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The Connection between Responsibility and Potential Remorse
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Constructing Ideal Defendants in the Pre-sentence Phase: The Connection between Responsibility and Potential Remorse

LOUISE VICTORIA JOHANSEN

Expectations surrounding defendants’ emotive responses have been studied most extensively in the context of courtrooms as spaces that invite very limited emotional expressions while categorising others as entirely undesirable. This chapter, however, takes its point of departure at an earlier stage in the criminal process: at the probation service, where pre-sentence reports are issued to be used by judges in court as a basis for sentencing. The chapter argues that these reports constitute an important element in co-constructing emotional knowledge about the defendant. I analyse the interview that the Probation Service conducts with the defendant as a specific ‘opening technique’ to reveal the inner core of the defendant, as well as the defendant’s stance towards the crime and the reasons underlying its perpetration. Probation workers’ efforts to discern defendants’ emotions work as a temporal prism, denoting a movement from the past of the deed and the reasons for it, to the responsibility of the present and the vision of a possible non-criminal future. The defendant’s recognition of problems, and acceptance of eventual future treatment options, is argued to constitute a sign of ‘indirect remorse’. The chapter therefore focuses on the ways in which temporality constitutes an integral part of constructing and anticipating emotional acts.

I. INTRODUCTION

This chapter explores the pre-trial criminal process in Denmark, focusing on the ways in which the production of personal investigation reports constructs defendants as specific moral persons in relation to the

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criminal act in question. While the role of remorse in criminal cases has often centred on the courtroom itself – its communicative logics and constrained emotional frame\(^1\) – other studies have explored how probation services document defendants’ reactions at the initial stages of the criminal process.\(^2\) The chapter thus attempts to connect two strands of research, on remorse and personal investigation reports, respectively. Based on a multi-sited ethnographic study that followed specific violence cases through the Prosecutors’ Office, the Probation Service and the District Court, it asks how probation workers elicit and communicate defendants’ attitudes and emotional reactions to the courts through personal investigation reports.

In Denmark, personal investigation reports are generally issued in minor criminal cases, where the defendant, if convicted, will be likely to receive a suspended sentence, often implemented with measures such as community service or treatment conditions. In these cases, the personal investigation reports are read aloud in the courtroom prior to the final remarks being made and before the question of guilt has been assessed. Judges then deliberate on the question of guilt and subsequently determine the sentence. This particular situation puts restraints on the probation workers. The reports are not allowed to address questions of guilt if defendants plead not guilty. However, probation workers are also expected to provide in-depth information on the relation between the alleged offence and the personal and social situation of the defendant. This makes both the conversation with the defendant and the subsequent reporting a balancing act in which probation workers weigh their words carefully in order not to compromise the defendant. More indirectly, though, they search for and convey connections between person and offence on multiple levels that express more subtle indications of possible guilt. Nevertheless, most legal actors regard the production and use of the personal investigation reports as an unproblematic and even mitigating element in the defendant’s case. This perception makes it possible for courts to use the reports in order to gain a holistic understanding of each particular case and defendant,\(^3\) and to extract explicit as well as tacit knowledge about the possible explanations for the offence.\(^4\) Although personal investigation reports do not determine any particular sentencing outcome, they

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\(^3\)C Tata, ‘A Sense of Justice: The Role of Pre-Sentence Reports in the Production (and Disruption) of Guilt and Guilty Pleas’ (2010) 12 *Punishment & Society* 239.

\(^4\)Johansen (n 2).
do offer a possibility for courts to take the defendants’ eventual remorse and ability to reflect on their own actions into account.\textsuperscript{5}

A. Vocabularies of Motive: Responsibility and Acceptance as Indirect Remorse

In the courtroom context, ‘moralising’ is often understood as the act of asking somebody for a moral explanation or reaction. Scheffer\textsuperscript{6} adds to this understanding of moralising in the space of the courtroom by referring to ‘moralising outsourced’ in the work of psychologists, probation workers and other experts who feed courts with additional information about defendants, collected in other institutional settings and within other knowledge frameworks. These experts add temporal layers to the courts’ knowledge about the defendant through their biographical approach and their quest for signs of moral engagement during conversations. The process of moralising means that defendants are encouraged to reflect on their past in terms of admitting, explaining or excusing not just the acts, but their causes as well. In the present chapter, this point of view is translated into the term ‘indirect remorse’, because probation workers use the conversation with the defendant to probe into personal and social reasons for their crime that may be communicated as ‘repentance’ to the court at a later stage. Sarat\textsuperscript{7} has argued that an offender’s first step towards expressing remorse is to be able to act responsibly in relation to the offence. Sarat defines this responsibility as the awareness to acknowledge that one \textit{could} have behaved differently. These specific ways of talking about responsibility are analytically coined in the chapter as ‘vocabularies of motive’.

According to Mills,\textsuperscript{8} vocabularies of motive constitute a framework of meaning that appears to provide adequate reason to explain a person’s behaviour. Motives thus provide acceptable justifications within a group for individual and collective acts. Sarat and Felstiner\textsuperscript{9} elaborate on Mills’s concept in their analysis of lawyer–client interactions by highlighting its relational and negotiation dimensions. They state that vocabularies of motive serve to co-construct the past, present and future in a joint attempt to make sense of life events and interpret conduct. This meaning-making process always takes place in specific contexts and situations in which some vocabularies of motive seem more

\textsuperscript{5} van Oorschot et al (n 2).
\textsuperscript{6} T Scheffer, \textit{Adversarial Case-making: An Ethnography of the English Crown Court} (Amsterdam, Brill, 2010).
\textsuperscript{8} CW Mills, ‘Situated Actions and Vocabularies of Motive’ (1940) \textit{5 American Sociological Review} 904.
appropriate than others. Transposed to the analysis of personal investigation reports, we may uncover the vocabularies of motive that the probation staff and institutional context make available to defendants and which appear legitimate in this particular conversation situation, and further contextualise defendants’ own responses. This also implies that vocabularies of motive are constructed on an assumed ‘normality’ since some emotional reactions may seem more appropriate than others in explaining criminality. ‘Motive’ is thus more than a reason for crime in this particular context; the concept encompasses other aspects, such as responsibility, personal and social problems, or treatment options. I use ‘vocabularies of motive’ to analyse how defendants and probation workers can meet expectations to talk about possible relationships between person, social context and crime. This raises specific issues as to the reports’ role in knowledge production to be used when judges decide on sentencing. Firstly, probation workers expect specific ideal defendant reasons and emotions to be expressed while considering other forms invalid. Secondly, the probation conversations and subsequent reports address and link past, present and future scenarios based on the defendant’s emotions. This temporal dimension of emotions has attracted limited attention in a criminological context, but may deepen our understanding of how the criminal justice system uses emotions to understand defendants’ present situations in light of the past and to facilitate an imagined non-criminal future. Taking into account this temporal interconnectedness of reasons, responsibility and remorse in the process of report production, the analysis elaborates on the specific Danish social and cultural context in which it makes sense for the Probation Service (and courts) to perceive defendants’ responsibility and remorse in terms of an acknowledgement of personal problems (such as addiction) and the acceptance of correspondent treatment options that it offers them. Research on pre-sentence reports has investigated issues such as how the reports reflect broader tendencies within contemporary sentencing and, on a comparative note, how they may be constructed differently according to the penal system and penal ideologies in question in a particular country. Following this line of thought, the chapter ends with a discussion of how ‘remorse’ may potentially be understood and articulated in this Danish legal context, guided by specific penal rationales and expectations regarding ideal defendant emotions.

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II. METHODS AND DATA

Personal investigation reports\textsuperscript{13} were first introduced in the Danish Penal Code of 1930 in order to identify and decide on supervision conditions in suspended sentences. They have since been used to address shifting penal policies such as community service, and recently to target an increasing amount of possible measures relating to a fine-grained risk assessment. Despite these shifting penal rationales, the structure of the report itself has remained remarkably identical regarding relevant topics that have to be addressed by probation workers.\textsuperscript{14} At the time of this study, they were organised into seven topics: upbringing, family relations and friends/leisure time; housing situation; health conditions, different kinds of misuse; education and work; economic situation; future plans and probation officer’s impression of the defendant; and documentation. These topics have been quite consistent since 1930, although worded differently over the years.

The present analysis is based on observations of conversations between probation workers and defendants, the writing process that the workers engage in afterwards and document analysis of the final reports themselves. Although this delimited phase of the penal process is the focus of the chapter, it views the production of personal investigation reports as being interconnected with other parts of the criminal justice institutions. Probation workers conduct the interview with the defendant and subsequently write the report while taking into consideration what other professional actors in other contexts and localities, for instance the court, might expect from these documents.\textsuperscript{15} Research in European countries often describes judges’ ambivalent stance regarding the quality and impartiality of the information conveyed in these documents.\textsuperscript{16} However, Danish judges consistently find reports useful when sentencing, and they seem to trust the information given by the Probation Service.\textsuperscript{17} Since they have pled not guilty, many defendants are reluctant to be interviewed for the personal investigation report, but are persuaded to do so by their defence lawyers on the grounds that it may benefit their case. Both defendants and probation workers thus participate in this ‘conversation project’ with the awareness that it may be part of a future trial in which other criminal justice actors will possibly make use of the information in the report.\textsuperscript{18}

\textsuperscript{13}These reports can be compared with pre-sentence reports in other jurisdictions, but they are read aloud in court in minor cases \textit{before} the question of guilt has been assessed.
\textsuperscript{14}Freelance ‘investigators’ usually prepare these reports and are not considered ‘staff’. They are often students or retirees. I have chosen to use the term ‘probation worker’ (PW) instead of ‘probation officer’ to capture their non-committal status.
\textsuperscript{15}J Gubrium and J Holstein, \textit{Analyzing Narrative Reality} (London, SAGE, 2009).
\textsuperscript{16}J Phoenix, ‘Pre-Sentence Reports, Magisterial Discourse and agency in the Youth Courts in England and Wales’ (2009) \textit{12 Punishment & Society} 348; Tata et al (n 2).
\textsuperscript{17}Johansen (n 2).
I draw upon 32 cases of assault in which the defendants all pled not guilty, in the sense that most of the defendants did not deny having had some sort of contact with the alleged victim, but disagreed on the sequence of events and with the way in which blame had been attributed. Crimes concerning violence were selected because a suspended sentence with retributive measures is a possible but not necessarily expected sentencing outcome in relation to these crimes in Denmark. Reflecting the general pattern in violence cases, men heavily outnumbered women in the sample of defendants (in fact, only one out of the 32 defendants included in the study was a woman); the average age of the defendants was 23, the youngest being only 15 and the eldest 65.

In the cases I observed, probation workers usually interviewed defendants at the offices of the Probation Service. The interviews lasted between one and a half and two hours on average. I was allowed to observe the interviews and to take notes, which appeared inconspicuous as the probation worker was also taking notes of the defendant’s responses. Among other details, my notes focused on both the defendant’s and the probation worker’s emotional expressions concerning both the violence in the case and the interview situation itself, as communicated both orally and bodily. For instance, the defendant’s anger, sorrow, discomfort or unwillingness to participate or answer certain questions were noted, as was the probation worker’s eventual disapproval or irritation, which could lead to critical, targeted follow-up questions. I followed up on these conversations by interviewing the probation workers about their impressions of the defendant immediately after their meeting. These comments formed part of my field notes. The probation workers were later interviewed more formally with a view to connecting the specific observations I had made during their conversations with defendants and the workers’ more general experiences and views. Nineteen probation workers were interviewed formally. The probation workers spanned an age range of 25–65 years, with a predominance of people aged over 50. While many of these workers were women, I conducted one-third of my interviews with probation workers who were men. The interviews lasted approximately one hour and were recorded and transcribed.

The Probation Service provided access to all 32 personal investigation reports issued on the basis of the conversations I had observed. In addition to these reports, I was given access to another 28 reports from the archives concerning violence cases. For the purposes of this chapter, all field notes, interview transcripts and reports were anonymised, read and coded in order to identify the use of emotional expressions and evaluations in their immediate conversational contexts.

III. THE CONVERSATION

This section analyses probation workers’ specific techniques for handling conversations with defendants, including the underlying assumptions that guided
their work. Probation workers approached the conversation with the defendant from the stance that they possess an inner core and emotional self which the worker should be able to access in order to elucidate personal problems indicating reasons for the crime. Since non-guilty pleas had been entered in all the violence cases, probation workers were not able to target culpability directly but needed to explore possible relations between the violence case and the person by probing into the relationship between the victim and the defendant, as well as issues such as uncontrollable anger or provocation. These problem identifications that are clearly crime-related were complemented by other foci such as substance abuse, general state of mind and addiction to gambling, pointing to a more general problem-identification strategy. Discussing the risk/needs nexus in contemporary correctional practices, Hannah-Moffat\textsuperscript{19} suggests that professional knowledge of these issues is fluid and flexible in the sense that needs are categorised dynamically in order to meet targeted interventions. Setting the scene for the conversation, probation workers frame it as a specific situation that presupposes sincerity and unequivocal openness about a very broad range of issues that may be of potential interest for the identification of problems and possible actions.

A. Expecting Openness

Probation workers characterised the conversation as a particular situation in which the defendant must open up and reveal an inner self, if they wished to come across in a positive way in court. It is presupposed that this knowledge about the defendant will only be relevant if the court finds the defendant guilty, but the rest of the interview puts this issue aside and probes into possible relationships between the defendant’s personal and social characteristics and the offence. It demands that the defendant scrutinise their personality and problems as if the violence in question had been admitted to.

Because probation workers sometimes experienced resistance from defendants during their initial conversation, they were very keen to explain that the report is in the best interests of the defendant and hinges on their cooperation. When beginning the interview, many probation workers would state the importance of acting with this degree of honesty and openness, as evidenced in the following quotations from four conversations documented in my field notes:

PW: ‘We have to find out what kind of person you are, what personality you have, so we can find an adequate punishment for you. It goes like this: I ask you a lot of questions … and you can decline to answer, but then again, the more sincere you are, the better you look.’

Defendant Michael, 35, says, ‘Yeah, fine.’

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PW: ‘It’s about peeling everything off you and seeing what’s inside of you. What do you contain?’

Defendant Noah, 16, nods and looks down at the table.

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Defendant Ejnar, 38: ‘What do those questions have to do with my case, anyway?’

PW: ‘It’s because I have to make a description of the entire person. I also have to assess if there’s a need for support.’

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PW: ‘I’m describing you and collecting as much as possible about you.’

Defendant Hans, 19, nods.

By using the term ‘we’ in reference to the relationship underlying the conversation, the probation worker speaking in the first quote indicates a common project between himself and the defendant. Their conversation will be characterised by the sheer amount of information shared, conveyed through the pains that workers take to ‘collect’ as much as possible in order to be able to describe the ‘entire’ person comprehensively. Other significant words in the quotes include ‘peeling off’, ‘seeing inside’ and ‘personality’, reflecting the fact that probation workers are required to really dig into the defendant’s supposed inner self. The probation workers evidently assumed there was a core or inner layer existing within the defendant that they would be able to access during the conversation. The idea of an inner self presupposes that the defendant has to open up in order to grant access to this self, and this openness is achieved by bringing emotions into play as an opening technique. One probation worker explained how he perceived the relationship between himself and defendants during the conversation:

Many [defendants], they also say, ‘It’s so nice that I get to talk about myself – for once, somebody is listening. And I seem to get a grip on some issues.’ And sometimes, some of them break down crying. And where I say, ‘Was it that bad?’ ‘No, it was okay, because I got to put into words, or to get closure on issues that I haven’t, that I’ve had on my mind.’ This way, you often get recognition for the fact that somebody shows interest for another person.

This quote describes the conversation as a space that sparks defendants’ interest and elicits engagement from them. Mik-Meyer and Haugaard document similar expectations in their study of labour activation-enabling services: the staff’s goal to engage with their clients only seems achievable if clients reflect upon their emotions and difficult situation. Emotions thus become pivotal for

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probation work itself. The probation workers in my study often used an element of persuasion to foster this emotional openness – the conversation is voluntary, but defendants should explain themselves comprehensively and open up for their own sake. This gives rise to a situation in which the defendant must exhibit openness and expose very personal matters as a prerequisite to fulfilling the aim of the conversation and in order to be viewed positively in court. Having assessed how probation workers tried to address and tease out the defendant’s emotions as an entry point to facilitate the conversation and obtain relevant information, the next sections analyse how criminal reasons are brought into play by using specific temporal dimensions of emotions and, more indirectly, repentance.

IV. THE PAST: CRIMINAL REASONS

Mills noted that ‘vocabularies of motive’ can serve as both an excuse for and an ascription of guilt, and can justify or reject certain actions. Even though the defendants in the present study had pled not guilty, probation workers searched for, and tended to find, potential explanations for the violent actions. Having set the scene for the conversation and its purposes, probation workers proceeded to ask about the alleged crime. Many probation workers would ask the defendant a leading question, such as ‘Would you care to explain the background to the incident?’, and most defendants were actually happy to recount their version of events, often finding reasons for them in the personal relations between offender and victim, such as being partners or friends. Probation workers also tried to find explanations in the defendant’s suspected addiction(s), psychological instability or violent temper. The handbook that prepares probation workers for conducting these conversations, for instance, states that probation workers should pay attention to ‘defendants’ personal and/or social problems’, and should ask if ‘there may be eventual links between the crime and these problems, so that the risk of recidivism may be reduced if the problems are remedied’. This entails that probation workers should search for personal, typological or crime-related motives for the violent, criminal reactions.

These expectations for finding a connection between person and offence were obviously not always met. If the probation worker had tested all possible reasons – the result of drunkenness, provocation, jealousy, etc – without receiving any concessions from the defendant, then the report would often quite negatively conclude that the defendant seemed unrealistic or immature, or did not take responsibility for their actions. In the following paragraphs, two examples of conversations are cited, one which the probation worker reflected positively upon in our subsequent interview and another in which the probation worker’s
initial positive stance towards the defendant was reversed. The two examples are then used to show how probation workers and defendants are expected to talk about reasons for crime.

Frans, 19 years old, is charged with hitting another young man in the street late at night. Before their conversation, Officer Kirsten has read the indictment and remarks that it seems to be a violent assault. She thinks Frans sounded unpleasant during their phone conversation. Frans is then shown into the conversation room and sits in front of Kirsten clothed in a big hoodie; his hair is crewcut and he has large tattoos on his arms and hands. Kirsten: ‘You are pleading not guilty?’ ‘Uh, yeah, part of it at least,’ Frans answers. Kirsten: ‘Well, you can’t get community service if you haven’t been through us. I take it you would prefer community service to prison?’ Frans smiles and nods: ‘Yes.’ After giving some practical information and encouraging him to be open, Kirsten proceeds to talk about Frans’s childhood. Frans tells her about his parents, who are both early retirees; they’ve both been to prison once. Kirsten asks how he grew up, and Frans talks about a caring family that he talks with every day. They know about the indictment.

Frans: ‘I’ve always been comfortable with by parents.’ Frans smiles while he talks about his parents. Kirsten proceeds to ask about his girlfriend, whom he has been with for several years. He tells Kirsten about her and her family, whom he spends a lot of time with and gets along with very well, and concludes that her parents have been ‘my second parents.’

… Kirsten: ‘How about your psychological well-being?’
Frans: ‘I’ve always been quite grown-up and taken care of myself.’
Kirsten: ‘Are you the type that gets into a lot of brawls?’
Frans: ‘I kind of liked it before, but now that you’re older you just want to talk about things instead.’
Kirsten: ‘What about alcohol?’ Frans says that he does not drink that often.
Kirsten: ‘Did you drink that night [of the crime]?’
Frans: ‘I can’t remember that much, I was pissed. In fact, I haven’t been drinking since that day.’ Frans describes that he remembers both parties as engaging in the violence against each other, but he thinks it was stupid for his part and does not want to drink and put himself in that situation once more.

Kirsten asks about his drug use, and Frans says that he has used hash maybe 10 times, and nothing else. ‘I don’t want to take anything to feel better about myself. I’m fine with myself.’

They talk about Fran’s job situation and future. He states that he just wants a driver’s licence and some work. He mentions his tattoos and thinks it was stupid of him to get them. He is saving up in order to get them removed. Kirsten agrees with him and notes down under the section ‘Future plans’ that Frans wants to have his tattoos removed.

After the conversation, Kirsten remarks to me that Frans was quite nice. ‘It’s a criminal family, but he seems mature in many ways. So they must have been able to give him warmth because he is not unfeeling.’
The probation worker moves from an initial negative impression of Frans, formed on the basis of the violence committed and their phone conversation, to an assessment of him as being mature and emotionally aware. This ultimately positive view of Frans comes from his openness and smiling attitude, among other things. Additionally, he reacts ideally when talking about his family, drug and alcohol consumption, work situation and future, in which he wishes to remove his tattoos in order to be eligible for a job. Even the fact that his family is ‘criminal’ does not change the probation worker’s impression of him as being responsible and mature. He speaks about these issues within a comprehensible ‘vocabulary of motive’, recognising his reasons for the crime and responding appropriately; he was drunk, became involved in a public brawl and has therefore not drunk alcohol since. The probation worker deems him eligible for community service and does not have any further treatment suggestions.

In another conversation, the opposite development took place. The probation worker initially had a positive impression of the defendant, but this changed substantively during the conversation:

Officer Mette says that Sune sounded very nice on the phone. She looks into the indictment and reads that Sune is charged with hitting a woman, Lillie Olsen, in the face with his fist in an electronics shop at four in the afternoon some months ago. Mette is a bit surprised when thinking about her phone conversation with Sune and thinks that he might have hit his girlfriend.

When Sune arrives, Mette tries to understand the indictment: ‘You’re charged with hitting a woman in the head with your fist?’ Sune: ‘Yes, it was at an electronics shop where I work.’ Mette: ‘Did you know her?’ Sune: ‘No, in fact.’ He says that he was depressed four years ago and received treatment for a short period of time. Mette goes on: ‘Were you under influence of alcohol, then?’ Sune says no. Mette: ‘Did you hit a customer?’ Sune: ‘Yes.’ Mette: ‘Did she provoke you?’ Sune: ‘Yes, but that’s no excuse, I was a customer myself at that point.’

Mette then probes into his family life. He lives with his mother and sibling and is happy with this situation. He says he does not abuse drugs, and he is currently planning an education that could eventually lead him to a job as a pilot.

After Sune has left, Mette comments to me: ‘He did get some medical treatment but that was four years ago! He also seems unrealistic about his future. He doesn’t take any responsibility for himself, either. I sense that he doesn’t say everything about his childhood … But I think he can manage community service, he isn’t ill. But something’s quite wrong with him, hitting somebody in a shop, and he doesn’t even know her!’

When writing up her report, Mette remarks under the section ‘PW’s impression’: ‘Sune seems of average intelligence … It does not seem as if Sune takes any responsibility for his circumstances, and he seems unrealistic as to his future.’

The negative assessment of Sune and his actions is tied to the lack of emotional relation he has to his victim. Mette tried, unsuccessfully, to find a reason for his deed; the positive impression Mette got from the phone call led her to probe
quite rigorously into possible reasons for the crime, but she would not accept his explanation that he is psychologically unstable since his doctor has declared him well and he does not take medicine. Mette moved from her impression of ‘a nice young man’ to one of lack of responsibility. She connected information from the doctor with the indictment, the conversation and Sune’s apparently unrealistic future plans, to reach a conclusion of possible insincerity and inexplicable action. Even though Mette declared Sune suitable for community service, her negative comments about his irresponsibility and lack of sense of reality would eventually add layers to the court’s impression of this particular defendant.

Both examples elucidate how the initial impressions and even family context of the defendant mean less for the probation workers’ assessment of the defendant than their demeanour during the conversation and their reasons for the crime do. There is a difference between being drunk and fighting with another man, and inflicting violence upon a random (female) victim in a shop. The latter example does not seem to fit into an acceptable ‘vocabulary of motive’.

Both defendants had probably felt provoked, but only one kind of provocation constitutes a suitable reason. The suitability is also linked to the defendants’ reactions after the incidents. While Frans had stopped drinking, Sune did not seem to reflect on his own role in the violence sufficiently to actually change anything about himself. There is an important difference in the degree of responsibility each defendant takes, as Mette remarked in the report about Sune: he does not take any responsibility for his circumstances. Conversely, Frans did so to the extent that the probation worker characterised him as ‘not [being] unfeeling’, implying that she related his responsibility with his emotional capability. Not being unfeeling points to a self-awareness regarding one’s role in the crime, suggesting the possibility that one could have acted differently. This is a crucial step towards possible remorse.

Both conversations touch on the reasons for crime as a dimension of the past, and the ways in which the defendant reflects on his situation at present. This latter aspect is elaborated on in the section below.

V. (SELF-)DIAGNOSIS BETWEEN PAST AND PRESENT

As implied in the preceding examples, reasons for crime include issues relating to temper, drugs, alcohol or psychological state. In the following, I focus on the ways on which these kinds of information were elicited from defendants during the conversation.

‘Self-diagnosis’ analytically refers to the parts of the conversation in which the defendant is encouraged to reflect about themselves in relation to criminality, psychological conditions, etc. Rose remarks that ‘psy’ disciplines – like

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22 Sarat (n 7).
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Psychology and psychiatry—have contributed to making people conscious about their inner selves. Modern institutions increasingly encourage people to reflect upon themselves. This ‘self’ does not exist in a vacuum, but is continuously defined and redefined on the basis of shifting historical perceptions of normality and deviance. The relationship between diagnosis and self-diagnosis is apparent in the ways in which probation workers, for instance, shift between providing their own evaluations of the defendant during the conversation and prompting the defendants to reflect critically on themselves. One probation worker explained his (working) strategy this way:

Jan: Like, using this, under the part about psychological conditions, to say to them: ‘How are you, and how’s your temper?’ I think it’s a good idea myself, because sometimes it doesn’t match with my [perception], and then I note that down under the part about ‘my observations’, but at least that’s how they perceive themselves.

Jan’s approach implies testing the defendant’s self-perception against the probation worker’s professional evaluation. This self-diagnosis highlights a related aspect of the conversation: the probation worker is not the only one to extract information from the defendant; the defendant should ideally also engage in self-presenting their lifestyle, habits and weaknesses. The techniques for obtaining this information may be more roundabout, as in this example in which the worker tries to coax out a defendant’s self-perception:

Probation worker (PW): ‘How do you feel psychologically?’
Ernst: ‘Generally well, I think. I’m working on some problems right now.’
PW: ‘Are you seeing a psychologist?’
Ernst: ‘No, I haven’t talked to a psychologist.’
PW: ‘I’ve read your personal investigation report from back in 2001, where I read you as a peaceful, non-criminal person, are you still that way?’
Ernst: ‘Yes.’
PW: ‘How is Ernst?’
Ernst: ‘Relatively extrovert, I think.’
PW: ‘Is he a happy person, or sad?’
Ernst: ‘Generally happy.’

Several of the probation workers used this third-person style when asking the defendant about their inner state, for instance: ‘If you were to describe Ole Hansen [defendant’s name], how is he?’ or ‘What does David Jensen’s future look like?’ The defendants often answered in the third person themselves. Probation workers thereby directed defendants’ attention inwards to their ‘self’ by framing it as a third person that defendants might then reflect on.24

In addition to creating this personal level of reflection, ‘self-diagnosis’ was also a dimension in assessing the criminal act, and probation workers therefore

24 ibid.
tended to ask specific questions to invite an evaluation of the offence that defendants were charged with. In violence cases, ‘temper’ was always addressed, for instance through questions such as: ‘Do you often lose your temper?’ or ‘Do you blow up easily?’ Probation workers often urged defendants to reflect even more deeply on the issue of temper, as in the following example from a conversation:

PW: ‘Do you have a lot of temper?’
Idrisse: ‘No, I don’t get into a temper.’
PW: ‘Now I’m using stereotypes: “Idrisse” – is it an Italian …’
Idrisse smiles and interrupts: ‘It’s Tunisian.’
PW: ‘Is it your genes? Is this why you think you have a bad temper?’
Idrisse: ‘I don’t have a temper.’

While this probation worker quite openly admitted his prejudices, he wanted Idrisse himself to make the connection between the offence and his personality and/or culture, even though Idrisse had pled not guilty. By giving the defendant the possibility of diagnosing himself (‘Is this why you think you have a bad temper?’), he is encouraged to embrace his ideal role as a self-conscious criminal. Fox uses the concept ‘criminal self’ in her analysis of inmates and the ways in which expert staff within cognitive programmes try to get inmates to realise the connections between their inner selves and the offence. In order to redress their criminal inclinations and predispositions, the inmates must acknowledge that their inner self is criminal, violent, etc. Probation workers similarly work with the relationship that is established between the defendant’s self-regulating abilities and the expertise that the worker may offer.

If a defendant has pled not guilty, the probation worker cannot insist on their recognition of a violent temper, but this lacking concession does not seem to influence the probation worker’s conclusions as to the defendant’s suitability for treatment. Probation workers instead diligently test the defendants’ willingness to take part in the dialogue about their eventual problems and to scrutinise themselves. Acting responsibly (and cooperatively) during this problem identification process is crucial and reflects the adequate ‘vocabulary of motive’ in a present-time scenario. Self-reflection on the part of the defendant is also paramount to finding solutions for the future.

VI. ACCEPTING FUTURE TREATMENT

The reasons for the criminal actions as well as the processes of self-diagnosis may lead probation workers and defendants to a possible next step: for the

26 ibid.
27 Rose (n 23).
defendants to acknowledge their weaknesses and to accept the treatment options offered by the Probation Service. A crucial element of any personal investigation report is the defendants’ willingness to cooperate with the Probation Service and, in the event that a probation worker has identified a possible problem, to react appropriately to it by either admitting an issue, proposing a solution or accepting treatment. For instance, the aforementioned defendant Frans admitted that he had had a hard time finding work and was now considering having his very visible tattoos removed from his body in order to appear more suited to and eligible for the job market. This was written up in his report as a sign of willingness to change his situation—he was taking responsibility. Similarly, drug or alcohol addiction can be framed almost positively if the defendant expresses willingness to enter into a rehabilitation programme. This emphasis on acceptance as a positive trait and a proper way of addressing problems hinges on the fact that the penal system can only prescribe treatment if the defendant is willing to accept it. The problem, however, seems to be that defendants do not always agree with the diagnosis underlying the treatment option, but may feel compelled to accept treatment in order to be eligible for a suspended sentence. Another issue arises from the fact that institutional solutions can become guiding for the diagnoses. Research about the relationship between staff and clients has shown that the goal of betterment may be influenced by the often limited institutional solutions available to staff.28

The overlap between these two problems is explored in the quotes below, in which the probation worker’s knowledge about treatment options has a decisive impact on the proposal made to the defendant, irrespective of his non-compliance. During a formal interview with PW Peter, he explained to me how some of the issues in the personal investigation report are ultimately less important to him than others, although they may contribute to the selection of a certain treatment option:

Peter: ‘One thing I find less important is their financial situation, for instance—well of course, if they have a huge debt and a lot of expenses, and maybe they’re compulsive gamblers, then you can see that there are some limitations in their possibilities … Sometimes, when considering compulsive gambling, you may find a relation since some people need special conditions [to the sentence], and I’ve discovered that quite a lot suffer from this compulsive gambling … And it’s particularly important to dig into in order to find out if there are some measures that we should propose. After all, we have this treatment option in Middelfart [Danish city], and you can direct them to it …’

Even though Peter does not view a person’s finances as a core issue in the report, and certainly not in cases of violence, some situations demand a more thorough investigation into the connections between finance and compulsive gambling.

Peter feels that he sees an increasing number of ‘cases’ of compulsive gamblers and links them to the available treatment options. Later during my field work, Officer Peter conducted an interview with a 29-year-old defendant charged with violence during which he tried to pinpoint this specific weakness in the defendant. During the conversation, Peter began inquiring into the issue of ‘compulsive gambling’ after having asked about the defendant’s debts, amounting to the equivalent of £10,000, incurred due to a long trip to the Far East. The probation worker proceeded with the following questions:

Peter: ‘Do you play poker online?’
Tarhan: ‘Yeah, sometimes.’
Peter: ‘How much do you lose?’
Tarhan: ‘It differs.’
Peter: ‘Can you quit?’
Tarhan: ‘Yes of course.’
Peter: ‘Do you think you have a problem you should have treatment for?’
Tarhan: ‘No, not at all.’
Peter: ‘Do you know that you can get treatment for compulsive gambling?’
Tarhan: ‘Yes, but I don’t suffer from compulsive gambling.’
Peter: ‘Is it a problem for you?’
Tarhan: ‘No, I don’t think so.’

Peter almost insists on making Tarhan accept that he has a problem with compulsive gambling, and even though Tarhan denies it, he ends up accepting an eventual treatment option for this ‘addiction’, knowing that he will be closer to a suspended sentence if he does so. This approach is textbook in staff management of client needs since the institutionally available treatment options tend to shape their diagnosis of client problems. Peter has recently discovered a new treatment paradigm, including treatment for compulsive gambling, and applies it to conversations with defendants regardless of their indictment for violence and not guilty plea. Hannah-Moffat describes how the act of assessing risk and need leads practitioners to define needs according to the availability of resources to resolve them and to disregard problems with no solutions, such as unemployment. Popularly stated, ‘if there’s no solution, there’s no problem’. While also noticeable in a Danish context, one might argue this correlation the other way around in the sense that the availability of resources or programmes may lead probation workers to search for and find problems in the defendant that are not overtly obvious but are underpinned by the desire to use specific programmes and interventions. This might

29 Hannah-Moffat (n 19).
30 ibid 42.
be readily explained as ‘if there’s a solution, then there’s probably also a problem’. Categorising problems is thus inextricably related to treatment options – options that may change over time.31 Acceptance appears to be an ideal way for defendants to talk about the future. Interestingly, defendants do not even have to admit a specific vulnerability, as long as they accept treatment options and show willingness to participate in them.

VII. COMMUNICATING POSSIBLE REMORSE IN REPORTS

Personal investigation reports in Denmark are not expected to communicate the defendant’s possible remorse, and it has been put forth that a moral account of the defendant and their level of responsibility is actually absent in reports.32 Although this is in line with the official articulation of expectations for report writing, a different picture emerges when observing the specific conversations at the probation office as well as the subsequent report writing. They point at more or less subtle ways of communicating the defendant’s moral abilities and possible remorse. The quotes below point at the translation from the conversation situation to encoded messages in the report that I argue may convey precisely morality and remorse. I focus on one of the seven obligatory sections in the report: the probation worker’s impression of the defendant during the interview. Probation workers’ expectations for openness in defendants are honed in this section on their own impressions, and consistent terms that characterise a ‘good’ conversation are often used. For instance, Probation workers will state that:

- NN tells openly and very eloquently about his personal circumstances.
- NN reflects on his situation … He seems thoughtful and mature.
- NN seemed honest about his circumstances.

The opposite situation might, however, lead to evaluations such as:

- NN answers the questions more or less cooperatively. At the beginning of the conversation, he seems uptight and difficult to establish contact with.
- NN showed hostility towards a conversation that he was probably not able to discern the meaning of.

These descriptions of the defendant consolidate the importance of being open and honest in order to be considered an ideal defendant. Some probation

workers expressed that they would put in a substantial effort to present the defendant as positively as they could if they had experienced this openness. Officer Esther explained this in an interview: ‘If I’ve had good contact with them during the conversation I always write that “He seemed very honest”, or something like that’. Openness is linked quite automatically with sincerity in this quote. Another probation worker, Lars, asked defendant Tom, 17 years old: ‘How good a boy are you, when it comes to it? Do you have anything to say?’ Tom said that he was sorry and that he repented what happened. Lars did not document this exchange because of the non-guilty plea, but he deliberately wrote his impression that ‘Tom seems very mature and honest’. This quote conveys that the defendant has reacted properly. Even though the report does not often engage in direct moral language, the preceding conversation is laden with morality. In line with this, probation workers’ overall positive impression of a cooperative defendant may lead them to connect this openness and cooperation with defendants’ emotional response to the crime they are charged with. Almost one-third of the 60 reports I had access to conveyed defendants’ attitude towards the crime as part of the probation worker’s ‘impression’. The following examples, taken from this part of the reports, describe the defendant’s emotional reactions to the offence, even though the defendant had pled not guilty:

NN has contributed positively and in a friendly way to the interview. He is very sorry about the case and what the victim perceives as having been subject to.

NN underlines that he feels very badly about the case and looks forward to settling it, because it has given him big personal consequences.

NN answers politely, very openly and cooperatively to the questions. A good rapport is established … As for the reasons for the present indictment, NN explains that he was very frustrated and had lost a lot in his life.

The examples illustrate how the reports try to convey the defendant’s emotional reactions to the case, expressed through words such as ‘feeling badly’, ‘being sorry’ or ‘frustrated’. Probation workers try not to incriminate the offender directly and choose to use phrases such as ‘what the victim perceives having been subject to’ or, more neutrally, ‘he feels very badly about the case’. The remarks about possible remorse serve as an open invitation for defence lawyers to encourage defendants to elaborate on these feelings later in the courtroom. More importantly, statements about the defendant’s openness, responsibility and acceptance of treatment options seem to link with these more explicit remarks about possible remorse. The expectation for specific emotional reactions represents a vocabulary of motive through which the defendant’s actions are made comprehensible in light of their timing in the past, present and future. They presuppose being moral – and consequently open – about the past, responsible in the present and accepting of the future, constituting three layers of temporality that together convey an ideal defendant demeanour.
Research has set Danish personal investigation reports at the nexus between different penological considerations, drawing on both a modernist-welfare account and a more recent penal change towards risk assessment. This is in line with international research stating that one should regard shifts between old and new penologies as coexisting and partly overlapping penal rationales. For instance, Moore states that the criminal subject may be defined quite differently now than in the 1960s, while the focus on rehabilitation seems to endure. My analysis has tried to add to this discussion about different penologies by showing how the interpretation and communication of defendants’ emotional reactions play a mediating role for the relation between crime and punishment. It might be tempting to assume that a previous focus on defendant emotions such as repentance and morality has been abandoned in favour of actuarial risk assessment in present-day personal investigation reports. Although the language of repentance may be less protruding in these written reports, it still seems to thrive in the probation conversation and to be encoded in the report writing. Probation workers try to tease out adequate emotional reactions in the shape of openness, responsibility, self-reflection and a project of change, translating them into issues of cooperation, maturity, honesty and possible repentance in the report. This ‘responsibilized subject’ indicates that the criminal can choose to change. The defendant is expected to embrace the need for normalisation because of their deviations from an imagined norm. As Tata remarks this process entails that defendants align themselves with the image of the ‘ideal’ offender who takes responsibility and acknowledges culpability. My examples from non-guilty pleas accentuates this issue since culpability is denied by defendants. The personal investigation report as ‘technique’, though, succeeds in transforming the issue of guilt into a therapeutic goal of motivation that the defendant can accept regardless of the plea.

Field and Nelken argue that ‘the social construction of problems and solutions in relation to crime may be highly culturally specific, relating closely to the institutional relations and the social and political cultures of particular jurisdictions’. Danish judges seem to accept the validity of personal investigation reports,

33 ibid.
34 Field and Nelken (n 12); Hannah-Moffat (n 19); D Moore, Criminal Artefacts: Governing Drugs and Users (Vancouver, UBC Press, 2007); P O’Malley, ‘The Risk Society Implications for Justice and Beyond’ (1999) Report Commissioned for the Department of Justice, Victoria, Australia.
35 Moore (n 34).
36 ibid.
37 ibid; Hannah-Moffat (n 19).
39 Moore (n 34) 106.
40 Field and Nelken (n 12).
and they similarly attach greater importance to defendants’ acknowledgement of issues of addiction, uncontrollable temper, etc than to direct expressions of remorse. This is a tendency possibly sparked by a political and cultural understanding of how to prevent crime in Denmark. The Danish penal system emphasises rehabilitation and treatment. To be able to offer treatment, however, one needs an offender who openly reflects on and copes with personal problems and accepts treatment. This necessity is met by interweaving emotions in the ‘time-space’ surrounding the defendant and the criminal act as presented in the personal investigation report. Probation work is structured so as to enable workers to move back and forth between past, present and future events. Hannah-Moffat similarly links present and future perspectives in correctional work by quoting Rose in saying that ‘calculations about tomorrow should and must inform decisions made today’. This means that the professional power and assumed capability of calculating possible recidivism constitutes knowledge that has to be put to use in order to guide interventions in the present to avert a criminal future. Past, present and future dimensions should not, however, be understood as unidirectional, but rather consist of many decisions that are made by going back and forth in time. If a defendant does not respond appropriately regarding their future plans, this may lead probation workers to revisit the indictment, for instance. The temporal aspect instead works to structure probation work itself and to ascribe meaning to defendant actions, risks and needs.

Added to this, and in light of the present analysis, one should also pay attention to the power of time in identifying and making the defendant’s criminal deeds emotionally understandable, in that they serve to identify the defendant’s emotional reactions and to situate them in time and space. Probation workers evaluate defendants’ moral culpability and pathology in order to find a match between the defendant and the available institutional solutions. In order to be assessed as needy and worthy of these solutions, defendants are required to express an appropriate moral stance towards their flawed past, an active responsibility in the present by acknowledging the reasons for their problems and acceptance towards the future solution that the probation service makes available, even if they do not recognise the diagnosis or problem that it seeks to address. This happens within a narrowly defined institutional vocabulary of motive that comes to exercise control over a limited range of acceptable moral reactions. Since these vocabularies are ‘unofficial’ and even discouraged by official politics of rehabilitation, they work inconspicuously in classifying defendants as more or less morally ideal.

41 Johansen (n 2); Wandall (n 32).
42 Scheffer (n 6).
43 Hannah-Moffat (n 19).