

Prison Leavers: Inefficiencies in the Fight Against Recidivism

François Koch

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“The ‘full release’ rate remains stuck at 80 percent, despite detainees leaving prison at the end of their sentence being twice as likely to go back as those who leave on conditional release [parole].”

This statement has been repeated again and again for years by politicians and *juges de l'application des peines* (enforcement judges, responsible for monitoring condemned persons and their sentences), accompanied—explicitly or not—by: “What are we waiting for? ...”

This claim that gets repeated on a loop has inspired us to ask the following questions.

1. Where does this famous “full release” rate come from? Are the statistical tools used to collect prison data reliable?
2. Which scientific studies indicate that inmates who are released from prison with a commutation of their sentence have a much lower risk of being sentenced again to a custodial sentence? Are these studies rigorous and their conclusions indisputable?
3. Why in France do we have so little recourse to commutation, be it conditional release, work release, semi-custodial release, or electronic tagging? Where do the bottlenecks come from? From prosecutors? From politicians? Does ideology rule over pragmatism?

In the first section, we will seek reliable data on the “full release” rate—a misleading term that simply indicates the proportion of detainees who leave prison without any form of commutation (conditional release, work release,

semi-custodial release, or electronic tagging). We will thus delve into the hidden depths of prison statistics.

Once we have analyzed the rate of overcrowding in prisons, we will outline the four types of commutation, highlighting the evolution of the number of commutations granted. The “full release” rate ought to be easily calculable by dividing the number of prisoners released from prison without a commuted sentence by the total number of detainees released. This appears simple. But is it really so? Are the French Prison Administration’s statistical tools effective enough?

We will then look at studies on the rate of recidivism in released prisoners. These are intensive inquiries into large sets of figures, with apparently remarkable results. But have the conclusions to these studies been correctly understood? Has selection bias been taken into account? Has it been compensated for? If the prisoner on conditional release has twice as much “chance” as the prisoner who has served a full sentence of not returning to prison, could this not be because he or she was chosen by an enforcement judge on grounds of a favorable profile in terms of rehabilitation? Which leads to the question: Do studies really show that commutations cause a significant decline in the rate of recidivism?

In the second section, we will explore whether these studies influence public policy. The battle against recidivism is highlighted by policymakers who claim to favor an increase in the number of sentence commutations. But is that true? Have they sought to effectively convince the criminal courts and enforcement judges by accompanying their criminal policy with a sufficient increase in human resources?

Where are the bottlenecks? Do they stem from a lack of pragmatism? Or from the terrorism of ideologies based on security concerns, or a sense of righteousness? Does the cause not lie in the perception French society has of its prisons? Are we not guilty of a disinterest in and failure to understand our correctional institutions, typically viewing them as “five-star hotels” or “infamous penal colonies”? Do we think about the fact that, sooner or later, prisoners are going to be freed? Do we wonder if their time in prison will have helped them say goodbye to a life of crime? Does this apparent mass blindness explain the public policies that are frequently meek and of poor-quality? And where does this lack of consensus about the security of fellow citizens—and hence lack of a true desire for bold reforms to obtain a reduction in recidivism—come from?

STATISTICS AND STUDIES: “IN SEARCH OF FULL RELEASE AND RECIDIVISM FIGURES”

Before we begin our search for “full release” figures, let us look at a snapshot of the situation of penal establishments. The table on the following page, which uses figures provided by the French Prison Administration, shows the evolution of the number of detainees—all those housed who are charged or accused—and the prison population density (or manifest rate of overcrowding) calculated using the number of prisoners and the number of operational spaces.

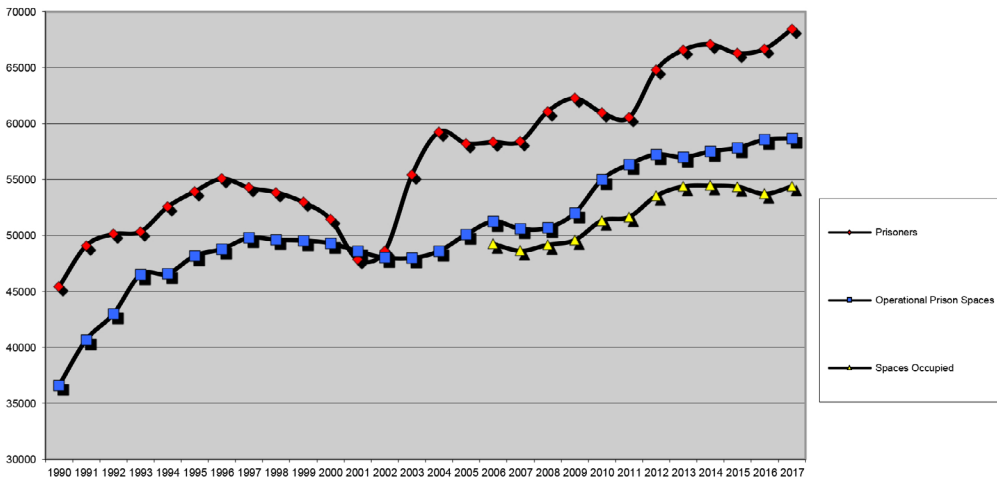
Numbers of prisoners and prison spaces occupied. Rate of overcrowding.

	Prisoners	Operational prison spaces	Prison population density	Unoccupied spaces	Occupied spaces	Actual overcrowding
Jan-90	45420	36615	124.0	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-91	49083	40675	120.7	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-92	50115	42981	116.6	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-93	50342	46494	108.3	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-94	52551	46579	112.8	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-95	53935	48187	111.9	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-96	55062	48791	112.9	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-97	54269	49791	109.0	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-98	53845	49619	108.5	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-99	52961	49549	106.9	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-00	51441	49294	104.4	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-01	47837	48593	98.4	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-02	48594	48021	101.2	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-03	55407	47987	115.5	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-04	59246	48605	121.9	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-05	58231	50094	116.2	<i>Not available</i>	<i>Not available</i>	<i>Not available</i>
Jan-06	58344	51252	113.8	1994	49258	118.4
Jan-07	58402	50588	115.4	1966	48622	120.1
Jan-08	61076	50693	120.5	1535	49158	124.2
Jan-09	62252	51997	119.7	2414	49583	125.6
Jan-10	60978	54988	110.9	3663	51325	118.8
Jan-11	60544	56358	107.4	4713	51645	117.2
Jan-12	64787	57236	113.2	3700	53536	121.0
Jan-13	66572	56992	116.8	2614	54378	122.4
Jan-14	67075	57516	116.6	3060	54456	123.2
Jan-15	66270	57841	114.6	3483	54358	121.9
Jan-16	66678	58561	113.9	4847	53714	124.1
Jan-17	68432	58681	116.6	4304	54377	125.8

Source: French Prison Administration and figures calculated by Pierre V. Tournier.

The evolution of the number of prisoners reveals that the biggest decrease in the prison population took place between the years 1997 and 2002, when Lionel Jospin was prime minister, and the fastest increase was at the start of the second mandate of President Jacques Chirac (2002-2007). And contrary to what is

Prisoners, Operational Prison Spaces, And Spaces Occupied from 1990 to 2017



Source: French Prison Administration and figures calculated by Pierre V. Tournier.

generally believed, Christiane Taubira's time as minister of justice did not lead to a reduction in the number of prisoners, since we note an increase for this period.

Analysis of prison population density statistics over more than a quarter of a century leads to the following surprising conclusion: the situation today is on the whole equivalent to that of prisons at the beginning of the 1990s. Even in January 2017, prison population density is 116.6, over seven points below the level of January 1990.

But we cannot leave it there, since this official statistic is questionable. As Pierre Victor Tournier—researcher at the French National Center for Scientific Research (CNRS)—says repeatedly in vain¹, the Prison Administration takes into account the number of places that are operational: a theoretical figure that does not reflect the number of spaces actually occupied. Of the 187 prison establishments, some have populations below 100, and so to appreciate the reality of prison overcrowding, we must deduct the number of unoccupied spaces²—which is considerable since these amount to more than 4,000³—from the number of operational spaces. This gives us the true rate of overcrowding, which is well above the population density as reported by the Prison Administration.

It is then interesting in terms of our investigation to analyze how levels of severity of sentence are divided among the prison population. The proportion sentenced for a crime is 13.2% (ten years or more imprisonment). And among

1 Former Research Director at CNRS, Pierre V. Tournier retired on July 17, 2015.

2 Especially in high security prisons (long prison sentences).

3 Pierre V. Tournier calculates the number of unoccupied spaces for each “under-occupied” establishment before reaching a total. He began carrying out this task in 2006.

those serving a correctional sentence (less than ten years), 19.8% are serving a sentence of less than six months, 22.1% six months to a year, 33.4% one to three years, 13.5% three to five years, and 11.3% five years or more.⁴

DEFINITION OF THE FOUR TYPES OF COMMUTATION

Semi-Custodial Release

Semi-custodial release is reserved for those sentenced to less than or equal to two years' imprisonment (or one year for recidivists), or to those who have less than two years left to serve of a sentence (one year for recidivists). Applicants must submit a plan for rehabilitation. The decision rests with the enforcement judge.

This detention system allows the prisoner "to engage in professional activity, pursue an educational course or professional training, have a temporary job, look for work, take part in essential aspects of family life, receive medical treatment, or get involved with any other type of rehabilitation plan."⁵ The prisoner is detained in a semi-custodial center or the semi-custodial quarters of a penitentiary center.

The detainee must respect certain hours concerning their return to custody, as well as compensation of victims and potential prohibition of access to certain places. With the agreement of the enforcement judge, the hours may be adapted to suit evening work (for restaurant or bar work, for example), or those needing to be away for several days.

Monitoring is carried out by the Prison Integration and Probation Service (SPIP), which ensures all obligations are met and provides assistance with social rehabilitation. The enforcement judge can authorize temporary absences (either in the prisoner's own home or elsewhere) for week nights, weekends, or on public holidays.

Work Release

This is another type of sentence commutation intended for the same type of detainee as those who benefit from semi-custodial release. The decision is the responsibility of the enforcement judge.

Work release is the result of a partnership between the Prison Administration and an establishment in which the detainee is entrusted to carry out an activity. It may be, for example, a farm, or a cultural heritage site.

The detainee may be housed by the partner association, potentially at the site where the work is carried out, or may have to return to the prison at night and on non-working days.

⁴ Quarterly statistics of population held in secure detention, figures as of January 1, 2015 (French Prison Administration: DAP).

⁵ Ministry of Justice website.

Electronic Tagging

Introduced in 2000, electronic tagging is an option available for the same type of prisoner as in the first two types of sentence commutation above. Those placed under electronic surveillance must commit to fixed periods set by the enforcement judge during which they must remain at home. Outside of these periods, prisoners may work (most often), or take an educational course or training, receive medical treatment, or look for a job.

When the home is that of a third party (parents, a friend, the center warden, and so on), this person must agree in writing to the installation of the surveillance system.

To ensure that the terms of the release are adhered to, the prisoner wears an electronic bracelet on their ankle. If triggered, an alarm goes off in a room at the penitentiary center. A detention officer then contacts the person concerned to find out the reason for the unauthorized exit, requesting the transmission of supporting documents to the *Conseiller pénitentiaire d'insertion et de probation* (Prison Integration and Probation Advisor, CPIP). If the reason is not deemed to be legitimate, the enforcement judge decides on a sanction, which could be anything from cancellation of the remission of sentence to an outright return to prison.

Conditional Release

This sentence commutation is available to prisoners who have served at least half of their sentence (two thirds for recidivists); but also to those who still have four years of imprisonment left to serve and who have parental responsibility for a child under ten.

In order to be granted such a release by an enforcement judge, the prisoner must have demonstrated “serious effort toward social rehabilitation” and presented supporting evidence of a plan: an occupation, training, family responsibilities, medical treatment, compensation to victims, or any other plan for rehabilitation.

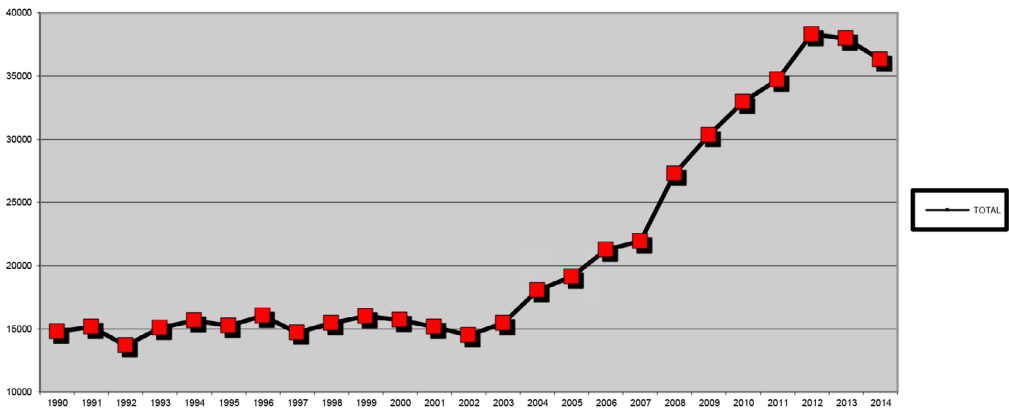
The duration of the conditional release cannot be less than the remaining sentence to be served, and can be no more than a year longer.

This commutation is carried out under the supervision of an enforcement judge and the surveillance of a CPIP. In the event of non-compliance with the fixed obligations, the enforcement judge or a sentence enforcement court may revoke the conditional release.

QUANTITATIVE EVOLUTION OF THE FOUR TYPES OF COMMUTATION

In May 2014, the Prison Administration published a data series on persons in custody from 1980-2014, which has not been updated since, containing figures on the “distribution of commutations granted.” In the table above, it is easy to

Evolution of Commutations: 1990-2014

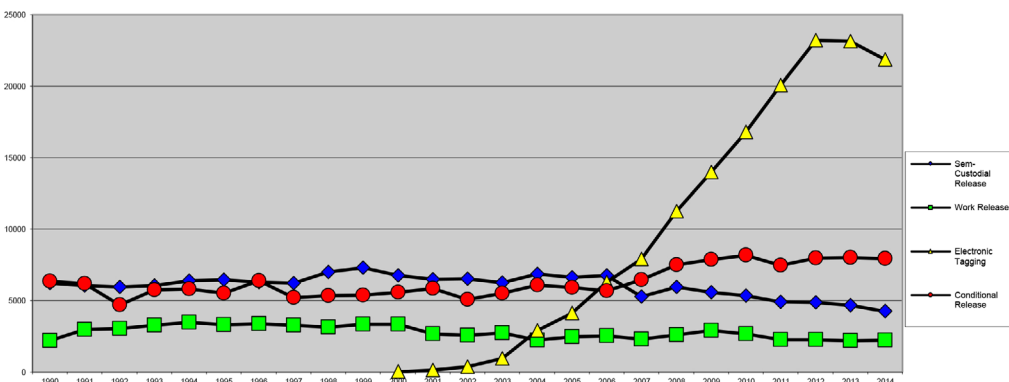


Source: Statistical data on persons placed in custody 1980-2014 (DAP) and key Prison Administration figures from January 1, 2015 for 2014.

see that the high growth from 2003 to 2012 is mainly due to a large increase in the use of electronic tagging, which was a new form of commutation brought in on October 10, 2000.

These figures lead to another finding: contrary to a widely held view in legal circles, electronic tagging has not led to a decrease in conditional releases. The only visible effect has been a decrease in the number of semi-custodial releases granted since 2007. Overall, the increase in the power of electronic tagging has produced a rise in commutations without having a significant effect on the balance between the three pre-existing forms: semi-custodial release, work release, and conditional release.

Evolution of the Four Types of Commutation: 1990-2014



Source: Statistical data on persons placed in custody 1980-2014 (DAP) and key Prison Administration figures from January 1, 2015 for the year 2014. Formatted by us.

	Semi-custodial release	Work release	Electronic tagging	Conditional release	TOTAL
1990	6229	2193		6361	14783
1991	6037	2955		6178	15170
1992	5947	3042		4679	13668
1993	6045	3273		5745	15063
1994	6370	3477		5813	15660
1995	6437	3299		5492	15228
1996	6267	3371		6374	16012
1997	6228	3268		5204	14700
1998	6983	3137		5322	15442
1999	7300	3328		5370	15998
2000	6757	3339	13	5567	15676
2001	6481	2682	130	5847	15140
2002	6527	2550	359	5056	14492
2003	6261	2733	948	5509	15451
2004	6842	2230	2915	6067	18054
2005	6619	2478	4128	5916	19141
2006	6751	2528	6288	5679	21246
2007	5283	2289	7900	6436	21908
2008	5928	2608	11259	7494	27289
2009	5578	2890	13994	7871	30333
2010	5331	2651	16797	8167	32946
2011	4889	2258	20082	7481	34710
2012	4866	2258	23215	7980	38319
2013	4651	2176	23147	7999	37973
2014	4238	2235	21873	7949	36295

Source: Statistical data on persons placed in custody 1980-2014 (DAP) and key Prison Administration figures from January 1, 2015 for 2014.

RELEASE UNDER CONSTRAINT

Release under constraint was introduced as part of the “Taubira Act” of August 15, 2014 (a significant reform of the French Penal Code). It involves an automatic review of the situation of each prisoner sentenced to a maximum of five years in prison who has served two thirds of their sentence.

Provided the detained prisoner agrees to certain rehabilitation terms, the enforcement judge grants release under constraint in the form of one of the four types of commutation: Semi-custodial release, work release, electronic tagging, or conditional release. The person concerned must agree to the terms. Between January 2015 and September 2016, releases under constraint in accordance with commutations were distributed in the following way: electronic tagging 43%, semi-custodial release 29%, conditional release 24%, and work release 3.5%⁶.

The number of releases under constraint per year is 3,396 (October 2015-September 2016)⁷, that is to say less than 10% of all commutations.

WHERE CAN WE FIND THE “FULL RELEASE RATE”?

This could be simple, since we ought to know the number of prisoners who leave prison each year, and be able to distinguish between those who have served their full sentence and those who leave under one of the four forms of commutation.

In May 2014, before the French National Assembly, Minister of Justice Christiane Taubira referred to a “full release rate of 80% on average.” On the official site of the Ministry of Justice we find the figure of 81% in an article on the act of August 15, 2014. This figure appeared in October 2016 in the report on sentences by the then Minister of Justice Jean-Jacques Urvoas⁸ with the important clarification that these are data from 2011! This information came from the report by Socialist Party deputy Dominique Raimbourg, completed May 28, 2014, on behalf of the Law Commission on the Taubira bill on penal constraint⁹. The member of parliament had got this data from the impact statement accompanying the bill. These are, then, the same figures from 2011 which regularly get taken up officially: a full release rate of 81%. By detailing the length of the sentence given, the figure increases to 98% for imprisonment of less than six months, and 84% for custodial sentences of six months to a year. But it drops to 64% for sentences of one to three years. And by consulting an impact study of October 7, 2013 for the bill on the prevention of recidivism and the individualization of sentencing (*Etude d’impact du*

6 Jean-Jacques Urvoas, Minister of Justice, *Rapport sur la mise en œuvre de la loi du 15 août 2014 relative à l’individualisation des peines et renforçant l’efficacité des sanctions pénales* [Report on the implementation of the act of August 15, 2014 pertaining to the individualization of sentences and reinforcing the effectiveness of criminal sanctions], October 21, 2016.

7 Jean-Jacques Urvoas, *Report on the act of August 15, 2014*, October 21, 2016.

8 Jean-Jacques Urvoas, Minister of Justice, *Rapport sur la mise en œuvre de la loi du 15 août 2014 relative à l’individualisation des peines et renforçant l’efficacité des sanctions pénales* [Report into the implementation of the act of August 15, 2014 pertaining to the individualization of sentences and reinforcing the effectiveness of criminal sanctions], October 21, 2016.

9 The “Taubira Act” of 2014 also introduced the *contrainte pénale* (penal constraint), which is a type of probationary sentence meant to replace incarceration; the subject must abide by a certain number of restrictions and is under continuous supervision, but is not in prison.

Projet de Loi relatif à la prévention de la récidive et à l'individualisation des peines), we discover that the full release rate fell to 78% in 2012.

“Full Releases” in 2011

Sentence duration	Less than 6 months	6 months -1 year	1-3 years	3-5 years	5-10 years	10-20 years	20+ years	TOTAL
Number of prisoner releases	28341	19959	16844	3860	2173	970	389	72536
Portion without sentence commutation.	98%	84%	64%	49%	41%	43%	40%	81%

Source: National record of detainees, DAP/PMJ5, 2011 data.

We can see that this does not exactly equate to the full release rate. Because to this 81% of prisoners released in 2011 without having had a commutation during the execution of their sentence, we must add those who benefited from a commutation and who returned to prison to leave again at the end of the sentence. However, the results would not, in all likelihood, be significantly different.

Is it possible to see figures for other years than 2011? Annie Kensey, head of the statistics and studies office at the French Prison Administration (ME5), and her assistant, Florence de Bruyn, do not hide their embarrassment on mention of the famous “full release” figures, although it is they who produce the official prison statistics. In March, we requested to see the evolution of this key indicator since 1990. At the end of April we received the following response: “There are indicators of the incidence of “full release” available which help with the management of services, but which are not currently strong enough to be more widely disseminated.”¹⁰

We insisted, and Florence De Bruyn gave us the “P.2.2” indicator provided by ME5. The “percentage of sentenced persons benefiting from a commutation or release under constraint” was as follows: 26% in 2014 and 21.7% in 2016 (equating to a full release rate of 74% and 78.3% respectively). Florence De Bruyn clarified: “The P.2.2 indicator may have reduced, but a proportion of this reduction may also be linked to a gain in precision thanks to a change in software”

The Inspectorate General of Judicial Services’ report of July 2016 on the development of commutations includes different figures on the “proportion of prisoners carrying out their sentence without any commutation, either in the form of ‘end of sentence electronic tagging’¹¹ or release under constraint, in relation to the total number of prisoners”: 83.6% in 2010, 76.8% in 2014, and 77.7% in 2016. Even

¹⁰ Email from Florence De Bruyn received April 27, 2017.

¹¹ *Surveillance électronique de fin de peine* (SEFIP). Replaced in 2014 by ‘release under constraint’ involving a period of monitoring with an electronic tag.

though these figures are not vastly different from those provided by the Prison Administration (DAP), the discrepancies observed are indicative of a failing statistical system.

THE CATASTROPHIC STATE OF THE STATISTICAL TOOLS

Around 80 percent of prison releases are therefore full releases. This affirmation is repeated by all without a shadow of a doubt—by Jean-Jacques Urvoas, the then-president of the National Assembly Law Commission, who wrote on his deputy’s blog on August 30, 2013: “Full releases’ will therefore soon be impossible. [...] Owing to the creation of ‘release under constraint,’ we will no longer see 80% of releases without monitoring as is the case today.”

When we met the minister of justice on April 27, 2017 at the chancery, he recognized that the figure is uncertain: “There is a general failing of the statistical tools at the Ministry of Justice, not just relating to the DAP. [...] The software systems don’t talk to each other.” Between 2013 and 2017, Jean-Jacques Urvoas examined a report into “The Development of Commutations and Use of Penal Constraint and Release under Constraint,” which he had been given by the Inspectorate General of Judicial Services (*Inspection générale des services judiciaires*, IGSJ) in July 2016 at his request. In this confidential report, which we have been able to obtain, the inspectors stress that the data available has “reduced reliability,” owing to a “complex system of statistical information that draws on data collected locally in an often piecemeal manner through the use of several situation, procedure, and file management applications.”¹²

These three applications have cryptic names: “Cassiopée,” “Appi,” and “Génésis.” Cassiopée (which in French stands for “Application Chain Supporting the Penal Procedure and Children Information System”) is installed in the superior courts to record complaints and denunciations received by judicial officers up to and including the execution of sentences, but not to record appeal decisions. Appi (“Enforcement of Sentences, Probation, and Integration”) manages information provided by enforcement judges and Prison Integration and Probation Services. And Génésis (“National Management of Persons in Custody for Individual Monitoring and Security”) manages the execution of decisions by the judicial authorities for persons in custody; fully functional since 2016, it replaced Gide (“Electronic Management of Detained Persons”). According to the IGSJ inspectors, the use of Cassiopée is fairly uneven depending on the jurisdiction: some cannot use Génésis because it is not integrated with the penal system and has no link to Cassiopée or national criminal records. They suggest the creation of a

12 *Evolution des aménagements de peine et recours à la contrainte pénale et à la libération sous contrainte* [The Development of Commutations, and Use of Penal Constraint and Release under Constraint], report by the Inspectorate General of Judicial Services, July 2016, 92 pages (not published by the Ministry of Justice).

unique identifier for offenders in order to have “a base of intelligible data for all information systems.”

What seems a pity, but unfortunately typical, is that this has all been known for a very long time. On the subject of Cassiopée, Appi and Gide, Eric Ciotti stated back in June 2011 in his report on “Strengthening the Effectiveness of the Execution of Sentences” (*Pour renforcer l’efficacité de l’exécution des peines*) that: “Notwithstanding the difficulties specific to each of the above applications, the state has no gateway between them; and indeed this compartmentalization makes the functioning of the Ministry of Justice less efficient.” And he concluded: “The creation of a single computer file for each person placed in custody, via a common application across all sections of the penal system (the police, the judicial authorities, prisons, and the Prison Integration and Probation Service) is imperative.” Five years later, the IGSJ proposed a very similar sounding “unique identifier.” Why was Eric Ciotti’s proposal not implemented at the end of Nicolas Sarkozy’s term as president? And why was nothing done during that of François Hollande? Pierre Victor Tournier told us that he alerted Christiane Taubira very soon after she became minister of justice. According to him, “she didn’t want anything to do with it.” Is Tournier too harsh?

Without being too hard on his predecessor, Jean-Jacques Urvoas recognizes that this was not among governmental priorities, although modernization of the statistical tools was carried out for the Ministry of the Interior by Manuel Valls. In his “Letter from the Keeper of the Seals to a future Minister of Justice,” Jean-Jacques Urvoas wrote: “The various statistical functions still scattered in all directions ought to be grouped together within the ministerial statistics service. How much longer can we put up with the fact that we are unable to carry out monitoring of an individual’s criminal record, or that we do not have real-time or projected data elements?”¹³ A few days earlier, in a white paper on prison-building (*Livre Blanc sur l’immobilier pénitentiaire*) submitted to the minister of justice on April 4, 2017, Jean-René Lecerf criticized the absence of links between information systems, saying that this results in a lack of “reliable information on criminal trajectories.”

With such shaky foundations, what are the implications for the current rate of recidivism in former prisoners?

RECIDIVISM AND COMMUTATION: KEY STUDY BY ANNIE KENSEY (DAP)

Since the “Consensus on the Prevention of Recidivism Conference,” which was held in Paris in February 2013, and which aimed to legitimize the Taubira bill on penal constraint, a certain study by Annie Kensey, head of the ME5

¹³ Jean-Jacques Urvoas, *Lettre du Garde des Sceaux à un futur Ministre de la Justice. Partageons une ambition pour la Justice* (Paris: Éditions Dalloz, April 2017), 58 pages.

office of the DAP, has been labeled a gimmick. “Risks of Recidivism¹⁴ in Former Prisoners: A New Assessment” provided recidivism figures for released prisoners according to whether or not they had benefited from a commutation (the study’s co-author, Abdelmalik Benaouda, is hardly mentioned).¹⁵

This study, published in May 2011, is the most recent investigation analyzing the incidence of recidivism according to type of end of detention. It is based on a sample of 7,000 usable files on detainees who left prison between June 1 and December 31, 2002, who were monitored for five years. “My co-author Abdelmalik Benaouda and the temporary staff worked themselves to the bone collecting data for this study,” Annie Kensey let on to us. The previous study, carried out in 2005 with Pierre Victor Tournier on a group of former prisoners who had been released between 1996 and 1997, involved “only” 2,600 cases. Benaouda and Kensey’s published findings ended with a seemingly significant and controversial conclusion: “The risk of recidivism among former prisoners who have not benefited from a commutation is 1.6 times higher than for those who have benefited from a conditional release; the risk of receiving a custodial sentence is twice as high.”

Certain politicians, especially those on the left, seized on this shock statement. The first was Christiane Taubira,¹⁶ who, when questioned in her capacity as minister of justice by the National Assembly Law Commission, brandished the Kensey-Benaouda study, stating that it “suggests that the more prepared detainees are before leaving prison, the less chance there is of a repeat.”¹⁷ The minister announced unequivocally, moreover, in a document from June 2014 still available online, that the “use of full release generates increased recidivism.”¹⁸

WHEN SELECTION BIAS DESTROYS THE CAUSAL EFFECT

And so, when it comes to communications with the media, politicians keep to this condensed version of the 2011 Kensey study, which is both simple and promising: 1.6 times the level of recidivism, or twice the number of prison sentences, for “full releases” compared with parolees. But when they put pen to paper, some of them are obliged to reveal that not everything is as rosy as it seems.

14 This does not refer to recidivism in the sense of the same crime or offense, but in the common sense of a repeat offense (whether identical or not).

15 Annie Kensey and Abdelmalik Benaouda, “Les risques de récidive des sortants de prison. Une nouvelle évaluation,” *Cahiers d'études pénitentiaires et criminologiques*, DAP (2011).

16 We have not received a response to our requests for interview sent via several channels.

17 Dominique Raimbourg, report “*relatif à la prévention de la récidive et à l'individualisation des peines*” [into the prevention of recidivism and the individualization of sentences], (National Assembly, May 28, 2014), 548 pages.

18 *Prévention de la récidive et individualisation des peines. Chiffres-clés. Juin 2014* [Prevention of Recidivism and the Individualization of Sentences. Key figures. June 2014] (8 pages), accessed September 14, 2017, http://www.justice.gouv.fr/include_htm/reforme_penale_chiffres_cles_plaquette.pdf

In his information report “on ways of combating prison overcrowding” (2013), Socialist Party deputy Dominique Raimbourg introduced the following apparently innocuous detail after citing the Kensey-Benaouda study: “Prisoners seeing their sentence commuted were those for whom the risk of recidivism was theoretically lowest. [...] Nevertheless, the authors’ use of ‘regression analysis’ in the study, taking many factors into account (age, family, and employment status, etc), meant the risk could be compared all things being equal.”¹⁹

In two sentences, Dominique Raimbourg put his finger on two essential concepts: selection bias and how to remedy it. What is “selection bias”? The group of parolees was not chosen at random: they had been selected by the enforcement judge based on the strength of their plan for rehabilitation. It is therefore logical that these parolees would have a lower incidence of recidivism than those leaving prison without commutation. In other words, could we say that conditional release lowers the rate of recidivism since the granting of the request is contingent upon a plan to keep the parolee away from crime? Many researchers have their suspicions. In its contribution to the consensus conference of February 2013, even the very official General Secretariat of the Ministry of Justice made the following clear and careful judgment: “Analysis that compares recidivism rates according to sentence commutation is not entirely conclusive, since it cannot completely account for selection bias.”

The General Secretariat of the Ministry of Justice had the 2011 Kensey-Benaouda study in mind, of course. What is most striking is that is that nobody cited the conclusion of the same study, no doubt on account of it seeming paradoxical and confusing. The Kensey-Benaouda authors claim that: “The effect of commutation on release from prison is well established.” Before continuing: “But these results do not necessarily indicate a causal link. [...] It makes sense to suppose that the selection [of released prisoners] favors, all things being equal, those for whom the risk of recidivism is deemed to be lowest—for example, those who have shown good behavior in detention, or who have a particularly solid rehabilitation plan—elements that we do not see in this data.”

We discussed this “selection bias”—which indeed calls the results of her famous study into question—with Annie Kensey. Seeming uncomfortable, she referred us to Benjamin Monnery, a student from Lyon who has worked on the subject. The thesis submitted in November 2016 by this temporary lecturer and research assistant of the university of Lumière Lyon 2 was titled: “Prison, Rehabilitation, and Recidivism: Microeconomic Applications.”

This young researcher’s conclusion undermined very common certainties: “It is not possible to identify the causal effect of a commutation.” According to him, saying that the parolee is 1.6 times less likely to be sentenced again within

19 Dominique Raimbourg, information report “*sur les moyens de lutte contre la surpopulation carcérale*,” [on ways of combating prison overcrowding], (National Assembly, January 23, 2013), 199 pages.

five years is totally absurd. And yet this is what Annie Kensey and Abdelmalik Benaouda write. In Benjamin Monnery's opinion, significant variables taken into account by enforcement judges are not used, such as addictions. He calls this a "phantom variable bias."

Two of the main researchers on prison issues share the same skepticism. For Martine Herzog-Evans, lecturer at the University of Reims, "most research does not prove a causal effect of commutation on recidivism, but the problem is that this is not what we want to hear." Pierre Victor Tournier is even more emphatic in stating that there "is no causal effect": "Many quantifiable variables do not amount to a causal effect, but the majority of variables are not quantifiable."

Annie Kensey and Abdelmalik Benaouda carried out "regression analysis" to limit the effects of selection bias. To achieve this, they took into account the following factors: age at time of release, marital status, having one or two previous convictions, employment status, having French nationality, length of sentence, nature of offense committed, and type of commutation. On the other hand, their analysis did not take into account whether or not the detainee had a home to go to, addictions, or mental health status. "One variable plays an essential role in recidivism," says Pierre Victor Tournier: "the profile of the person who is waiting outside the prison door for the prisoner to be released." The probability of repeat offense is obviously much higher if the person waiting is a trafficker. "There are even cases of mafia-type influence," reveals Pascale Baranger, head of prison integration and probation at Villejuif (Val-de-Marne department). "If the former prisoner wishes to get out of the trafficking they were caught up in before being convicted, the 'godfathers' may threaten his family."

In theory, there is a way of eliminating all selection bias in order to uncover the causal effect: allocate commutations to a group of prisoners selected at random. Benjamin Monnery and Brigitte Herzog-Evans point out that this has been done in Switzerland as part of a study published in 1997 on community service in the Canton of Vaud.²⁰ Two samples of convicts were drawn at random: 112 were sentenced to community service and 41 to fourteen days in prison. The conclusion appears to be conflicting. Those sentenced to community service had a lower incidence of recidivism, without this being quantitative, since ex-detainees "deny more often than not that they have a debt to society and that they have more resentment regarding their sentence and the judge who delivered it." On the other hand, the Swiss study did not prove the existence of "harmful effects of prison on the social life of prisoners," no doubt owing to the brevity of the period of detention studied (fourteen days).

The author of this Swiss research in any case remained extremely cautious regarding the results owing to the small size of the groups of convicts. Nevertheless,

20 Martin Killias, *Le travail d'intérêt général dans le Canton de Vaud* [Community Service in the Canton of Vaud], report involving a comparison between a randomized test group and a control group (Institut de police scientifique et de criminologie de Lausanne, October 1997), 49 pages.

such an inquiry using random samples is practically unique in the world. It was only possible to carry it out since it involved a sentence of just fourteen days. It would certainly be inconceivable for candidates for conditional release among those sentenced to more than six months of detention to be selected in a random manner.

THE LACK OF COLLABORATION BETWEEN THE LEGAL PROFESSION AND ACADEMICS

Without wishing to provide a display of typically French self-flagellation, we ought to note that prison research in France lags considerably when compared with practices in several countries, especially Canada.

When questioned on this subject when still minister of justice, Jean-Jacques Urvoas did not deny the fledgling nature of French prison research. On the one hand, he recognized that many researchers were likely to be tired of the disastrous state of the service's statistical tools and by the rather closed attitude of the Prison Administration. On the other hand, he regretted, despite everything, that French academics and CNRS²¹ researchers did not seek more collaborations. Robert Gelli, whom we met when still in the role of head of the Directorate for Criminal Matters and Pardons, made the same desperate observation: "Prison research has not been given support politically or financially."

What is most surprising is that this situation appears to be long-standing. The current damning conclusion was, as a matter of fact, reached by Pascal Clément, Minister of Justice under the presidency of Jacques Chirac, when he launched the *Commission d'analyse et de suivi de la récidive* (Commission for Analysis and Monitoring of Repeat Offense) on December 6, 2005: "I hope to prevent recidivism more effectively by improving our knowledge of the subject. Because unlike that of the US or the UK, or of our friends in Quebec, our scientific approach to recidivism is insufficient. Indeed, we are unable to measure it precisely because we lack the relevant statistical tools."

Our statistical tools are therefore ineffective, and have been for a long time, as our research on recidivism is scant and inadequate. It is strange that governments on both the left and the right have not had more political will to improve the situation. At the same time, all actors—both decision-makers and observers—agree that commutations need to be developed in order to reduce the rate of recidivism. In the second part of this paper, looking beyond the difficulties relating to the quality of statistical tools and research into recidivism, we will decipher legal, societal, and political bottlenecks that prevent an increase in the numbers of offenders being released from prison under constraint.

21 In particular within the framework of Cesdip (Centre de recherches sociologiques sur le droit et les institutions pénales—Center for Sociological Research in Law and Penal Institutions), which is run by CNRS, the Ministry of Justice, the University of Versailles-Saint-Quentin, and the University of Cergy-Pontoise.

INEFFICIENCIES IN THE FIGHT AGAINST RECIDIVISM: “WHY SO MANY BOTTLENECKS?”

Centrist Minister of Justice Pascal Clément of the UMP party made statements when in his role during Jacques Chirac’s presidency that were practically repeated word for word by his successors on the left, Christiane Taubira and Jean-Jacques Urvoas. Beginning with: “Can we allow ‘full releases’ from prison when everyone knows that they only contribute to repeat offending?” This is an extract from his speech of October 25, 2005 when he was defending the bill to introduce mobile electronic bracelets (which supplemented placement under electronic surveillance).

Sixteen years later, “full releases” continue to be, at least on the surface, public enemy number one in the sphere of criminal policy. “We are fighting against full releases, which are a breeding ground for encouraging repeat offending,” declared Christiane Taubira before members examining her bill in the spring of 2014. It must be pointed out that her battle has not been rewarded with great results, since the rate of full releases does not appear to have decreased (the poor quality of official statistics prevents us from being firmer in this statement). We will therefore analyze the inefficiencies and bottlenecks that prevent us from having greater access to commutations, and thus avoid offenders leaving prison being left to their own devices (and to trafficking that is as illegal as it is financially attractive).

RELUCTANT ENFORCEMENT JUDGES?

“All the legislators and the [political] powers that be can do is make the tools available,” Jean-Jacques Urvoas told us when he was minister of justice. It is the judges who decide to use them.”²² Commutation, semi-custodial release, work release, electronic tagging, conditional release, and the all-new release under constraint are decided by the *juges de l’application des peines* (enforcement judges). Do enforcement judges put their foot on the brake in resistance to criminal policy?

We therefore asked the head of the Directorate for Criminal Matters and Pardons, Robert Gelli—whose mission it was to relay the minister of justice’s criminal policy to attorneys general and prosecutors—where, in his opinion, the bottlenecks lay. “The political will to develop commutations and adequate means is generally lacking,” he admitted to us. “But the judges are also reluctant. Because if a prisoner given work release, for example, commits a crime, the blame will fall to the enforcement judge and the CPIP.”²³

22 Interview with the author on April 27, 2017, in the minister of justice’s office in the presence of Nathalie Vergez, criminal and public policy advisor.

23 Interview with the author March 31, 2017. Robert Gelli became attorney general of Aix-en-Provence on May 12, 2017.

The reluctance of enforcement judges. The accusation has been made. Of course, the “Pornic case”²⁴ was an example of this. On the night of January 18-19, 2011, in the commune of Pornic in Brittany, Laëtitia Perrais was abducted, stabbed, and strangled by Tony Meilhon. A year previously, the young man had been released from prison, where he had been detained for threatening behavior and contempt of court, and was to be monitored by an enforcement judge as part of a suspended sentence with probation including for medical treatment and to engage in professional activity. Except that he had not really been monitored because his enforcement judge had not deemed it to be a priority case. The sentence enforcement division of the high court of Nantes and the Prison Integration and Probation Service are notoriously under-staffed. But this would not stop the President of the Republic Nicolas Sarkozy declaring that: “When we let an individual such as the alleged perpetrator out of prison without ensuring that he will be monitored by a parole officer, this is an error. Those who have covered up this error or allowed it to be made will be punished.” Following the president’s take-up of the cause, the Pornic case became a national issue, with judges going “on strike” for ten days, with the support of the CPIP as well as police officers. Many inspections were carried out, but no penalty was given except for the transfer of the interregional director of the Rennes prison service. Six years later, this case remains one of the reasons for the “reluctance” of the enforcement judges.

“We’re all afraid of another ‘Pornic’ case,” says Cécile Dangles, president of the National Association of Enforcement Judges. “The French society our profession is deeply rooted in avoids risk, so ...” But what is a risky decision for an enforcement judge? To refuse commutation and let the offender leave prison in the long run without any kind of monitoring, thus most likely on the path back into crime? Or agree to a commutation, hence an early release with the possibility of a failure in rehabilitation? Each decision could end in disaster, but only the second could be blamed on the enforcement judge. And so it is not surprising that there is a tendency to avoid the option that could bring blame.

Cécile Dangles, vice-president in charge of sentence enforcement at the high court of Lille is keen to volunteer. “In saying yes to a commutation request I am protecting society,” she says. “I agree to the release of some borderline cases because I sense that this decision will give them extra motivation. I have known failure with prisoners who have a good track record, and success with prisoners who gave the impression of being a lost cause.” So she is aware of the risks, knowing that accidents can happen, and convinced that she is fighting recidivism more effectively than her colleagues who are more demanding than she is when it comes to the conditions of commutation.

The question raised by Cécile Dangles appears to be both key and provocative. Almost confusing. Are enforcement judges using the right criteria to make

24 See Ivan Jablonka, *Laëtitia ou la fin des hommes* (Paris: Seuil, La Librairie du XXI^{ème} Siècle, August 2016), 402 pages.

their decisions? Are they not thinking about it the wrong way around? Today, each prisoner candidate for commutation is assessed on their: 1. Admission of guilt. 2. Behavior in detention. 3. Plan for rehabilitation. Simply put, offenders most suited to rehabilitation are being monitored by an enforcement judge and a CPIP, and those who pose the greatest risk of recidivism are being set free. Should it not be the other way around? The question was in essence asked by the Court of Audit in its 2010 report on “Preventing Recidivism, Managing Prison Life.”²⁵ “Full releases are still the most common type of release, with the paradox that the convicted persons concerned—because they do not fulfill the conditions for commutation on account of their criminal profile—find themselves led toward the least prepared type of release, the one with the highest risk of recidivism.”

The former director of the National School of Prison Administration from 2013 to 2016, Philippe Pottier, pleads the same cause as the Court of Audit. “Our habits need a shake-up,” he says. “Because offenders leaving prison on conditional release are those who need monitoring the least as they have a firm rehabilitation plan. It is the others, paradoxically, who need guidance the most after their release.”

Would such a change of paradigm be possible and advisable? Certainly not in the short term, because it would require a profound transformation of the French administration of sentence commutations, with in particular a large increase in the number of enforcement judges and CPIPs (see 2.4 further on). Even then, it could not be a total reversal of practices. Philippe Pottier agrees when he says that he would like all prisoners to be granted conditional release, “... except for the most dangerous offenders.” For Martine Herzog-Evans, commutation is often preferable to full release, but she is wary of automation, which leads to blindness. There is a tenacious myth,” she says, “that commutation is always beneficial.”²⁶ But it is not automatically preferable to staying in prison. It all depends on what awaits the prisoner on the outside.

Martine Herzog-Evans’s caution is welcome, but we are a long way from a reversal of judicial practices that mean commutation would be standard for all. There is in any case real hostility in France when it comes to any form of automation. Judges greatly protested against the minimum sentences introduced in 2007. They also criticized Christiane Taubira’s bill to bring in automatic release under constraint after two thirds of a sentence had been served. Owing to an arbitration in favor of Minister of the Interior Manuel Valls, the minister of justice was forced to step back and accept the removal of the automation aspect: once the offender

25 Cour des Comptes, *Le service public pénitentiaire: ‘Prévenir la récidive, gérer la vie carcérale,’* thematic public report, July 2010, 227 pages.

26 Martine Herzog-Evans, *Commentaires sur l’étude du TGI de Créteil sur l’établissement de Fresnes relativement à l’aménagement des courtes peines* [Remarks on the Report by the High Court of Créteil on Fresnes Prison and its Sentence Commutations]; the High Court of Créteil’s report dated March 11, 2014 (following a visit to Fresnes Prison, June 21, 2013) is entitled *Les obstacles à l’aménagement des peines, l’impact des courtes périodes de détention sur la mise en œuvre des aménagements de peine*. [Obstacles to Sentence Commutations, the Impact of Short Periods of Detention on the Implementation of Sentence Commutations].

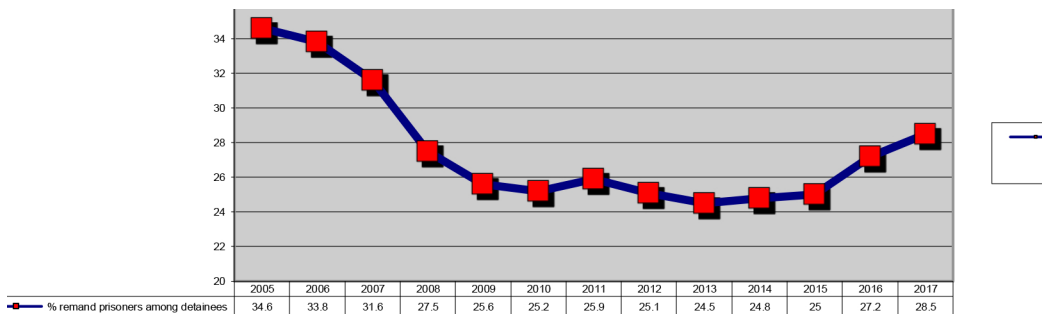
has served two thirds of the sentence their file is studied by the enforcement judge, but there is no obligation to decide on a release under constraint.

Given current resources, an increase in sentence commutations could only take place to the detriment of the quality of work carried out by the 419 enforcement judges.²⁷ As Cécile Dangles comments: “Commutations are not evolving because enforcement judges refuse to make prison releases into an industry and prefer to keep them a fine craft so that their decisions have meaning.” The president of the National Association of Enforcement Judges also questions the attitude of many of her prosecutor colleagues who, despite circulars in favor of commutations, appeal for suspensions on decisions made by the enforcement judges. “The difference between courts in handling cases is scandalous, and known by the prisoners—who make their own Michelin Guide of jurisdictions!”

Case law also remains very variable according to the enforcement judges—to the regret of the Prison Integration and Probation Service staff, who are in contact with the prisoners. According to Pascale Baranger, Director of Prison Integration and Probation Services for commuted sentences in the district of Villejuif (in the southern suburbs of Paris), too many “enforcement judges are unaware of real life: the majority of them should do a placement in prison and at interim establishments.” She adds: “The resistance of the enforcement judges and prosecutors is linked to the political and societal atmosphere, the direction of the wind.” Jean-René Lecerf, who submitted the white paper on prison-building to the ministry of justice in April 2017, takes the same critical tone. In his opinion, what prosecutors need most is much closer partnership and more frequent collaboration with the prison service management to be able to manage the flow of incoming and outgoing prisoners and their sentence commutations together.

HAVE WE FORGOTTEN ABOUT “MAGISTRATES FOR CUSTODY AND RELEASE” AND CRIMINAL COURT OFFICERS?

Percentage of Remand Prisoners Among Detainees on January 1, 2005-2017



²⁷ According to the Office of Court Administration, the number of enforcement judge positions for 2016 was 432, the actual number of enforcement judge staff was 419, and the full-time equivalent for sentence enforcement work was 322.6 in 2015, as enforcement judges also do other work such as acting as judge of final recourse in the criminal court or the Court of Assize (IGSJ report, July 2016).

The quality of the work carried out in prisons, most of all by CPIPs, largely depends on the conditions at institutions, which are generally overcrowded. And the overcrowding increases as the number of persons remanded in custody grows. The proportion of prisoners on remand among detainees, which had stabilized at 25 percent, has begun to climb again since 2015 to reach 29 percent in May 2017. Enforcement judges and CPIPs say it again and again, the more prisoners are piled up—two, three, four to a cell—with 1,755 mattresses on the floor,²⁸ the harder it is to prepare releases and sentence commutations. Are the magistrates for custody and release (*juges des libertés et de la détention*, JLD) and prosecutors aware of this vicious circle? Most likely not very.

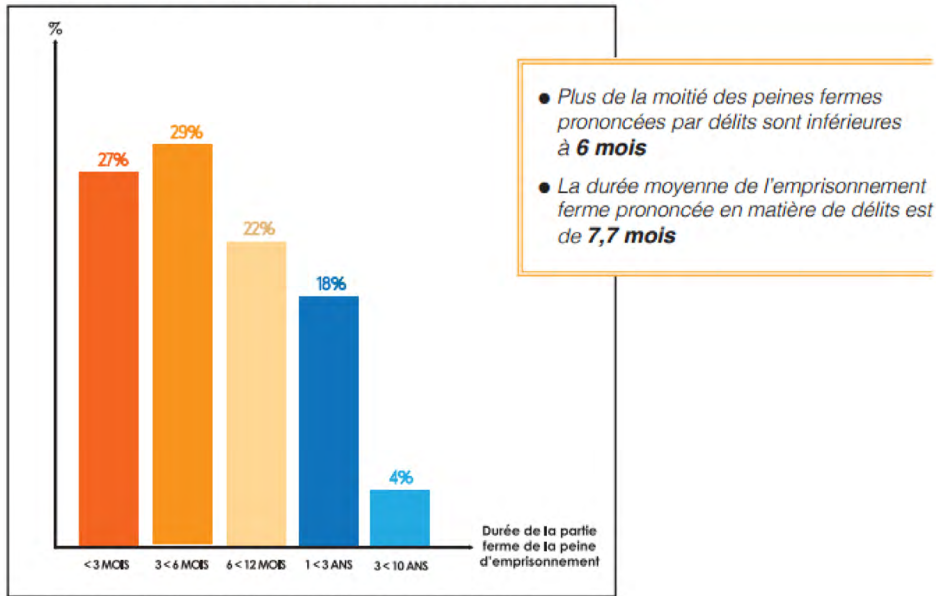
Criminal court officers play a central role in deciding custodial sentences, which are expected to be commuted when of less than two years. The vast majority of decisions involve short periods of detention: 56 percent are less than six months and 78 percent less than twelve months (see chart below)²⁹.

French	English
La durée des peines d'emprisonnement ferme prononcées (délits)	Length of custodial sentences (minor offenses)
Plus de la moitié des peines fermes prononcées par délits sont inférieures à 6 mois	More than half of custodial sentences delivered for minor offenses are less than 6 months
La durée moyenne de l'emprisonnement ferme prononcée en matière de délits est de 7,7 mois	The average length of a custodial sentence for a minor offense is 7.7 months
<3 mois	<3 months
3<6 mois	3<6 months
6<12 mois	6<2 months
1<3 ans	1<3 years
3<10 ans	3<10 years
Durée de la partie ferme de la peine d'emprisonnement	Length of the custodial portion of prison sentence
En 2012 . Source : Sous-direction de la statistique et des études du ministère de la Justice	In 2012. Source: Ministry of Justice Division of Statistics and Studies

28 Data from May 1, 2017 provided by the Ministry of Justice. The number of mattresses on the floor was 752 on February 1, 2013.

29 The chart above uses data from 2012. The figures available for 2015 establish an average length of criminal prison sentence of 8.4 months without further detail.

LA DURÉE DES PEINES D'EMPRISONNEMENT FERME PRONONCÉES (DÉLITS)



Thanks to the option of commutation, after sentencing and prior to incarceration, enforcement judges convert the custodial sentence of the majority of offenders to an alternative restrictive measure.³⁰ All the same, they approve many short prison sentences, since 39.1 percent of offenders are condemned to a sentence of less than six months, and two thirds to less than a year. We know that it is almost impossible to organize a commutation for a sentence of less than six months (the enforcement judge does this in less than 2 percent of cases), and very difficult for sentences of six months to a year (a 16 percent success rate). In addition, for these sentences of six months to a year, taking into account the time needed to put a commutation in place, the remainder of the sentence to be commuted is often short, therefore of rather relative effectiveness.

“There’s a real issue surrounding the role of criminal court officers,” explained Robert Gelli, the then Director for Criminal Matters and Pardons. “Especially the assessors who fulfill this role from time to time on a rotational basis, since these are usually specialized judges such as family court judges or juvenile court judges, for example. When they carry out summary judgments from time to time, they are not very concerned about the decisions they make.” In other words, there is a lack of true reflection in France on the part of criminal court officers on the meaning of short prison sentences, and above all their effectiveness in preventing recidivism.

Martine Herzog-Evans agrees that sending a young person to prison for fifteen days could serve as a salutary electroshock with no social harm done—but

30 Enforcement judges can convert prison sentences of less than two years into semi-custodial release, work release, electronic tagging, or conditional release, but also prison sentences less than or equal to six months into a daily fine or community service.

this is an option that does not really exist in France. On the other hand, detention of several months often has a desocializing effect and nearly always ends without commutation, and therefore with a higher risk of recidivism.

From the moment of her arrival at the Ministry of Justice, Christiane Taubira attempted to launch a debate with judicial officers on the meaning of sentencing. But she failed by rubbing them up the wrong way. Her successor, Jean-Jacques Urvoas, was less clumsy, but only had fifteen months—at the end of which his observations were bitter since he deemed the “area of sentencing” to be in an outright “mess.” He made the following comments on the “area of sentencing”: “Changes adopted over the past twenty years, guided by a desire for diversification of choice available to judges, have made [the process] both complex and extremely rigid, which is evident as much at the stage of pronouncing the sentence (when jurisdictions are torn between legislators’ contradictory injunctions) as the stage of executing the sentence, which has become completely incomprehensible for the accused, for society, and for victims.”³¹

FROM SENTENCE COMMUTATIONS ... TO SENTENCES?

Are there specific factors that explain the challenges in the development of sentence commutation for offenders: semi-custodial release, work release, electronic tagging, conditional release, or release under constraint?

Semi-Custodial Release

The number of semi-custodial sentences decreased by 37 percent between 2006 and 2014 (going from 6,751 to 4,238). This decline was not the result of a reduction in capacity to house such prisoners, since these increased. The occupancy of semi-custodial places plummeted by 18 points between 2010 and 2016, according to the Inspectorate General of Judicial Services’ 2016 report (see table above).³²

A number of criticisms voiced when the semi-custody system was launched can explain the lack of success of this measure. The first was aimed at the lack of flexibility in timetables, which are often too restricted and sometimes incompatible with a job. This observation was made by Dominique Raimbourg in his 2013 report,³³ which was based on the Notice relating to the implementation of the

31 *Pour une politique pénitentiaire ambitieuse. Réponse de Jean-Jacques Urvoas, Garde des Sceaux, Ministre de la Justice, à Jean-René Lecerf, Président de la Commission du Livre blanc sur l’immobilier pénitentiaire, le 4 avril 2017* [In Support of Ambitious Prison Policy: Response of Jean-Jacques Urvoas, Keeper of the Seals, Minister of Justice to Jean-René Lecerf, President of the Commission of the White Paper on Prison-Building, April 4, 2017], 41 pages.

32 *Evolution des aménagements de peine et recours à la contrainte pénale et à la libération sous contrainte*, [The Development of Commutations, and Use of Penal Constraint and Release under Constraint], report by the Inspectorate General of Judicial Services, July 2016, 92 pages (not published by the Ministry of Justice).

33 Dominique Raimbourg, information report “*sur les moyens de lutte contre la surpopulation carcérale*,” (National Assembly, January 23, 2013), 199 pages.

**Evolution of the rate of occupation in semi-custodial centers
or at institutions with semi-custodial places, 2010–2016**

	No. of detainees	Theoretical capacity	Occupancy in %
01/01/2010	1890	2328	81.2
1/1/2011	1768	2388	74.0
1/1/2012	2018	2568	78.6
1/1/2013	1893	2626	72.1
1/1/2014	1972	2606	75.7
1/1/2015	1833	2700	67.9
1/1/2016	1694	2699	62.8

Source: DAP—SDMi-Mi5, monthly statistics of Me5.

semi-custody system, submitted on September 26, 2012 by the Controller General of Prisons. Eric Ciotti had already written this in his June 2011 report on sentence enforcement, and asked for semi-custodial centers to have “longer hours with either early opening and late closing, or consistent presence of a guard to ensure the doors could be opened.”³⁴ Dominique Raimbourg himself proposed “relaxing the conditions in which changes could be made to the times when semi-custodial prisoners could go in or out” (to be the decision of the enforcement judge without need for the prosecutor's opinion, and more leeway for the chief of the semi-custodial center or Director of the Prison Integration and Probation Service).

Astonishingly, despite the warnings over the years, the situation has not got any better, if we believe the prison wardens themselves. “The under-occupation of semi-custodial zones,” wrote the National Union of Prison Wardens in March 2017,³⁵ “is linked to their location far from areas of employment and to their placement within institutions [prisons], which too often results in hours that do not suit work schedules such as contract or restaurant and bar work, for example.”

The use of the phone is another problem area noted. According to information collected by Dominique Raimbourg, there is no “phone point” at

34 Eric Ciotti, *Pour renforcer l'efficacité de l'exécution des peines*, [Reinforcing the Effectiveness of Sentence Enforcement] report commissioned by Nicolas Sarkozy, Président de la République, June 2011, 134 pages.

35 Contribution by the National Union of Prison Wardens to the White Paper on Prison-Building, March 10, 2017.

semi-custodial centers, and detainees are forbidden from using their cell phones, and yet they are free to do so as soon as they leave the building. This rule is, to say the least, ludicrous, and can only hinder the needs of the detainee who either has a job or is looking for one.

Work Release

This measure attracts support for its effectiveness with the most desocialized offenders since it ensures a wide cover of work, training, and medical treatment. It also teaches the offender about responsibility. However, the surge in electronic tagging has meant that fewer workers have been placed since the beginning of the 2000s: a 33 percent drop between 2000 and 2014.

In 2014, when her new law was going to be adopted by parliament, Christiane Taubira was promoting work release, which she considered to be an excellent measure. But beyond these words, there has been no obvious public contract for the development of work release placements. It is known that this measure suffers primarily from a big funding problem.

In light of the considerable efficiency of this commutation, its cost per day of around 35 euros would appear very economical compared with that of detention at around 100 euros. This cost has “not been reassessed since 2006,” highlights the IGSJ in its 2016 report (cited above). Such a bottleneck has suffocated the associations that manage work releases. “It really is a great measure,” says Cécile Dangles, President of the National Association of Enforcement Judges. “But if we take the example of my northern ‘inter-region’: seven years ago, the DAP stopped the funding of partner associations for several years, which led to the demise of some of them.”

For IGSJ judicial officers, the implementation of this commutation “has proven to be vastly complex,” because it requires synchronization of the hours of the legal service with, in particular, those of training courses, whose calendar depends on different requirements from those of the execution of the sentence. Another explanation offered by the IGSJ is that enforcement judges hesitate to grant work release placements because this commutation will be “seen as too lenient.”

Conditional Release

Unlike the two previous measures, conditional release has seen a net increase since the year 2000: a 43 percent rise between 2000 and 2014. This measure remains the second form of commutation, and does not receive too much criticism. There is no specific bottleneck here except that, as mentioned above, certain enforcement judges have very high requirements when it comes to the candidate detainee's profile and plan for rehabilitation. These requirements are often difficult to meet for detainees who find it increasingly harder to find job offers as the rate of unemployment rises.

Electronic Tagging

Launched in October 2000, electronic tagging shot up from 2004 to reach a ceiling in 2012-2013, before decreasing over 2013-2014. In 2014, this measure still accounted for 60 percent of sentence commutations.

This success was accompanied by a lackluster balance sheet, which may explain the downward trend for the last three to four years. The IGSJ's 2016 report first of all cites the most positive opinions which say that electronic tagging brings guarantees of control and monitoring far superior to other commutations, while it has enjoyed substantial public support. It has therefore had a positive impact on the prevention of recidivism. The same internal inspection report expressed two reservations: the delay involved in implementing tagging and the lack of responsiveness of the Prison Integration and Probation Service to change the timetables linked to this method of monitoring.

From 2011, Eric Ciotti felt that tagging was in danger of “rapidly revealing its limits,” in particular since “the multiplication of incidents that are not systematically followed up could foster a sense of impunity.”³⁶

Adopting a clearly critical point of view, Dominique Raimbourg, in his 2013 report, stated that the device was both inappropriate for some offenders and problematic to sustain for a period of more than six months³⁷. He also argues that “the measure suffers from highly insufficient social and educational support, which is the only guarantee of preventing recidivism.” He describes beneficiaries being “left completely alone,” meaning it impedes social rehabilitation. He goes on to conclude: “Electronic tagging is akin to a simple control device whose effect on the prevention of recidivism appears rather unclear.” And the Socialist Party parliamentarian, a close ally of Minister of Justice Jean-Jacques Urvoas (2016-2017), called on the latter to assess electronic tagging and above all to “considerably strengthen the social and educational support linked to the measure in order to transform it into something more than a simple mechanism for ‘decongesting’ prisons.”

Cécile Dangles, who is active in the field, considers that the level of electronic tagging is still too high today, and that this measure is not suited to certain inmates. She regrets the fact that, in the absence of prior serious investigation, we are setting offenders free to return to the same milieu that is not necessarily favorable to the success of a plan built around lawful activities. And clearly, if on leaving prison the former convict is surrounded by criminals and taken under their wing, that person has a high chance of re-entering an illegal trade.

Release under Constraint

Introduced on January 1, 2015 as a product of the Taubira Act of August 2014,

36 Eric Ciotti, *Pour renforcer l'efficacité de l'exécution des peines* [Reinforcing the Effectiveness of Sentence Enforcement] report commissioned by Nicolas Sarkozy, Président de la République, June 2011, 134 pages.

37 Dominique Raimbourg, information report “*sur les moyens de lutte contre la surpopulation carcérale*,” [on ways of combating prison overcrowding], (National Assembly, January 23, 2013), 199 pages.

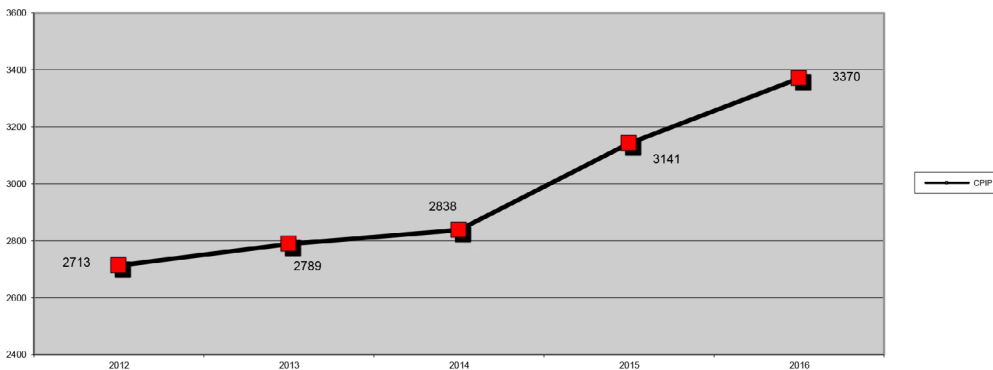
release under constraint has got off to a lukewarm start during its first two years of existence. In his October 2016 report, Minister of Justice Jean-Jacques Urvoas recognizes the limits of this new measure. “Although release under constraint, unlike commutation, does not require a plan for rehabilitation and is based on setting one or more objectives, some prisoners are not in favor.”³⁸

The minister cannot quite make this innovation—which is not a sentence commutation, but which stems from one of the four types of commutation—a hundred percent comprehensible. Adding: “Obtaining [the detainee’s] consent is sometimes carried out in conditions that are not conducive to the adherence of the offender.” He also criticizes certain jurisdictions which, contrary to the spirit of the measure, demand that the offender has a plan for rehabilitation before awarding a release under constraint.

Eric Morinière, assistant to the Rennes interregional prisons director, is bitter about it and says outright that it is a “total failure,” and that “many inmates prefer to carry out the last third of their detention in order to be released without being held accountable.” ANJAP president Cécile Dangles claims that most prisoners who are reluctant give another reason: they say they are not ready for freedom.

CPIPS! CPIPS! CPIPS! BUT WHICH CPIPS?

Prison Integration and Probation Advisor Staff Expressed as Full-Time Equivalents from October 1, 2012 to 2016



Source: Nathalie Vergez, criminal and public policy advisor to the Minister of Justice (May 15, 2017).

Minister of Justice Jean-Jacques Urvoas put it clearly to us: if there were more CPIPs (Prison Integration and Probation Advisors), judicial officers would take greater advantage of commuting sentences. This being

³⁸ Jean-Jacques Urvoas, Minister of Justice, *Rapport sur la mise en œuvre de la loi du 15 août 2014 relative à l’individualisation des peines et renforçant l’efficacité des sanctions pénales* [Report into the implementation of the act of August 15, 2014 pertaining to the individualization of sentences and reinforcing the effectiveness of criminal sanctions], October 21, 2016.

the case, why is the workforce not expanding at a quicker pace? Based on the new needs of her August 2014 law which introduced penal constraint and release under constraint, Christiane Taubira achieved the creation of 1,000 CPIP posts in three years, taking the number of CPIP³⁹ staff positions from 4,000 to 5,000.

This figure of 1,000 CPIP posts appears both enormous and derisory. Enormous since it entails a workforce increase for this profession of more than 30 percent. And derisory owing to its double objective: to keep track of 20,000 penal constraints a year and halve the number of cases monitored by each CPIP. This figure averaged 99 in January 2015 and reduced to 87 in September 2016, while the European standard is 40 cases. Therefore the ratio of “number of files per CPIP” has not decreased by much, since rather than 20,000 penal constraints, the annual number was previously closer to 1,150. This prompted Martine Herzog-Evans to write: “Our ‘normal’ probation rate would be an unacceptable number in other countries, or rather simply would not occur anywhere else.”⁴⁰

The number of CPIP expressed as full-time equivalents increased by 532 units between 2014 and 2016, according to the figures provided by the Office of the Ministry of Justice, which predicts that the CPIP workforce increase will reach 1,100 in 2019. Except that we have Dominique Raimbourg now saying that we should double the SPIP’s workforce to take it from 5,000 to 10,000. Indeed this is what Jean-Jacques Urvoas, as outgoing Keeper of the Seals, wrote in his letter to the future minister of justice.

Why say this at the end of an administrative term, when he had had more opportunities to do this several years ago? Such a large rise in the number of CPIPs would have most likely had the effect of encouraging hesitant judicial officers to deliver sentence commutations, since their reluctance to do so is linked to the lack of monitoring for offenders. “[Prime Minister] Jean-Marc Ayrault accepted a SPIP staff increase of just 25 percent in 2014,” Dominique Raimbourg, Socialist Party President of the National Assembly Law Commission, laments to us. “I had to fight this battle on my own.”⁴¹

But is the issue of judicial bottlenecks linked to CPIPs merely of a quantitative nature? “What we need rather than an increase in staff is better CPIP training,” states Cécile Dangles, ANJAP president. “There is a need for skills that are not just legal but multidisciplinary.” Psychology skills get mentioned most often, which CPIPs have been receiving training in since 2014. Professor Martine Herzog-Evans regrets that “social work has sharply declined in the French probation service, with a continual decrease in the number of home visits.”⁴²

39 The Prison Integration and Probation Services (SPIP) comprise mostly CPIPs, but also SPIP support staff and management as well as other, primarily administrative, personnel.

40 Martine Herzog-Evans, *Moderniser la probation française. Un défi à relever!* (Paris: L’Harmattan, October 2013), 142 pages.

41 Interview with the author, March 15, 2017.

42 Martine Herzog-Evans, *Moderniser la probation française. Un défi à relever!* (Paris: L’Harmattan, October 2013), 142 pages.

Martine Herzog-Evans and Cécile Dangles would also like a reinvestment of the CPIPs in the courts. In 1999, the Prison Integration and Probation Services moved out of the courthouses, which resulted in, according to them, a deterioration in their collaboration with judicial officers. They are not hoping for a return of CPIPs within the courts,⁴³ but rather for an exchange of a better quality of information aimed at favoring the delivery of sentence commutations. In 2016, this idea was also present on a wider scale in the IGSJ inspectors' recommendations when they suggested that the SPIP reinvest in the pre-trial phase, which had been abandoned for decades.⁴⁴ It is the CPIPs who are still to be convinced: they understand these proposals, but remain committed to the reform of 1999.

Another concern for judicial officers is that the crucial issue of addiction, which lowers the chances of success for commuted sentences, does not appear to have been sufficiently taken into account. "In some institutions, prisoners are released from detention suffering from withdrawal symptoms, with no guidance or guarantee of external support," writes Virginie Gautron, lecturer in criminal law and criminal science at the University of Nantes, in a review of the DAP.⁴⁵ According to Professor Martine Herzog-Evans, there are no regular or rigorous tests carried out to check for drug addictions, which would appear to be within the remit of the CPIPs for sentences with various obligations attached. "As a result, the prisoner with a commuted sentence does whatever he or she likes, in particular by avoiding obligations. It's terrible—we have stricter checks for racing cyclists than we do for ex-prisoners!" Here again there is no encouragement for enforcement judges to opt for a sentence of conditional or work release.

A SUBJECT UNHEARD BY CITIZENS, UNSPEAKABLE FOR POLITICIANS?

“**C**onditional release is one of the most effective measures and one of the most constructive in preventing recidivism and favoring the social rehabilitation of prisoners into society according to a planned, assisted, and controlled process.” Where does this statement come from? This is the second paragraph of the 2003 Recommendation of Ministers to Member States of

43 In his 2011 report, Eric Ciotti made the following proposal: “Reinstate the Prison Integration and Probation Services in the courthouses.”

44 *Evolution des aménagements de peine et recours à la contrainte pénale et à la libération sous contrainte* [The Development of Commutations, and Use of Penal Constraint and Release under Constraint], report by the Inspectorate General of Judicial Services, July 2016, 92 pages (not published by the Ministry of Justice).

45 DAP, *La prévention des récidives: évaluation, suivis, partenariats* [Preventing Recidivism: Evaluation, Monitoring, and Partnerships] (international study day actions organized by the DAP, October 20-21, 2014), 220 pages, Collection Travaux & Documents n°84. Virginie Gautron cites the *Etude sur l'accès aux soins des personnes détenues* [Study on Access to Care for Detained Persons] by the Commission Nationale Consultative des Droits de l'Homme (CNCDH, 2006).

the Council of Europe on conditional release.⁴⁶ Having highlighted that “studies show that detention often has adverse consequences and does not ensure the rehabilitation of prisoners,” the European ministers stated that: “conditional release measures require the support of policymakers and administrative officials, judges, prosecutors, lawyers, and all citizens, who in return require precise explanations as to the reasons for the sentence commutation.”

“All citizens”? This European recommendation seems far away from the realities in France. “The French look away when it comes to the issue of prisons,” Jean-René Lecerf, President of the Commission of the White Paper on Prison-Building, told us. “Cover these prisons that I must not see. Souls are wounded by such things ...” we could write, paraphrasing Molière. This is a very French hypocrisy, which leads our citizens to have a stereotypical view of the custodial world, ranging from “five-star prisons,” to “squalid and disgraceful penal colonies.” “If prison, which is so often denounced and criticized, is so difficult to reform, it is first of all because it is more an object of argument and haranguing than it is the subject of reflection,” wrote Jean-Jacques Urvoas in September 2016.⁴⁷

There is little information, and even less education. Apart from the specialists, who concedes that an offender sentenced to imprisonment can get out mid-sentence? “French people do not understand sentence commutations,” regrets Jean-Marie Delarue, former Controller General of Prisons. “This is the fault of politicians who only talk about the need to build prisons in order to hold more inmates.” The media is also largely to blame for only rarely publishing reports on or studies into prisons. Section heads and editors assume their readers do not want to read about “difficult” subjects or those deemed to be alarming, and therefore do not commission such articles, or block their publication.

It is therefore a vicious circle in which the incomprehension and lack of interest of the French—on one side—and security-driven and vote-seeking political discourse—on the other—feed off one another. A societal atmosphere reinforces the reluctance of the judges. Is any political leader crazy enough to promote commutations when the subject is so unpopular, since in doing so he or she would immediately appear over-righteous or even lax?

However, the safety of citizens should be a unifying theme, even when explaining that those sentenced to imprisonment should, for the most part, be released under constraint in order to reduce the risk of recidivism. Jean-Jacques Urvoas, with a few days left as Keeper of the Seals, declared in his open letter to the future minister of justice that in order for sentence execution to succeed, both “absolute political commitment of the government and the willingness to build consensus” are needed.⁴⁸

46 The Council of Europe, *Recommendation of the Committee of Ministers to Member States on Conditional Release (Parole)*, adopted by the Committee of Ministers on September 24, 2003.

47 Jean-Jacques Urvoas, *Pour en finir avec la surpopulation carcérale* [How to End Prison Overcrowding], Minister of Justice report to parliament, September 20, 2016, 70 pages.

48 Jean-Jacques Urvoas, *Lettre du Garde des Sceaux à un futur Ministre de la Justice. Partageons une ambition pour la Justice*, (Paris: Éditions Dalloz, April 2017), 58 pages.

Should this be a left-right consensus, as called for by Jean-René Lecerf? This would no doubt allow us to move on from the unproductive and stereotyped debates. This could be the key to a societal, political, and judicial breakthrough. We asked Jean-Jacques Urvoas how his successor might reach this consensus he calls for. His surprising answer was one word: discretion. And this is because he is well aware that opinion is not ready to hear nor understand public debate on the commutation of sentences. According to him, there are two reasons for this: 1. “The less we talk about it, the more progress we will make on matters, since to talk about it is to place responsibility on the judicial officer, which he or she will tend to avoid by upholding imprisonment.” 2. “It involves areas in which there is no interest in promoting the measure, since to promote it is to oversimplify it to the point of caricature.” It seems, however, difficult, even impossible almost, to obtain a consensus, especially with citizens, if going by a motto of keeping “hush-hush.”

CONCLUSION

“Multiple studies have proven that prison increases the risk of recidivism more than other forms of punishment; the saying ‘prison: school of crime’ is not completely fanciful.”⁴⁹ This statement by Minister of Justice Christiane Taubira to *Le Monde* four months after taking up her post is deserving of a thorough investigation. At the point of concluding, the CNAM auditor finds himself literally stunned.

Stunned by the disastrous state of the statistical tools of the Ministry of Justice which prevent any researcher from carrying out serious analysis of the situation. Politicians have denounced the “80 percent full release rate” for years, and we have found that no reliable figure exists. We do not have, therefore, knowledge that is in any way rigorous on this indicator, and even less as to its evolution. It is difficult to believe, but we have to point out that before 2006 prison statistics did not distinguish between types of prisoner!

Without going back to previous governments, François Hollande’s presidency should have restructured and modernized the statistical tools of the Ministry of Justice, since his two successive ministers of justice were strongly committed to the battle to lower the incidence of full release. The same goes for their promotion of sentence commutations based on the assertion that “those leaving prison at the end of their sentence are twice as likely to go back as those who leave on conditional release.” Yet this allegation turns out to be false, since it comes from a study that failed to compensate for “selection bias.” In other words, prisoners on conditional release necessarily have a weaker incidence of recidivism than others since enforcement judges select them for this reason.

⁴⁹ Interview with Christiane Taubira: “Le tout-carcéral augmente les risques de récidive” by Franck Johannès and Cécile Prieur. *Le Monde*, September 20, 2012.

When we questioned them on these studies that get cited again and again by politicians and judicial officers, the best researchers had three reactions: 1. To give 100 percent support to conditional over full release is absurd. 2. We could obtain a more accurate result by quantifying certain information which is not currently quantified. 3. It is impossible to neutralize selection bias, since certain variables are not quantifiable.

These statistical and scientific shifting sands can only lead to the logical conclusion of the need to develop sentence commutations. This is the case for politicians as well as professionals in the field. The National Council of Bars (CNB), in no way a left-leaning structure, declared in a press release the day before the last presidential election⁵⁰: “The current reality in prisons aggravates the risk of recidivism and produces more crime than it prevents. It thus creates the instability of tomorrow.” And the representative body of French lawyers added that “policies offering real alternatives to detention and especially to pre-trial detention must be developed.”

This stance from lawyers reflects the situation of bottlenecks and insufficient effectiveness of the French prison system. “We have been debating full releases since the end of the nineteenth century and we’re going backwards,” laments Jean-Marie Delarue, former Controller General of Prisons. “We will have made progress the day we start talking about those leaving prison and not just about those going in.”

These bottlenecks are therefore numerous and complex. We have described a web of inefficiencies and tensions, many of which stem from the hypocrisy of citizens and from social indifference. A silent media goes in the direction of the wind, blown by its readers. The accusations brought against judicial officers after each “incident” make them more and more timid, when they are not naturally daring in the first place. As for the criminal judges, especially the assessors, they do not seem to be really interested in the consequences of their decisions, when instead they ought to be seeking answers to this crucial question: what happens to offenders after their stay in prison?

Within the chain of the penal system, each body manages its link with professionalism. But judges do not collaborate enough with prison management and the CPIPs, and the preparation of detainees’ rehabilitation, such as the prevention of recidivism, is in no way central to a prisoner’s experience owing to a lack of true public resources and because of endemic overcrowding in prisons. As for experimentation and innovation in the prison system, they remain in their infancy.

The great difficulty in achieving progress lies in this paradox. First, it is crucial to gain a deeper knowledge of the real situation in prisons and the need for prisoners to be released with close monitoring in order to try to limit recidivism.

50 The title of this press release was “Face à l’échec flagrant de la politique du tout carcéral, le Conseil national des barreaux demande aux pouvoirs publics une politique pénale plus ambitieuse (le 7 avril 2017)” [In response to the flagrant failure of all prison policy, the National Council of Bars demands a more ambitious prison policy from the public authorities, April 7, 2017.]

Second, given the level of responsiveness of French society, all discourse on the subject of prisons and the penal system is misunderstood or exaggerated, therefore ineffective or even counter-productive. The public authorities are thus condemned to navigate between these two pragmatic imperatives, hoping that from the vicious circles a virtuous opening will emerge.