 Nanterre

laramahi75@gmail.com

Appendices

Appendix 1.—*The thirty-three variables from ethnographic observations*

Groups of variables	Variables
"Personality " of those convicted	Sex
	Age
	Nationality
	Family situation (1)
	Family situation (2)
	Occupation —Type of job
	Domicile
	Health events —Types of health events —Transmittable —Medical treatment —Desire to start health monitoring
	Criminal record
Offences and circumstances	Number of offences —Main offence (1) —Offence (2) —Offence (3) —Offence (4) —Offence (5)
	Aggravating circumstances —Number of aggravating circumstances —Aggravating circumstance (1) —Aggravating circumstance (2) —Aggravating circumstance (3) —Aggravating circumstance (4) —Aggravating circumstance (5)
	Recidivism status
Sentence	Public prosecutors' requests
	Conviction —Type of conviction —Length of sentence —Committal order/Continued detention

APPENDIX 2.—***Main offence leading to the criminal conviction (n = 290)***

	Number	Frequency (%)
Injury to persons	72	24.8
Damage to property without violence	32	11
Damage to property with violence	81	27.9
Offences against drug laws	32	11
Offences against laws on foreigners	31	10.7
Driving offences	15	5.2
Others	27	9.3
Total	290	100

Field: Persons convicted in magistrates' courts between September 2010 and August 2011 in Paris.

APPENDIX 3.—***Socio-demographic profile of those convicted (n = 290)***

	Number	Frequency (%)
Sex		
Male	269	92.8
Female	21	7.2
Age		
18–20 years	59	20.3
21–25 years	56	19.3
26–35 years	91	31.4
36–45 years	53	18.3
+ 45 years	31	10.7
Nationality		
French	169	58.3
Foreigner	121	41.7
Employment		
Has a job	143	49.3
—with long-term contract	37	12.8
—not declared	34	11.7
Has no job	147	50.7
—of which unemployed	143	49.3
—of which retired	4	1.4
TOTAL	290	100

	Number	Frequency (%)
Home		
Has a home	226	77.9
Does not have a home	64	22.1
Family situation (1)		
Single	236	81.4
Cohabiting couples	54	18.6
Family status (2)		
One or more child(ren)	186	64.1
No children	104	35.9
Health events		
One "health problem"	90	31
—with medical supervision	72	24.8
—without medical supervision	18	6.2
Criminal record		
No convictions	106	36.6
One or two convictions (s)	60	20.7
Three to nine convictions	74	25.5
Ten or more convictions	50	17.2
TOTAL	290	100

Field: Persons convicted in magistrate's courts between September 2010 and August 2011 in Paris.

APPENDIX 4.—***Events introduced as "health problems"during the hearing (n = 290)***

Health event	Number of mentions*	Frequency (%)
Substance addiction	25	8.6
Alcoholism	20	6.9
Cancer	9	3.1
HIV	7	2.4
Hepatitis C	7	2.4
Diabetes	6	2.1
Epilepsy	6	2.1
Physical disability	6	2.1
Respiratory diseases	4	1.4
Heart disease	3	1
Hepatitis B virus	2	0.7
Unspecified**	4	1.4

Field: Persons convicted at magistrates' court between September 2010 and August 2011 in Paris.
* Some litigants report more health problems.
** This is the case of four defendants introduced by the presidents of the hearings as "very sick" after reading the "rapid social investigation" and presented in the same terms by the prosecutors and lawyers without further development.

APPENDIX 5.—***"Rapid social survey" form completed for Alphonse***

28/12

apcars association de politique criminelle appliquée et de réinsertion sociale 10 ENQUETE SOCIALE RAPIDE

Art.27 – Loi du 6/01/1978 : Les personnes sollicitées à ce questionnaire y ont un droit d'accès et de rectification. Les réponses en sont facultatives. L'absence de réponse n'entraine pas de sanction judiciaire. Les destinataires de ces informations sont les autorités judiciaires. Les informations qui suivent ont été recueillies auprès de l'intéressé(e). Elles ont fait l'objet d'une procédure de vérification lorsque des tiers, employeurs ou organismes ont pu être contactés.

NOM DE L'ENQUETEUR : [Nom enquêteur] POSTE : [Numéro de poste] DATE : [Date de l'enquête]

ETAT CIVIL : vérification sous compétence des services de l'Identité Judiciaire

NOM : [Nom prévenu] Prénom : Alphonse

Né le : [redacted].[redacted].68 (46 ans) à : Port Louis (Ile Maurice) Nationalité : Française.

HABITATION

Confirmé par [Nom et prénom compagne] sa compagne

Résidence actuelle : [Adresse du prévenu] Paris 12ème

Chez : locataire

Depuis : 2010 Type de logement : studio.

Adresse précédente (éventuellement) :

SITUATION PERSONNELLE ET LIENS FAMILIAUX

actuelle.

06 [Numéro de portable]

Célibataire, marié(e), vie maritale, divorcé(e), séparé(e) depuis :

Personnes à charge : 1 fils, 12 ans - 1 fils, 11 ans à la charge de la mère

Parents : divorcés en 1976 - Père = 69 ans, retraité, Vitry.

Mère = 64 ans, retraité, à Nanay.

Fratrie :

2 sœurs de 44 et 42 ans, en France.

Observations : Mr [Nom prévenu] a exprimé se sentir déstabilisé par le tenue des questions posées lors de cet entretien mais l'interrogé s'est tout de même montré coopérant et participatif.

Né à l'île Maurice, Mr [Nom prévenu] relate avoir grandi au sein d'un environnement familial complexe et imposant de volume. Elevé par sa mère et la famille de cette dernière, l'interrogé rapporte avoir eu de bonnes contacts avec son père et co, tout au long de sa vie.

Actuellement, si l'ensemble de la famille réside en région parisienne, Mr [Nom prévenu] indique être peu lié avec cette dernière. En effet, après avoir

EMPLOI, STAGES, ETUDES, AUTRES

Confirmé par son responsable chez [Entreprise]

Mr [Nom et prénom employeur]

06 [Numéro de portable]

(+ photocopie fiche de paie)

Situation actuelle : Agent de service dans le bâtiment.

Depuis : 2 ans

Employeur et adresse : [Adresse entreprise]

Horaires :

Type de contrat et volume horaire :

en cdi à temps partiel

AUTRES RENSEIGNEMENTS

Agence Nat Fréquentation

Activités précédentes : 2005-2012 = intérimaire (manutention) dans le bâtiment pour [Entreprise] - Paris 15ème
2005 = agent de sécurité chez [Entreprise]. Paris 2è

Niveau d'instruction : Collège -

Divers : + diplômé en manutention et bâtiment en 2005 formation AFPA

Non confirmé

Situation financière (revenus, dettes, charges) : - salaire de 800 euros
- loyer de 575 euros charges incluses -
- 150 euros d'aide l'Etat (travail intérimaire)

Santé : - souffre de tendinite -
- souffre de douleurs à l'estomac suite à des périodes de stress -
- aucune consommation particulière

Confirmé par le docteur [Nom médecin] ou [Numéro de téléphone]

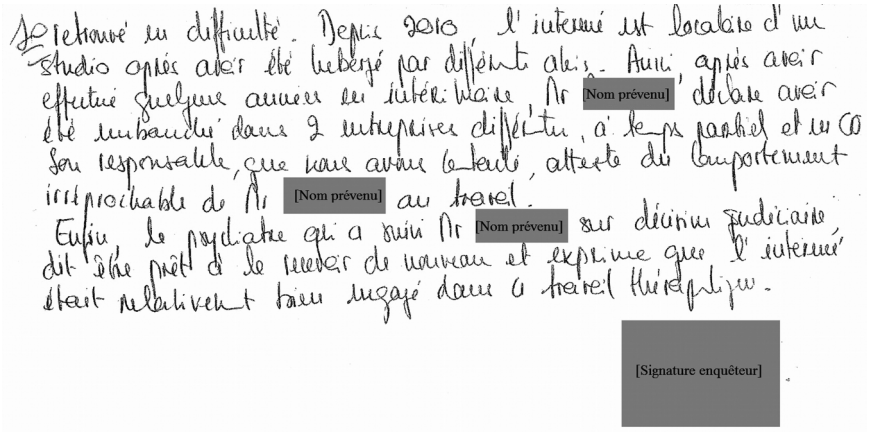
Suivis éducatifs et sociaux, actuels ou antérieurs : - suivi par une médecin psychiatre au CMP - [Adresse] 1 fois par mois - Metro [Nom station de métro]
depuis 2012.

SYNTHESE et PERSPECTIVES

été en rupture de lien avec son entourage familial durant plusieurs années, Mr [Nom prévenu] explique avoir repris contact très récemment avec eux sur la demande de la campagne actuelle.

Mr [Nom prévenu] connaît également une vie sentimentale chaotique. Marié puis divorcé en 2007 avec la mère de ses 2 enfants, l'entretien explique que, malgré un droit de visite accordé par le juge, il n'a pas revu ses enfants depuis plus de 3 ans suite à des conflits conjugaux avec son ancienne épouse. Ainsi, l'entretien dit entretenir des relations tumultueuses avec sa dernière campagne qui il aurait quitté ses mois derniers après 2 ans de relation. A ce propos, Mr [Nom prévenu] tient à préciser qu'il regrette avoir eu cette altercation mais atteste n'avoir pas une personnalité violente habituellement. Actuellement, l'entretien apporte avoir rencontré une nouvelle campagne avec qui il souhaite des projets d'avenir. Cette dernière, que nous avons contacté, confirme ces éléments et dit entretenir une relation bienveillante avec Mr [Nom prévenu]

Autrement, ce dernier semble être parvenu à stabiliser sa situation sociale et professionnelle suite à son divorce en 2007 où il s'était alors


Se retrouve en difficulté. Depuis 2010 l'intéressé est locataire d'un studio après avoir été hebergé par différents amis. Ainsi, après avoir effectué quelques années en intérimaire, Mr [Nom prévenu], déclare avoir été embauché dans 2 entreprises différentes, à temps partiel et en CDI. Son responsable, que nous avons contacté, atteste du comportement irréprochable de Mr [Nom prévenu] au travail.
Enfin, le psychiatre qui a suivi Mr [Nom prévenu] sur décision judiciaire, dit être prêt à le revoir de nouveau et exprime que l'intéressé était relativement bien engagé dans un travail thérapeutique.
[Signature enquêteur]

APPENDIX 6.—*Outcomes of trials (n = 290)*

Verdicts	Numbers	Frequencies (%)
Free to leave the court	187	64.5
—No prison sentence	96	33.1
—Suspended prison sentence	91	31.4
Taken directly to prison	103	35.5
Total	290	100

Field: Persons sentenced in magistrates' courts between September 2010 and August 2011 in Paris.

APPENDIX 7.—*Plea of a defence lawyer using "illness" according to three argumentative processes: priority, suffering and stress*

I am amazed at the severity of the public prosecutor's requisitions for conviction. We have here someone who has major heart problems, who has sunk into alcoholism, and who, according to his own account, drinks eight litres of whisky a day, so he finds himself in a situation where he does not really know what he's doing. He eventually … The case is a matter of fifty euros, after all, it doesn't change anything. but he did not try to go further. When he left the shop, as he says himself, he left it walking, which shows that this is not someone who is extremely dangerous and most of all it shows that he's not very well, he has a drinking problem, serious health problems, a problem of social integration, but not a problem of extreme violence. For the other matters—the mobile phone, the butcher's shop—the facts are not proven. I think he realises at this point the state he's in and where he has ended up. So the punishment may be severe, it may be just. I don't think that severity means four years in prison, but it means sentencing him … I think he is in a state where he needs … I think, where he needs to resume his life. To return to his parents whom I spoke to on the phone and who are ready to welcome him home. To continue his treatment …. He must have regular care, because it is life threatening. You have a letter from his doctor who certifies this. And then he has certainly got a long criminal record, but the last time he was on trial was as long ago as 2008. He was actually on probation but it was a drugs offence so it's not really the same story. Yes, he has a long criminal record, we can't deny that, but

it's still not a record that is … that is … So, punishment, of course, but do not forget that he is a disabled worker and he now has the opportunity to return to work today. As he said himself, the trainer is willing to see him again and to continue working with him … and he is about to take his driving test so that he is able to start work again. And I believe that, and that's what he told me when I met him, he told me that, he told me that we have to let him take the chance that society is giving him, the chance to come back, to reintegrate into society and come back … and understand the situation that he has got himself into. Prison will give him nothing, nothing. That is why I ask you to be lenient, to give him probation and especially healthcare obligations since he is likely to have alcohol problems. I especially ask you not to award custody.

(Magistrates' court, March 2011).

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