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'What on earth can this possibly mean'? French reentry courts and experts' risk assessment

Martine Herzog-Evans

University of Reims, Law faculty, 57 bis rue Pierre Taittinger, CS 80005, 51096 REIMS Cedex, France

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ABSTRACT

Against the backdrop of ten years of punitive criminal justice policies, the number of cases in which risk assessments by psychiatrist experts are mandatory has considerably increased in France. Because of complex and deeply ingrained cultural factors, most experts and academics oppose the use of actuarial or other structured judgement tools, which they assimilate to these policy changes. Parallel to this, the reentry judges in charge of making release and other community sentence decisions have maintained a strong rehabilitative and desistance-focused culture. Drawing on interviews with these judges and experts, the author wanted to assess the judges' expectations of experts' reports, their opinion on actuarial tools, and how they perceived experts and their aptitude to assess risk. The study showed that French reentry judges manage to keep experts' conclusions at bay when they do not fit with their desistance goals, as they can draw upon their own expertise and that of probation services. They do not have much faith in the professionalism and methodology of experts, and would like them to better demonstrate how they reach their conclusions. Moreover, criminogenic needs assessment would be much more useful to them than static risk assessment, which raises the issue as to why this is not the French probation services' role. Reentry judges who never encountered a report which uses a structured tool are influenced by the French ideological debate; those who have read such reports are unanimously in favour of such tools. It thus seems clear that they would like experts to be more strongly guided by science, but are not yet fully aware of what this entails.

1. Context

Forensic experts have long been involved in the decision-making process of penal courts (see e.g., for Trimaille, 2010), and this has undoubtedly reinforced their credibility (for Switzerland: Germann, 2014). Initially, they were mainly consulted in criminal cases where courts needed to know whether the suspect was mentally ill. Later on, early release in the form of parole or other measures (such as semi-freedom or electronic monitoring) created other needs such as the assessment of re-offending risks and, in certain cases, of the level of risk of serious harm posed by parolees.

Court participation in release is a rather recent phenomenon. In many jurisdictions Parole Boards or other executive bodies still decide such matters (Padfield, van Zyl Smit, & Dünkel, 2010). However, an increasing number of jurisdictions have opted for a fair trial procedure. France is something of a pioneer in this respect, after a number of regions judicialised release decisions as early as 1945. This was later extended nationwide in 1958 when the *juge de l'application des peines* (sentences' implementation judge — hereafter J.A.P.), i.e., an old French equivalent of problem-solving courts (Herzog-Evans, 2015), was created. Italy, Spain, Belgium and, to a certain degree, Germany, along with many South American jurisdictions (with the *juez de ejecución de penas*) have adopted similar systems (Padfield et al., 2010; Subijana Zunzunegui, 2005). The problem-solving court movement, and in particular its re-entry courts, which were created many decades later, embodies a modernised J.A.P. However, none of them seems to enjoy as large powers as French J.A.P. who can release offenders (even dangerous violent offenders – although in the most serious cases a three JAP court, the *tribunal de l'application des peines* — T.A.P. – decides), supervise them along with those sentenced to community sentences, transform a custody sentence of up to two years into a community sentence or measure before it is even implemented, can expunge criminal records when they create obstacles to employment, and are in charge of sanction and recall in breach cases along with furlough and remission (good time credit).

In an increasing number of cases (particularly for sex offenders, serious violent offences, and domestic violence) J.A.P. and T.A.P. cannot examine the case unless there are one, and at times several, risk assessment reports written by 'experts' in their file. In the absence of forensic psychiatrists or psychologists or criminologists, this task is undertaken by 'general' and 'non-forensic' psychiatrists. The questions asked of these experts are generally: is the person mentally ill; can he be cured

E-mail addresses: martineeevans@gmail.com, martineevans@ymail.com.
URL: http://herzog-evans.com.

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or stabilised; is he at risk of re-offending; and in some cases, is he dangerous? Risk assessment is thus exclusively focused on the risk that released offenders may present; it is not intended to map their criminogenic needs with the aim of better supervising and rehabilitating them. In spite of the European Recommendations (Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules; section 66–71), probation services are not in charge of assessment. Even though the prison and probation services have tried to involve their probation officers in risk assessment, these offices are strongly opposed to such an endeavour.

As in many jurisdictions, risk assessment has been a hugely contentious subject in France, where everything tends to be politicised. For many practitioners and academics, risk assessment — particularly when using actuarial or structured tools, represents the arm of the punitive ideologies that they abhor (Harcourt, 2011). Moreover, opponents reject the idea that 'humans can be defined by statistics' (e.g., Gravier, Moulin, & Senon, 2012; Harcourt, 2011). In a typically polarised context, opponents have also complained about the Garlandesque 'culture of control' (Garland, 2002) world that the development of risk assessment personifies (e.g., Chauvenet, 2008). There is no doubt that risk assessment is not a purely mathematical equation but is 'inherently subjective and represents a blending of science and judgement with important psychological, social, cultural, and political factors' (Slovic, 1999: 659). Yet, by focusing like the bull on the red rag on actuarial tools, opponents do not see that the real issue in this jurisdiction is, on the one hand, that assessment is only focused on risk and not on needs and, on the other hand, that using unstructured tools leads to very serious human rights violations because of the much greater risk of error it creates (Herzog-Evans, 2012). There is also a high risk of racial or other bias with risk assessment (Haber & Haber, 2013; Vinkers, de Beurs, Barendregt, Rinne, & Hoek, 2010), particularly with unstructured risk assessment, which suggests that protocols and structure should be put in place in order to try and contain them.

Legal scholars have also pointed to the incoherence of the French legal system which, in some cases, refers to 'dangerousness', in others to 'risk of [legal] recidivism' in others to a high risk of legal recidivism, in others still to 'established' risk of [legal] recidivism, in others to both dangerousness and the risk of recidivism, and lastly in a general yet inferior rule (Penal Procedure Code, art. D 49-24) to the more general risk of re-offending (Herzog-Evans, 2012–2013). Legal literature has pointed to the criminological absurdity of using the hugely intricate and limited concept of legal recidivism rather than the simpler concept of re-offending (Herzog-Evans, 2012–2013). It has pointed to the sheer impossibility in particular to operationally distinguish between a 'risk of recidivism' and an 'established' risk of recidivism (Herzog-Evans, 2012–2013). Similar legal conundrums and difficulties may also be found elsewhere as is the case with the 'likely to re-offend' notion (Sreenivasan, Weinberger, & Garrick, 2003). French social scientists (Hirschelmann, 2012) and legal scholars (e.g., Coche, 2011; Giudicelli-Delage, 2010) have pointed to the sheer impossibility of using the loose and indefinable concept of 'dangerousness'. Elsewhere, even the apparently steadier concept of mental illness has been criticised given the lack of agreement amongst practitioners and academics on its classification, a classification, they point out, which is not regularly reviewed and therefore is not purely objective. For these reasons, authors have warned courts not to have 'misplaced confidence' in psychiatric assessment (Mellsop, Fraser, Tapsell, & Menkes, 2011). Trying to make sense of legal requirements, some scholars have tried to differentiate between psychiatric dangerousness and criminological dangerousness (e.g., Mbanzoulou, 2010). In practice, however, this distinction does not seem to be operable (Baratta, Morali, & Halleguen, 2012b). As a matter of fact, practitioners (judges and experts) manage to have a relatively uniform perception of this concept (Hirschelmann, 2012; Hirschelmann, Harrati, Winter, & Ventéjoux, 2013).

As a result of all this opposition, France has made no progress since Giovannangeli, Cornet, and Mormont (2000) found, nearly fifteen years ago, that whereas Northern or Anglophone European jurisdictions were using evidence-based tools, Southern jurisdictions would still stick to unstructured clinical judgement. Predictably, in light of what has been known for decades (Blackburn, 1993; Meehl, 1995; Monahan, 1981), psychiatrist 'experts' very frequently get it wrong. Baratta, Morali, and Halleguen (2012a) studied forty-five unstructured assessments delivered by seventeen experts and compared their results with those yielded by more reliable tools such as VRAG or SORAG. They found that in 45% of the cases French experts concurred with these instruments; they diverged in 55%. They also found that errors in judgement were particularly made in the case of high risk offenders. The authors also pointed out that, in their reports, French experts mainly referred to (purely clinical) items which are not considered as being valid in international literature. This is not surprising in view of the fact that, as we shall see later, most of them have a psychoanalytical background and that, as Villerbu and Lameyre (2009) found, most of them assimilate mental illness and dangerousness. Conversely, Heering and Konrad (2012) recently found much stronger adherence to international standards and much higher reliability in the rather similar German prison context where it is also psychiatric experts who are in charge of risk assessments. Just eight years earlier, Seifert, Möller-Mussavi, and Wirtz (2005) found that German experts made a significant proportion of errors, which at the time was unsurprising given that they based their prediction primarily on clinical variables. Things may have changed in Germany, explain Heering and Conrad, owing to national guidelines issued in 2006. On the other side of the planet, Nguyen, Acklin, Fuger, Gowensmith, and Ignacio (2011) found that Hawaiian pre-conditional release reports were of a rather poor quality, which the authors also correlated to the lack of use of valid risk assessment instruments.

France has had no *Daubert* Supreme Court equivalent (Supreme Court, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 584–587) to assign them the role of scientific reliability gatekeepers. J.A.P. are required by law to entrust experts with the risk assessments of an increasing number of cases. They are then required to insert a summary of the experts' conclusions in their rulings. However, they are free to depart from the experts' conclusions as the governing principle of 'freedom of proof' means that all factual elements found in the case processing, all opinions and conclusions are of equal value. French J.A.P. may thus not be the gatekeepers of sound science; they nonetheless can ignore bad science or inconclusive or contradictory reports. Besides, they have their own expertise. J.A.P. are highly specialised re-entry and release judges, with nearly seven decades old professional habitus. They know offenders well; they are fully aware of the complex criminal career and desistance processes and act accordingly, as previous research has showed (Herzog-Evans, 2014b). In many cases they are in a capacity to overrule experts' perception of an offender's risk of re-offending and dangerousness. Moreover, the law also asks them to focus on many other release conditions such as the credibility of the release plan, and this include all known desistance factors (Maruna, 2001), whether the person has started paying damages whilst in prison, and so on.

One might thus wonder how French desistance non-punitive J.A.P. deal with experts' written testimonies. What do they need from experts' written conclusions and what do they actually use? What do they think of the recent laws which have considerably increased the number of cases where experts' assessments are mandatory? Are they systematically influenced by experts' conclusions, in particular in the most serious cases, as many fear, in a criminal justice punitive context? What do they think of experts' competence and skills? And lastly have they been contaminated by the ideological turn that the debate over actuarial tools has taken?