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Law as an extrinsic responsivity factor: What's just *is* what works!

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Abstract
If criminologists and psychologists have studied practitioners' ethics, they have not integrated the legal system into offender treatment theory. Offender treatment models have, moreover, not taken stock of the Legitimacy of Justice and the Self-Determination literatures, according to which people comply more substantively, and for longer periods of time, with decisions that are made fairly, and respect individuals' agency. It is generally assumed that despite modern mass managerial and punitive probation, practitioners and their institutions have retained their original well-meaning ethos. In this article, it is suggested that law as a system ought to be integrated into a new subdivision of the Responsivity principle: 'Extrinsic- Responsivity'. It is further argued that it is high time for probation staff and institutions to lose their untouchable status and be subjected to legal scrutiny and procedural constraints.

Keywords
Probation, responsivity, human rights, self-determination theory, legitimacy of justice, fair trial

Where does the legal system fit in current models of offender supervision? Psychologists and criminologists (e.g. Canton, 2013; Connolly and Ward, 2008; Ward and Birgden, 2013) have broached the issue of practitioners' ethics, but not those of the wider legal system per se. They have not integrated legal theory into offender treatment theory. The current dominant theoretical model for offender treatment is RNR-CCP (Risk, Needs, Responsivity and Core Correctional practices: Andrews and Bonta, 2010). This system comprises a theoretical explanatory model for crime (general personality and social psychology) and a list of treatment principles, which include standardised risk

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assessment. Answering criticism of their original model, RNR's creators later admitted that additional factors supporting their model were situated outside the strict realm of RNR; they labelled them 'non-programmatic factors' (Andrews, 2011; Palmer, 1995). Surprisingly, no clear theory has been built around the concept of 'non-programmatic factors'. In his aforementioned 2011 article, Andrews spent more time making a case against the Good Life Model (GLM) and desistance than dealing with his subject; reading through the lines, one can nonetheless guess that non-programmatic factors are anything that is not strictly situated within the RNR model, but is useful to successful programme implementation and fidelity. Slightly more precise, Palmer (1995) merely lists a series of factors that this 'tote bag' may contain: staff characteristics; offender characteristics; staff-client interaction; and work condition factors, such as caseload, frequency of contact and setting contexts. This list is, in fact, rather confusing. For instance, offender characteristics include risk levels and also refer to several needs (e.g. antisocial personality): Risk and needs are already included in the RNR model. Offender interpersonal style is likewise included in this model and can fit in the Responsivity category. It is our view that non-programmatic factors ought to be repealed and included into the Responsivity category. We have elsewhere argued that the responsivity factor should be revised and divided into two categories: on the one hand, Intrinsic Responsivity, which would refer to what AandB call 'specific responsivity'; that is, the responsivity of the person subjected to treatment and supervision and would include, inter alia, age, gender, ethnic and cultural identity, mental health, motivation, and so forth. On the other hand, Extrinsic Responsivity (that is 'originating from or on the outside': Webster Online Dictionary) would refer to the responsivity of the institutions, and the practitioners in charge of implementing the programme, along with the legal system in as much as it facilitates, or conversely hinders fidelity (for more on this, see Herzog-Evans, in press). Extrinsic Responsivity would include:

- *Institutional and practitioners' goals*: Are they, for instance, punitive oriented rather than pro-rehabilitation oriented?
- *Institutional structure*: For instance, are probation services a centralised, hierarchical and corporatist agency, or are they conversely flexible and imbedded in the community (Taxman and Belenko, 2012)?
- *Professional culture*: Is practitioners' professional culture collaborative and conducive to interagency work and information exchange (Pycroft and Gough, 2010; Sloper, 2004; Sullivan and Skelcher, 2002)?
- *Practitioner's skills*, well described in the now abundant 'real life' studies (e.g. Bonta et al., 2010): Do practitioners possess the right skills?
- *Treatment availability*: How available are treatment, social work and other indispensable human services resources locally?
- *The legal system* as a whole: Are the existing rules and procedures supportive of efficacy, and do they result in enhanced Criminal Justice legitimacy?

Much theorising ought to be devoted to the first five categories of Extrinsic Responsivity factors. This article shall exclusively deal with the sixth one. Recently, several authors have focused on human rights. Thus, Robert Canton (2013) made the point that the very goal of probation was human rights. Other authors have argued that practitioners and institutions ought to be regulated by human rights (Connolly and Ward, 2008; Ward and Birgden, 2013). Unfortunately, these rather general approaches do not detail how law and ethics may concretely guide offender supervision, and do not pave the way for adequate control over probation institutions and staff.

Whereas prison staff are traditionally suspected of human rights violations, and the logical consequence is that the prison system requires legal safeguards, it is generally assumed by criminologists and psychologists that probation officers, or whoever does supervision, and their institutions are necessarily ethical and well meaning. A witness of this viewpoint is the abundant literature that deplores the end of a former quasi-state of nature, where 'advise, assist and befriend' prevailed, but is currently disappearing (e.g. Burke and Collett, 2016; Mair and Burke, 2012). Such opinions seem to assume that practitioners, and to a lesser degree, their institution or corps, are to be distinguished from policy orientations, and that probation staff have thankfully retained their main ethos (Mawby and Worrall, 2013).

Authors probably refrain from pointing the finger at probation employees and institutions for fear of seeing punitive legislators jump on the critical bandwagon, as happened after Martinson declared that 'nothing worked' in probation, which provided empirical argument for the 'tough on crime' era that followed (e.g. McKenzie, 2001). Probation has thus enjoyed an untouchable status for a number of years. One can detect, however, discreet critical murmurs in the recent literature, which admits that probation can be painful (Durnescu, 2011), that many offenders prefer jail (May and Wood, 2010), that just as many do not want to be paroled (Best et al., 2012; Herzog-Evans, ongoing), and that probation's current expansion takes place along punitive trends (McNeill, 2013), and that it actually does not reduce incarceration (in the US: Phelps, 2013; in Europe: Aebi et al., 2015). For the truth is that supervision can be careless, and it can be un-rehabilitative and unsupportive (Morgenstern and Robinson, 2014), that it sometimes focuses mainly on managing probationers or doing paperwork (Herzog-Evans, 2015a), and that it can, in some cases, aim at perpetually controlling offenders (van der Wolf and Herzog-Evans, 2015). However, with some prudent exceptions, which have focused on staff recruitment and training (Paparozzi and Guy, 2015), authors criticise policies and legislators, but rarely disapprove of probation institutions and even more infrequently of their staff.

In times of mass probation, risk management and managerialism (Dubourg, 2015), along with the recent advent of a 'scientific' probation, which can now claim to 'know best', its clients are at a higher risk than ever of having their liberties infringed. It is therefore high time for probation staff and institutions to lose their untouchable status and be subjected to the same level of legal scrutiny and procedural constraints to which prisons, following the judiciary (notably in the form of appeal), have been progressively submitted.

As a general rule, lawyers prudently assume that people cannot be trusted on principle; they are trained and often feared for expecting the worst from institutions and human

beings, and for assuming that even good people can make mistakes and interpret reality erroneously. For this reason, lawyers place safeguards along institutions and people's way. These safeguards can be *substantive* and pertain, for instance, to parole conditions or supervision obligations; they can be *procedural*, and pertain, for example, to due process. Clearly, lawyers and legal systems have not done enough to submit probation to such protections. This article endeavours to raise awareness within practical areas in which the law should play its natural safeguard role over probation practices and practitioners.

It will draw upon the author's more than two decades of field and legal research into prisons, release and probation, and particularly upon a series of studies initiated in 2009, focusing on 'Who Works' in probation (Probation officers: Herzog-Evans 2011, 2012, 2013a; Reentry judges: Herzog-Evans, 2014a; Third sector practitioners: Herzog-Evans, 2014b; and Attorneys: Herzog-Evans, in press b).

For the unconvinced and the suspicious: Empirical support for legal safeguards

Punitive-oriented probation systems, along with 'toolbox' scientists, may be highly suspicious of a message that states that the legal system must place safeguards along their way. For this category of reader, our message is quite simple: Legal safeguards, whether procedural or substantive, increase efficiency.

Empirical support for procedural safeguards

It is surprising that RNR theory and other treatment theories have not taken stock of the abundant empirical literature, which has focused on the 'legitimacy of justice' in its procedural form. The legitimacy of justice, as first theorised by Lind and Tyler (1988), following in the footsteps of Thibault and colleagues (Thibaut and Walker, 1975; Walker et al., 1974), focuses on the broad question: 'Why do people obey the law'? (Tyler, 1990, 2006). Some of its focus and results are of a political science nature; however, its more concrete branch pertains to procedural justice. The empirical findings of this Legitimacy of Justice-Procedural Justice (LJ-PJ) model have been integrated into the wider legal theoretical model called 'therapeutic jurisprudence' (TJ), which was created by Wexler and Winnick (1991). TJ regards the law as a social force that 'produces behaviours and consequences'; it 'urges us to be aware of' the anti-therapeutic consequences the law can have (Wexler, 2010), and it draws upon hard sciences and human and social sciences in order to prevent these unintended consequences and to promote therapeutic ones. The LJ-PJ-TJ model, as synthesised by Tyler in 2012 – thereby casting out previously listed components such as ethicality or correctability (Tyler, 1988) – comprises four components, three of which are procedural in nature. First, 'Voice', which corresponds to people's need to 'have a forum in which they can tell their story'; secondly 'Neutrality', which relates to the fact that 'People react to evidence that the authorities with whom they are dealing are neutral' (Tyler, 1988: 21). To this model, Belgian author de Mesmaecker (2013) has added 'fact finding', which relates to the thoroughness with which cases are handled and the solid proofs upon which decisions are made. Tyler's

empirical findings, which have been replicated within the context of policing, courts (for an updated overview: Tankebe and Liebling, 2013) and, recently, prisons (Beijersbergen et al., 2014), are quite straightforward: People comply much better with decisions made by authorities when they are treated along these lines, because they are actually more interested in how they have been treated than in the actual outcome of their case.

Empirical support for substantive safeguards

The empirical support for substantive safeguards is just as powerful. Its main foundation is Self-Determination Theory (SDT) as developed by Deci and Ryan (1985, 2002). According to this model, for which empirical evidence also abounds (recently, for instance, in Ng et al., 2012), three essential human needs are autonomy, competence and relatedness. The first of these needs, autonomy, is of particular importance for the Criminal Justice System (CJS), because as conceptualised and supported by SDT, it takes the shape of a motivation continuum along a dichotomy between intrinsic and extrinsic motivation. Extrinsic motivation derives from external sources and comprises various steps towards more integrated motivation. At the beginning of this continuum, full externally regulated behaviour is a behaviour that is not autonomous at all and implies that people act because of external demands, coercion or the perspective of obtaining rewards; at the other end of the extrinsic motivation side of the continuum is 'integrated regulated' motivation, which is the most autonomous form of extrinsic motivation: It does react to the outside world, but occurs when regulations, values and societal demands are fully integrated. Intrinsic motivation pertains to human beings' natural internal drive to seek out challenges and interests. Some people are naturally more extrinsically regulated and react to sanctions and rewards. The problem with fully extrinsic motivation is that people cease to act the minute coercion or rewards are lifted. It is easy to see that, in many cases, probationers are mostly externally regulated.

Deci, Ryan and others have developed an Autonomy-Supportive Treatment method, which has been successfully tested in a number of treatment contexts, including addiction. Meta-analyses have confirmed the validity of this model (Sheldon, 2003). SDT also shows that autonomous supportive treatment favours more autonomous motivation, which conversely yields long-term compliance or action. SDT has been included in the Good Life Model (Casey et al., 2012).

Indeed, SDT has not yet been tested on offenders, as Andrews and colleagues (2011: 740) were prompt to notice. It nonetheless has strong theoretical and practical ties with Motivational Interviewing (Miller and Rollnick, 2012; Sheldon, 2003), a treatment method that is conversely largely used on offenders and has been deemed promising by Andrews and Bonta themselves (2010: 290–291). For practitioners, what this theory suggests is that staff and institutions would be more efficient if they were autonomy supportive. This requires that they do not 'do things to' offenders, but 'with' offenders and respect their sense of agency, by giving them choices, whenever possible, and collaborating with them in drafting heir supervision plan. However, our argument here is that it is not sufficient to suggest that they should. The legal system itself must also recognise that offenders are the actors in their own lives.

A similar argument can be made on the basis of compliance theory. This theory, albeit essentially essayist and non-empirical, does draw attention to the distinction between substantive compliance versus superficial or instrumental compliance (see Bottoms, 2001; Robinson and McNeill, 2008). It can also claim confirmation in longitudinal desistance studies, such as the Sheffield study, which reveals quite strikingly that supervision can only do so much (Farrall, 2002) and that many offenders may only reap the benefits of probation many years after they were submitted to it (Farrall et al., 2014). RNR programme evaluation studies have likewise revealed that the issue of attrition is just as crucial (e.g. Hatcher, 2009).

Equally supportive of substantive safeguards are the behavioural components included in the aforementioned LJ-PJ-TJ framework (Tyler, 2012), that is: first and foremost, 'respect', which is supported by the fact that people are 'sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens are respected'; and secondly, 'care', because 'people focus on cues that communicate information about the intentions and character of the legal authority with whom they are dealing' (Tyler, 2012: 21).

What these research domains show is that people do not comply just because institutions, practitioners, or the community want them to; They may even actively resist (Sučić et al., 2014), or at the very least, fake compliance or superficially comply (Bottoms, 2001), which suggests that many of them are only extrinsically motivated, with predictably only short-term results.

Empirical support for both procedural and substantive safeguards

For these 'involuntary clients' to substantively comply, one therefore needs organisations and staff to represent and enact beyond reproach models, as is suggested by 'pro-social modelling' (Trotter, 2015). Pro-social modelling supports both substantive and procedural safeguards being put in place to ensure that this is actually the case and to more effectively show offenders that even authorities need to conform to the legal system's requirements.

Law as a system – essentials

The law is indeed a system in its own right. A series of precise points must now be made. The first pertains to legal terminology. As was mentioned *supra*, psychologists and criminologists tend to refer to human rights in general. They are indeed correct in claiming that, by nature, human rights have the advantage of eliminating any 'eligibility' differentiation: Human rights apply to all human beings, whether they are offenders or law-abiding citizens, on the sole basis that they are humans (Connolly and Ward, 2008). Unfortunately, human rights are generally formulated in far too general terms, and as we shall see *infra*, supervision is often excluded from its procedural protection (and particularly from the scope of the European Human Rights Convention – EHRC – see e.g. van Zyl Smit and Spencer, 2010). Moreover, many human rights rules actually consist of 'soft law', which is not truly binding: States can ignore them, and many actually do. For safeguards to truly play their part, what is thus required is a framework of 'subjective rights'; that is, rights that are actionable in courts and can be enforced (Roubier, 1963).

Unfortunately, and as desirable as they may be, ethical rules are non-enforceable in nature and are usually too vague to support subjective rights. Such is patently the case with the recently adopted Probation Institute Code of Ethics (15 September 2014). Deontology rules, that is, rules that govern the behaviour of a given profession, are conversely binding, but their position in the 'hierarchy of norms' (see *infra*) is usually too low: They can easily be contradicted by superior norms. Moreover, they are self-drafted by institutions and enforced within these institutions, and are not actionable in general courts of law.

Subjective rights are found in the objective normative framework, that is, the ensemble of legal rules that constitute a legal system. For not every legal rule is important enough to host a truly enforceable subjective right. United Nations' or European recommendations, but also many internal regulations, are not situated high enough in the hierarchy of norms. Indeed, in most legal systems, there is a 'pyramid of norms' as theorised by the virtuoso German theorist Kelsen (1934), within which legal norms are hierarchically situated. At the top of this pyramid, in most European jurisdictions, are treaties, which have been signed and approved by states (Klabbers and Lefeber, 1997), such as, for example, the European Union treaties or the Council of Europe Human Rights Convention. Below treaties are national constitutional rules, then laws, and then decrees and other executive norms. According to this widely applied theory, each set of inferior norms must comply with all superior norms. Thus, for instance, national norms must comply with superior supra-national norms and to the constitution; decrees must also be compatible with laws. Situated outside of the pyramid are non-subjective norms, such as international and European recommendations. Similarly located, to illustrate with an image, in 'the underground' below the pyramid, are internal institutional circulars, which cannot be imposed on citizens, and which citizens cannot use in courts.

Many institutions, however, and particularly the prison services, may draft internal circulars, which shamelessly infringe on the natural domain of laws or decrees, are imposed on offenders and their families, and are considered by prison authorities as being intrinsically superior to laws and international norms. Such was for instance the case with a circular (18 August 1999, NOR : JUSE 9940062C, *BOMJ* n° 76) that allowed guards to strip search babies staying with their mothers in French prisons in spite of such searches being equated to a '*perquisition'* (house search operation) by the law (PPC, art. 53) with the consequence that only highly trained and higher rank police officers should have been allowed to strip search citizens (Court of Cassation, Criminal Chamber, 22 January 1953, *Inard* Case, *Bull. Crim*., n° 24). This inversion of the pyramid of norms (Canivet, 2000) reveals that many institutions consider themselves to be situated outside the reach of the legal system and can issue their own regulations, which, in some cases, contradict newly enacted laws (e.g. in France: Péchillon and Herzog-Evans, 2000; in Ukraine: Chovgan and Didenko, 2014). It follows that a major issue has been how to control these institutions, not only in terms of prison conditions, but also in terms of their submission to the legal system. In France, some progress has been made, thanks to 'legal guerrilla' and lobbying (e.g. Slama and Ferran, 2014); such improvement has sadly left the probation services untouched, in spite of their being merged with the prison services (Herzog-Evans, 2013a, 2015 a). In practice, the prison and probation services regularly issue circulars that frequently violate superior norms, including those regarding supervision (Herzog-Evans,

2016: 001.41-001.43). It is thus of vital importance for probation institutions to be efficiently banned from issuing so-called internal regulations, which, in fact, infringe on the domain of superior legal norms, and far too often, violate their substantive content. A recent French example has followed the enactment of the Taubira Act (Law ° 2014-896, August, 15n 2014) which has created a so-called fast track release procedure; two internal circulars issued by the Ministry of Justice and the Prison and Probation services (Circular Ministry of Justice, 26 December 2014, NOR: JUSD 1431153 C; Circular Prison Services, 26 December 2014) later stated that prison released no longer required any release plan or resocialisation effort on the part of prisoners, thereby patently violating the law.

Legal translation of the legitimacy of justice's procedural justice

The first three categories of LJ-PJ principles are, in many ways, already found in legal systems and are generally included in superior norms (supra-national and national). Such is first the case for 'Voice'. This principle translates into a long series of fundamental procedural principles found in most legal systems and in articles 5 and 6 of the European HRC: the right to appear in court; the right to counsel; the right to a defence; and the right to dispute the evidence. LJ-PJ's second main principle, 'Neutrality', translates into several other fundamental procedural safeguards: the apparent and subjective impartiality of decision-makers; the prohibition of discrimination; and the independence of the authorities who make decisions from the public, from policy-makers, from governments, and from the executive bodies that supervise or imprison offenders. The third procedural LJ-PJ principle is 'Fact-Finding', which translates, in legal terms, into: the principle of the burden of proof; the presumption of innocence and the rule *in dubio pro reo*; and the rigorous and thorough preparation and study of the evidence. However, on the basis of outdated legal analysis, these principles are often considered as not applying to the execution phase of sentences, and therefore, to supervision. Modern legal theory (e.g. Danti-Juan, 2006; Herzog-Evans, 1999; Levasseur, 1983), along with the problem-solving court movement and the resulting participation of courts in the reentry and supervision process (e.g. Berman and Feinblatt, 2005), provide the support for the abolition of the cut-off point between, on the one hand, sentencing, and on the other hand, the sentence's implementation, that is, release, supervision, obligation changes, increasing the intensity of supervision, sanctions and recall, and the exact determination of the length of sentences.

Making things possible: Systemic conditions

A series of systemic conditions are required for substantive and procedural safeguards to be extended to sentence implementation.

Penal continuum theory

In order for safeguards to apply, as they normally do in sentencing, one must first embrace our 'penal continuum theory' model (Herzog-Evans, 1994, 1999, 2015b, 2016).

According to this theory, there is a penal continuum comprising the series of stages through which an offender who is identified by the CJS goes, that is: (1) arrest; (2) investigation; (3) remanding the case to the prosecutor; (4) prosecution; (5) sentencing; (6) sentence implementation; (7) criminal record registration, criminal record expunging, and disputes over criminal records.

According to the penal continuum theory, in each of these phases, the main principles applying to penal substantive and procedural law should apply. In the sixth phase of the continuum, one finds 'sentence implementation', which is a sub-field of the 'mother legal discipline' of criminal law. Continuum theory has been argued in France (Herzog-Evans, 1999) successfully and has led to two ground-breaking and bipartisan law reforms (15 June 2000 and 9 March 2004) that have thus judicialised sentence implementation with the consequence that sentence implementation decisions, as defined above, are subjected, in most cases, to a fair trial and are appealable.

Alas, according to the European human rights court (EHRCt), for the most part, a fair trial does not apply to sentence implementation (van Zyl Smit and Spencer, 2010), but for a few exceptions (Herzog-Evans, 2016a: 001.57). The EHRCt jurisprudence typically improves only when a sufficient number of member states have reached a consensus, which is not yet the case (Padfield et al., 2010). The European Probation Rules are of little support, first, because of their non-binding nature; secondly, because rather than focusing on human rights and safeguards, they oddly mostly consist in a series of professional best practice guidelines and contain nothing of substance in terms of procedural safeguards. Likewise, if the 1992 Recommendation R (92) 16 on the European Rules on Community Sentences and Measures does contain a handful of procedural protective safeguards, it, for the most part, neglects the issue of due process, and does not make clear that supervision itself should be subjected to control; and again, it is a non-binding instrument.

Decision making: Discretionary versus individual decisions

A second requirement is for sentence implementation decisions to be tailored and individualised, not automatic. The search for consistency often leads to the enactment of grids and to automaticity, because discretionary decisions may be arbitrary and uneven (Gelsthorpe and Padfield, 2003). Automatic decisions, however, do not take the complexity of situations and humans into consideration and are not necessarily fair; they tend to reduce or to eliminate due process altogether, and with it, voice, neutrality and proof (Herzog-Evans, 2015b). They are typically the appanage of the executive, and therefore, are hardly ever subjected to judicial review in the form of appeal. Moreover, automatic release often dissimulates rather disputable goals, inter alia: the desire to release all offenders earlier simply to free prison space, without much, if any, support or preparation – this being one of the reasons why many offenders refuse such measures (Tribunal de Grande Instance de Créteil, 2014); and stringent mandatory supervision measures imposed after the sentence has been served (van der Wolf and Herzog-Evans, 2015) without any consideration of the offenders' consent and enforceable through additional 'safety detention'.

Decision making: Executive versus judicial

For adequate safeguards to be put in place, a third systemic requirement is for essential sentence implementation decisions to be made by independent judicial authorities, not by the executive, because a fair trial only applies in the context of a court of law.

One often forgets that the probation staff are part of the executive. It is highly problematic, for instance, for offenders to be recalled by probation officers or for these officers to decide, on their own, to intensify supervision. The sheer inequity of such instances is well expressed by offenders themselves, as recent studies have found (Digard, 2010, 2015). There is thus a risk that offenders who question the impartiality of these decisions will not comply with them.

General criminal law theory actually provides support for the argument that decisions should not be made by those who execute them (in our case, those who supervise offenders) and should instead be made by independent courts of law. A first principle, found, for instance, in French law, is that of the 'separation of incompatible functions' as theorised by Levasseur (1959–1960) and as included in modern interpretations of European human rights law (see e.g. Guinchard and Buisson, 2014). According to this principle, the same authority must not be in charge of several phases of what was presented *supra* as the penal continuum. For instance, a prosecutor cannot both prosecute and sentence a person. It likewise ensues that the prison services should not release prisoners and that probation officers should not be allowed to recall offenders. Another legal principle is that of 'congruent forms' (or 'parallelism'), whereby only the same type of authority that pronounced a measure should be allowed to shorten it or fundamentally change its nature. Thus, since courts of law sentence, other courts of law – notably the US reentry courts or continental Europe's sentence implementation judges (Herzog-Evans, 2014b) – should make important decisions pertaining to their implementation. The author of these lines is not naïve and is well aware that judges are not intrinsically more ethical than probation staff. Good courts (Berman and Feinblatt, 2005) are required, just as good probation staff are indispensable (Paparozzi and Guy, 2015). That being said, probation staff are not independent from the executive, are not congruent decision-making bodies, and crucially, do not abide by stringent procedural safeguards.

Consequences: Procedural safeguards

On the previously developed basis, we can now lay down the procedural safeguards that could be imposed on sentence implementation.

Due process principles

A first series of principles are based on the wider cardinal rule of due process or a fair trial. This rule is so important that it is deemed a human right in itself (see articles 5 and 6 of the European Human Rights Convention). The list of principles derived from the rule of due process is extensive. Their application in sentence implementation must be explained.

A first classic consequence of due process is the right to appear in court, be it the first court of law which makes the original decision – here a reentry or sentence's implementation court – or the court of appeal, what Leventhal (1980) has called 'correctability' and

Tyler (1988) 'error correction' opportunity, although he later dropped it from his more narrow list of essential LJ-TJ components (Tyler, 2012). 'Voice', in LJ-PJ terms, simply does not exist if the main party does not appear and cannot present his own interpretation of the case. Linked to appearance is the right to counsel. Many offenders find it hard to have their voice heard in court (de Mesmaecker, 2014), as they may be intimidated or may not have the language resources to understand what is being said. Attorneys can act as their translator-interpreter (Herzog-Evans, 2016b).

A third consequence of due process is the right to an adversarial hearing (in French law, the less war-like principle of '*contradictoire*': Buisson and Guinchard, 2014), that is, the right to dispute the evidence and contribute to it. Such a hearing does not need to be very formal or time-consuming: continental Europe *juges de l'application des peines* typically hold very informal and swift hearings, whilst observing due process principles, which could make it transferable to other jurisdictions (Herzog-Evans and Padfield, 2015).

A fourth series of consequences are the principles of independence and impartiality, which are, inter alia, ensured via the principle of the prohibition of incompatible functions and by the close control of superior courts, including the EHRCt.

A fifth principle is the right to appeal decisions. It protects litigants from the abuse of judicial power, negligence or prejudice. It also ensures that laws are applied more uniformly. This would, for instance, entail that probationers can *a minima* appeal (judicial) decisions that sanction or recall them, add new obligations to their probation order or release measure, or intensify their supervision, but also deny them parole. Mirroring this right, prosecutors could be allowed to challenge decisions they deem inappropriate. Such is the case in the French legal system following the aforementioned 2000–2004 reforms (Herzog-Evans, 2016a). The right to appeal is generally complemented by the right to 'cassation', that is, the right to challenge the appellate decision before a Supreme Court in charge of stating how laws should be interpreted at the national level. Supreme Courts represent the ultimate control of legality; they regulate the application of norms in national jurisdictions, and thus, reduce disparities and increase consistency.

'Fact-finding' principles

A second series of principles is derived from the 'fact-finding'-proof rule. There is indeed a 'proof' to be established in sentence implementation. However, 'the' truth is often multifactorial, and, whereas the executive tends to have access to one set of truth – a probation officer has access to the file and to what the probationer says in his office – the judge has to arbitrate between, and in many cases balance, a variety of 'truths' and their 'sources (testimonies, experts' conclusions, preliminary hearings, investigation reports, etc.) and notably between the needs and interests of: the wider society and the community; the victims; and the offenders and their families. In criminal law, the rule of evidence is rather stringent and there is no reason why sentence implementation ought to be an exception, precisely because so many important interests are at stake. Thus, for instance, in a case the author was a witness of, the probation service referred the probationer to the sentence's implementation judge for a sanction, and accused him of having been violent in approved premises, but the attorney made a convincing argument that no evidence corroborated the victim's statement, who had no medical certificate and that the victim in question was habitually manipulative. The prosecutor herself reversed her

opinion and the case was dismissed. For this to be possible, attorneys and parties should have full access to the file and should be allowed to dispute the evidence.

Another important issue is that of the burden of proof; in layman's terms: Who should prove what, and who should lose the case if he/she failed? This author has advocated for a number of years in the various editions of her Sentences' Implementation Law treaty (latest ed. 2016) that the following rules ought to be followed:

- *Prisoners* must prove that they are ready for, and meet the conditions for, early release, but should be supported by the probation service, which should have a duty to concretely help them (Morgenstern, 2015);
- *Probationers* must prove that they deserve, or that their situation warrants that, one or several obligations be lifted or that a supervision measure be shortened;
- *Prosecutors* should prove that probationers accused of having violated their obligations (so-called 'technical' violations) are indeed guilty and that a sanction should be pronounced, because this is the consequence of the principle of the presumption of innocence, which does apply to sentence implementation, since it yields the same freedom infringement consequences (Herzog-Evans, 2013b);
- *Prosecutors* should prove that probationers accused of having committed another offence are indeed guilty and that an additional sentence should be pronounced. This situation, which in our view, is no different than the precedent, is recognised as having a penal nature and of warranting the application of the presumption of innocence principle (Herzog-Evans, 2014a);
- *Prosecutors/probation* services should prove that probationers require more intense supervision and/or that new obligations must be added to their supervision order or measure.

In the context of RNR theory-based supervision, one particularly crucial evidentiary question is that of risk assessment. Aside from being more efficient, structured risk assessment tools present the advantage, from the legal viewpoint, of limiting – but not eliminating (Desmarais et al., 2016) – biases and discrimination. For this reason, and because risk assessment is here to stay, rather than fruitlessly opposing it on principle (as in France: Dubourg and Gautron, 2015) or with very weak empirical arguments (Raoult, 2015), one should focus on ensuring that a series of safeguards are in place, as with any type of expert testimony. A first safeguard should allow probationers to require a counter-assessment that is realised by another – independent – practitioner, and if relevant or possible, with one or several other assessment tools. A second safeguard that is hardly ever seen in practice is that risk assessment should never be undertaken by the same people who supervise. Other than following the principle of neutrality and independence which we presented *supra*, this also happens to be the consequence of a classic health law principle according to which one cannot both be the treatment practitioner and the expert at a person's trial (e.g. ar. article R. 4127-105 of the French Public Health Code). There is a serious question pertaining to both the clinical experience and the technical competence (Gannon and

Ward, 2014), along with the neutrality of probation officers, and only experienced forensic psychologists, who are themselves not in charge of treatment, should conduct these evaluations. Thirdly, in order to ensure that decisions are made on rigorous, but disputable evidence, practitioners who risk assess ought to justify, in writing, the evidence that allows them to score each item in a given way, something that is included in the Offender Assessment System (OAsys); they should also justify, in writing, the reasoning that led them to conclude for each item in a given way. For instance, in the LSI-R several items pertain to the probationer's relationships with his co-workers and employer. If, in many cases, the difficulties that the probationer encounters are owing to his own temperament and cognitions, in many others still, the work conditions, particularly in a time of uncontrolled capitalism, might be objectively unbearable, or the other people at stake might truly be obnoxious so that the evidence might be disputable and should therefore be presented. Moreover, offenders should be allowed to remain silent (and consequently informed) and refuse to provide information, on the basis of the antediluvian (it originates in the 1215 English Magna Carta) criminal law right not to incriminate oneself, as laid down, inter alia, in the 5th amendment of the U.S. Constitution and article 6 of the EHRC. They should also be assisted, if they so wish, by an attorney, when these very sensitive pieces of information are conveyed to the practitioner in charge of the assessment. Lastly, all decisions based on risk assessment should be subject to appeal.

Neutrality principles

A third series of principles pertain to independence and neutrality. As mentioned *supra*, the neutrality principle translates into a series of procedural prohibitions. In sentence implementation, the neutrality principle should prohibit those in charge of supervision from breaching or sanctioning probationers. Such missions should respectively be attributed to the prosecutors and the courts. The neutrality principle should also prohibit those in charge of supervision from assessing the offenders who are in their charge. As we have seen, when both competences are in the same hands, decisions are not deemed legitimate by offenders.

At an institutional level, the fact that, in some jurisdictions, probation services are part of the prison services raises considerable independence and neutrality issues – other than negatively affecting the professional culture of probation officers (Harker and Worrall, 2011; Herzog-Evans, 2013a) and reforms that separate one from the other (e.g. in Italy : Palmisano and Ciarpi, 2016) are to be encouraged as they are conducive of an independent professional culture (Harker and Worrall, 2011).

Substantive safeguards are additionally needed for sentence implementation to be truly ethical.

Consequences: Substantive safeguards

Independent law making

Neutrality should also extend to the drafting of the rules governing institutions. An institution should not be in charge of elaborating the very rules that govern itself and its

actions. Such is, however, often the case for probation services, which not only draft internal circulars, but also, in many cases, the Bills that are subsequently submitted to Parliament (Herzog-Evans, 2016a: Chap. 1). One does not expect the police to draft the rules that govern police detention and interrogation, and public opinion would likely find this quite shocking in view of the risk this might present to civil liberties. Probation services also represent risks in terms of civil liberties. Such has been the case of the aforementioned Taubira Act mostly drafted by the prison and probation services, which has significantly limited due process in sentencing and sentences' implementation along with offender agency, which has been strongly criticised by a French human rights protection body (Commission Nationale Consultative des Droits de l'Homme, 2014). Consequently, the rules that regulate probation should be designed by external bodies or agencies.

Confidentiality

A second and particularly pressing issue is that of confidentiality. Confidentiality is necessary, according to the European Probation Rules (Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules – hereafter EPR) as a 'means of ensuring accountability' (Rule 90). It is also essential for a working or therapeutic alliance to be established and maintained between the probation officer or psychologist and the probationer–patient (Lambert and Barley, 2001; Trotter, 2015). In most jurisdictions, the medical, criminal justice and social work professions are bound by a strict principle of secrecy (Gielsen and Kilbrandon, 1988: 408ff; and for lawyers: Buyle and The Bar of Brussels, 2013). In France, it is a felony for a medical doctor or a criminal justice practitioner to reveal information obtained in the course of her/his activity, and it is punishable by three years of imprisonment (art. 226-13 of the Penal Code). In Europe, the EPR contain a number of rules that pertain to the secrecy of professional data and files (Rules 88 and 89). They also explain that confidentiality should not preclude probation officers from communicating information to the judiciary and other competent authorities (Rule 91) and state that offenders should have access to their records (Rule 92). A complex balance must thus be struck between confidentiality and collaborative work (Boudjemaï, 2015). At the very least, and according to Trotter (2015), 'role clarification', an essential CCP, requires that probation or paraprobation (e.g. reentry judges, third sector practitioners, psychologists in charge of offender treatment…) practitioners clarify as early as intake, and as frequently as required, what shall be strictly confidential (for instance, probationers' childhood abuse depictions and the descriptions of their symptoms) and what may be disclosed to other practitioners (for instance, whether the offender is engaged in supervision-treatment, whether he is making progress…). However, for such clarity to be possible, the laws must themselves be clear and detailed. When they are not sufficiently clear and detailed, practitioners either tend to share too much information, at the expense of their clients' interest and engagement in supervision, or conversely, tend to be over-protective of their clients, at the expense of interagency collaboration. Such laws should be drafted in light of the dual (care and control) role that social workers (Van Drenth and De Haan, 2000), probation officers (Svensson, 2003), or forensic psychologists (Ward, 2013) have to play.

For this to happen, a consensus could be reached, possibly in the form of a consensus conference, which would include both psycho-criminology, offender supervision and law practitioners and academics.

Self-determination

Substantive laws should thirdly protect offenders' agency and autonomy. For indeed, offenders' agency has been identified by a vast array of empirical studies and theoretical models as being essential to compliance and engagement. Desistance theory has shown that it is essential for offenders to reclaim the control of their destiny for them to disengage from crime (e.g. King, 2013). Compliance theory has emerged in light of the depressing fact that, in spite of the CJS' demands, many offenders actively resist supervision (Sučić et al., 2014), and at the very least, do not fully comply with it or find many ways of 'staging' superficial or instrumental compliance (Bottoms, 2001; Robinson and McNeill, 2008; also see in medicine: Meichenbaum and Turk, 1987). Additionally, collaborative work with offenders is now included in the RNR model (Bourgon and Guitterez, 2013). Furthermore, Self-Determination Theory (Deci and Ryan, 1985, 2002) has empirically demonstrated the utmost importance of intrinsic autonomy and has developed an autonomy supportive treatment model, where, in particular, practitioners are, whenever possible, required to give offenders choice and to 'provide a clear rationale' for treatment. Legal theory also supports autonomy supportive supervision, particularly in light of the model of contractual autonomy of will (Herzog-Evans, 2015c). Self-determination is additionally considered as being a core human right principle (Hurphy, 2013). As much as possible, substantive laws should thus create a framework within which practitioners and institutions should respect offenders' need for agency and autonomy, whilst ensuring public protection and avoiding paternalism. A contractual model of autonomy, particularly with its insistence on professional/layman's 'super-information' does offer a basis for managing this delicate balance (Herzog-Evans, 2015c).

Amongst the many potential consequences of the application of this substantive law framework to sentence implementation are, inter alia, the following:

- Any decision to impose treatment on a probationer would be subjected to his/her *informed (independently and objectively) consent*, and the person should have the right to counsel when receiving the information and making this decision;
- This quasi-contract should also mention practitioners' and institutions' obligations, because contract theory implies that, in most cases, both parties have obligations (Herzog-Evans, 2015c). Practitioners and institutions would, in particular, provide: support, social work, availability, information and evidence-based treatment approaches as we know them today;
- Any decision to subject a person to treatment would be explained to the person and should be debatable (e.g. in court). Practitioners would explain why they think a given type of treatment is indicated in the person's case (e.g. group work,

rather than one-to-one supervision; cognitive-behavioural therapy, rather than administrative supervision and control, and so on);

- Whenever possible, there would be an option between different types of treatment or approaches; for instance, offenders should be given a choice between group work and one-to-one supervision and, *a minima*, should be allowed to refuse the former;
- Offenders would, whenever possible, have the right to choose their treatment provider, as it is irrational to imagine that a therapeutic alliance can be established on a purely mandatory and no-choice basis. Thus, when relevant, they should be given a choice between third sector or public sector supervision or between probation officer A or B. This might be particularly indicated in terms of gender or ethno-cultural responsivity (see Lewis et al., 2006).

Principle of legality

Another, and fourth, sensitive area is that of breach. If the definition of what constitutes a new offence is, in the vast majority of cases, determined by criminal law, the definition of what specifically constitutes a so-called 'technical violation' is not always so clearly defined. In criminal law, a fundamental, or 'cardinal' (Pradel, 2012), principle, is that of 'legality'. According to this principle, the sanctions that infringe on people's rights and liberties, and the violations or behaviours that expose them to such sanctions must be laid down in the marble of detailed and clear legal norms, so as not to leave any room for excessive interpretation. It further requires that these rules should pre-exist any litigious behaviour. It moreover implies that practitioners are prohibited from reasoning by analogy when analysing these illegal behaviours. These rules are inherently linked to democracy, and they are often violated in dictatorships (Grande, 2004). For this reason, they should apply to probation breach and sanctions. A comprehensive list of illegal behaviours should thus be drafted and only such behaviours would be punishable. It this task appears unsurmountable, the reader may remember that it has been achieved in criminal law. Conversely, referring to the mere 'bad behaviour' of the offender as is currently still the case under French law (PPC, art. 733) violates the principle of legality.

Reciprocity

Lastly, according to equity theory, it is unreasonable to expect humans to make promises and comply with them when there is no form of reciprocity (Walster et al., 1978). In probation, a complex issue is whether probation services, and more generally, the CJS have a duty to support offenders' reinsertion and treatment. Germany has long gone that far (Morgenstern, 2015), but regrettably (Burke and Collett, 2016), most jurisdictions expect offenders to make efforts, whilst not providing for a mirror obligation to support them. The obligation to actively support offenders, which is dying out in times of offenders' deservedness and so-called 'punitive governance' (McNeill, 2009), is moreover grounded in correction agencies' duty of care. Any adverse mental or physical consequence that probationers might encounter – in the form of higher mortality rates than the

general population (Gelsthorpe et al., 2012) or poor physical and mental health (Vaughn, DeLisi, Beaver, Perron, and Abdon, 2012) – may be considered as being a violation of articles 2 (right to life) or 3 (inhuman treatment) of the EHRC. Whilst so far, they have been essentially imposed on prison services (Belda, 2007), there is no reason to spare probation services from similar duties. A human rights and quasi-contractual basis for offender engagement to which the probation services or the CJS would be a party might offer the legal framework for reciprocal engagements (Herzog-Evans, 2015c).

Legal systems must also facilitate desistance by taking an employment and education supportive approach to criminal records' registration, expunging, and dissemination (Jacobs and Larrauri, 2012). In this respect, Southern continental European jurisdictions fare much better (Sands, 2016; Stacey, 2014).

Conclusion

In this article, we have presented the legal system as being an 'Extrinsic Responsivity factor', that is the responsivity of the institutions, and the practitioners in charge of implementing the programme, and the framework provided by the legal system. The legal system can indeed either hinder or facilitate the programmes' implementation and success. Although theorists and empiricists usually claim that 'of course' practitioners should behave ethically, they usually fail to include laws within the very structure of their theories and to detail what this ethical behaviour might entail. Unfortunately, humanistic criminologists have thus far solely focused on general and loose human rights that do little to constrain and control probation institutions and staff.

This is, however, essential, as the number of people on probation has increased in western world jurisdictions. Moreover, the advent of both managerialism and evidence-based practices in probation services present the risk of generating a 'we know better' type of supervision and a renewed form of controlling paternalism.

This article has shown that the manner in which staff and institutions behave and operate is, to a great extent, influenced and shaped by the legal system. Empirical research shows that they must establish a working alliance with the offenders they supervise for their efforts to be effective. Such a working alliance cannot happen if the probation staff fail to be truly ethical and if they operate in nocebo institutions.

Law is a system that states how humans and institutions should and should not behave. It can only support programmes, treatment and supervision if these people and institutions are submitted to the same rule of law as the rest of the population and institutions. This can, in turn, only happen if one understands that the so-called cut-off division between sentencing and probation-release-sanction and recall is an outdated legal artefact which previously long prevented democracy and human rights from affecting prisons and currently still closes the door on its application in sentence implementation. Our view is that there is a penal continuum ranging from arrest to the end of the execution of a sentence, which requires the same level of substantive and procedural protection: a penal continuum that focuses on the very same humans, whose criminogenic and psychological needs and expectations are identical, and whose very same liberties are thus infringed, and that should have the very same goals from beginning to end, that is, to prevent reoffending and to rehabilitate offenders. The consequences of the penal

continuum theory are both substantive and procedural. They consist in placing offender supervision under the framework of a 'democratic society' (EHRC, art. 6) and exercising sufficient control over institutions and staff, which is more likely to engage offenders in long-term rehabilitation. Empirical studies have sufficiently established that What Works is precisely What's Just.

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