

# scottish justice matters

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## **SPECIAL ISSUE ON DESISTANCE**

Edited by  
Fergus McNeill

### **ALSO**

Mike Nellis on  
Electronic Monitoring

Andrew Coyle on  
early prison reform in Scotland

Bernadette Monaghan on  
Children's Hearings

Interview with  
HMIP David Strang



# **DESISTANCE**

**MOVING ON: DESISTANCE AND REHABILITATION**

Scottish Justice Matters is a publication of the Scottish Consortium of Crime and Criminal Justice (SCCCJ). The Consortium is an alliance of organisations and individuals committed to better criminal justice policies. It works to stimulate well informed debate and to promote discussion and analysis of new ideas: it seeks a rational, humane, constructive and rights-based approach to questions of justice and crime in Scotland.

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# PAS DE PROBLÈME

## THE OLDEST PROBLEM-SOLVING COURT IS FRENCH AND DESISTANCE ORIENTED

Martine Herzog-Evans

**AMERICAN** problem-solving courts (PSCs), first created in 1989 have been successfully exported to other jurisdictions, including the European continent (and see Tata, 2013). However France has so far not displayed any interest in PSCs, possibly because it invented them in 1945. At that time, law-reformers who worked in the Ministry of Justice had personally experienced incarceration as résistants or deportees and this turned them into particularly imaginative reformers. Juge de l'application des peines (sentences' implementation judge, hereafter JAP), along with probation services, went nationwide in 1958. Today they can release inmates, grant them furlough and remission, transform custody sentences of up to two years into various community sentences and measures, deal with breach, define and modify community sentences or measures' obligations, and expunge criminal records for released offenders if they need it to find employment. They liaise with probation services which send them reports pertaining to the circumstances and personality of probationers. JAPs are recruited, like all French judges via an extremely selective national exam which is accessible for law students who have a Masters in law.

JAP share some of the important characteristics of PSC such as holding fair, yet private, trials, being therapeutic, respectful and humane and problem solving. For decades, JAP had been called 'super social workers'. Yet during Nicolas Sarkozy's term as Minister of Interior, then President, numerous punitive law reforms transformed

sentences' implementation and supervision. My recent research sought to find out if this had transformed JAP's traditional approach, to see whether they still had a desistance compass. The research findings were reassuring: JAP are overall 'good' judges and even though they have not been specifically trained they have a fairly good understanding of what it takes to desist.

### JAP as 'good courts'

One of the main questions investigated was whether JAP were 'good courts' in the 'therapeutic jurisprudence' sense, that is humane caring judges preoccupied with the end result of their decisions (Berman and Feinblatt, 2005), and also if 'Japperie' attracted people who were naturally good or whether they became so because, they had become JAP. I found it was a bit of both.

In order to assess what their motivation had been when they chose to become JAP and to thus uncover their personality, my team and I asked JAP inter alia why they had wanted to become JAP. They gave me five major reasons, and here, it is important to note that this was an open question.

Most (55%) answered that they wanted to have a 'close relationship' or close contacts with 'justiciables', that is the neutral term which, in French describes anybody who is in contact with the judicial system (divorce applicant, tort dispute parties, offenders, victims). 48% mentioned 'the need to do something useful, to help people resocialise and stop offending', to individualise the sentence, or variations in the same vein. Thirdly, 24.3% mentioned the desire to work in partnership for reintegration of offenders. A smaller number mentioned the desire to supervise 'justiciables'



A JAPs office, where the work with offenders takes place

in the long run, and to create new programmes. 9.3% of them spontaneously referred to the desire to 'give meaning to the sentence' ('donner du sens à la peine'), that is to their being efficient in terms of reintegration and desistance and making sense in the person's life. Importantly, this expression was also present in 69.4% of their rulings. Virtually all the JAP referred to it in the course of their interviews. Only a minority of JAP had become JAP because they were interested in the legal field itself (21.3%) or were curious about what followed sentencing (17.3%). In other words, JAP are first and foremost interested in the end result of sentences' implementation and in offenders.

It was difficult to find 'punitive' JAP, that is non-therapeutic judges who would not follow the lenient recall policy of their colleagues, would not be interested in the human dimension of this job, would speak harshly to offenders or would have a distant, mistrusting attitude towards them.

The research also showed that JAP are transformed by their role. Our observations showed that, whatever their professional history, judges took on therapeutic 'Japperie' culture and practice, sometimes quite quickly. Being close to offenders, seeing and talking to them, had made a vast difference.

Looking into the reasons why the transformation happened, beyond classic acculturation routes such as repeated contacts with colleagues and other agencies' personnel, the influence of clerks who assisted previous JAP, the influence of their internship master and other professional channels, I discovered that the National School for Judges of Bordeaux had been putting emphasis for the last five years on what it called 'savoir faire and savoir être', that is knowing how to do and knowing how/who to be with 'justiciables'.

Taken together, all these factors have created judicial practices that look very much like desistance.

## JAP as Monsieur Jourdain of desistance

In Molière's famous play 'Le Bourgeois Gentilhomme', Monsieur Jourdain discovers that he has unknowingly been speaking prose all along

Like Monsieur Jourdain, JAP do desistance or rather know about desistance without having formerly or formally studied it. During the first year of the research, most JAP had never heard of desistance. However, during the second year the special issue on desistance of the penal law journal 'Actualité Juridique Pénal' of September 2010 had clearly made an impact. As I had predicted, France would be naturally ready to embrace desistance, more so than 'what works' programmes, because its legal system was already grounded in the principle of reintegration. The concept of desistance which was unknown as such in France before 2010 is now embraced by politicians and mainstream national newspapers (Le Point.fr 23.12.12)

When asked about factors supporting desistance, JAP were in fact able to list most of them, leaving out, similar to French probation officers, leaving criminal peers and learning to live on a smaller budget (Herzog-Evans, 2011). Several of them referred to the idea of self-narrative (Maruna, 2001) without knowing it. For instance, JAP 23 said: 'with those who are very dissociated I do perceive in their discourse something that changes in the way they talk about what they have done and who they are, how they explain where they were compared to where they are now'. Most of them knew about the difference between early and later stages

of desistance and most believed that they could contribute, with all their partners, to sustaining or helping with the desistance process.

Asked whether they would be interested in creating desistance rituals as advocated by Maruna and as experienced in PSC, all agreed it would be ideal although they faced extreme overload. Several of them aptly observed that the judicial forms they had to follow during their hearings were rituals and that these rituals were probably desistance supportive. Most of them did behave respectfully, listened to 'justiciables', praised them even for small achievements, encouraged them and had a problem-solving approach.

A fascinating trait was that they got very frustrated with superficial instrumental compliance. Their goal was substantive compliance and the first substantial desistance steps people make. Conversely not a single one of the JAP, be it in their rulings, in their hearings or during their interviews ever mentioned the need to punish offenders.

To external observers it looks as if the French judicial system has integrated problem-solving to a degree not attained elsewhere. However, JAP face enormous challenges. They are constantly threatened with abolition by the Executive and law reformers who blame them for being too lenient with serious offenders whilst not releasing enough offenders jailed as a result of a decade of punitive laws. They also face managerialism associated with extreme criminal justice budget restrictions. Lastly, their relationships with probation services have become increasingly complicated since these services became part of the prison services in 1999. One of the essential components of PSC, that is partnership, is clearly missing, which reduces JAP's ability to have a significant impact on desistance through offender support and effective problem-solving.

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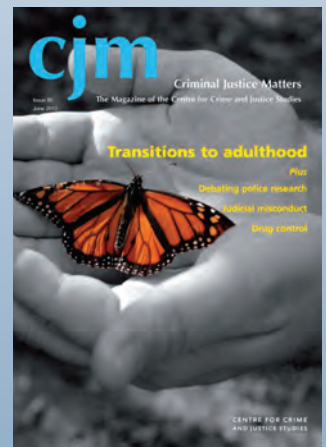
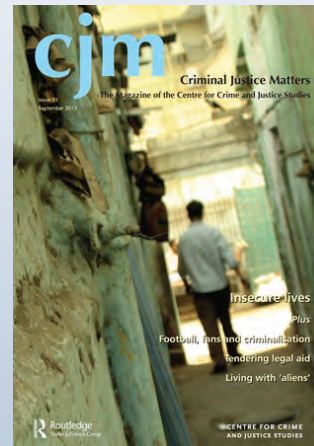
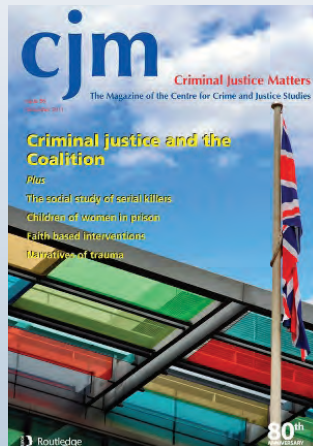
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 Professor Tim Newburn, London School of Economics.



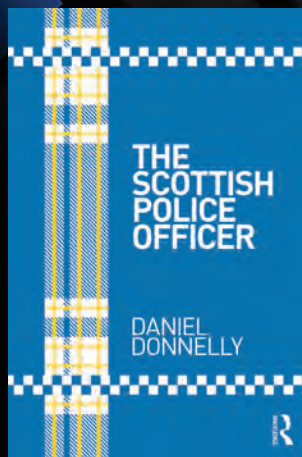
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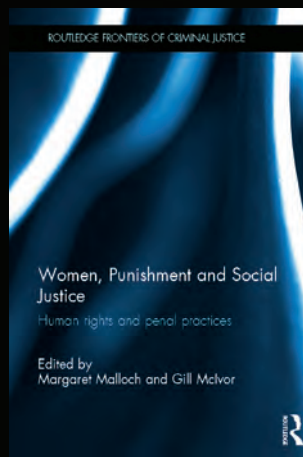
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