USES AND CONSEQUENCES OF A CRIMINAL CONVICTION

Going on the Record of an Offender

Margaret Fitzgerald O'Reilly

Uses and Consequences of a Criminal Conviction

Margaret Fitzgerald O'Reilly

Uses and Consequences of a Criminal Conviction

Going on the Record of an Offender

palgrave
macmillan

Margaret Fitzgerald O'Reilly
University of Limerick
Limerick, Ireland

ISBN 978-1-137-59661-1 ISBN 978-1-137-59662-8 (eBook)
https://doi.org/10.1057/978-1-137-59662-8

Library of Congress Control Number: 2018955652

Cover Credit: Shutterstock /© James E. Knopf
Cover Design: Fatima Jamadar

This Palgrave Macmillan imprint is published by the registered company Springer Nature Limited
The registered company address is: The Campus, 4 Crinan Street, London, N1 9XW, United Kingdom

"Mens evil manners live in brass: Their virtues we write in water."
William Shakespeare, Henry VIII, Act 4, scene 2, line 45

For Eileen

Acknowledgements

I would like to thank Professor Shane Kilcommins for all his advice and encouragement, without which this research would never have been completed. I would like to thank colleagues, both past and present, who have provided stimulating debate on many of the issues discussed in this book and who motivated me to explore research avenues I might not otherwise have looked at. I would also like to extend my gratitude to Josephine Taylor for commissioning this work and for her patience and assistance in the completion of the manuscript. My appreciation also extends to all the helpful staff at Palgrave Macmillan involved in preparing this manuscript for publication. I wish to thank my husband Seamas for his love, friendship, and patience and my children without whose joyful distractions this book might have been completed in half the time. Finally for my mom Eileen, who has always inspired me, a special thanks for her interest and encouragement and to whom this book is lovingly dedicated.

Contents

Part I

Criminological and Penological Perspectives

1

Introduction

"Liberation is not deliverance. A convict may leave prison behind but not his sentence."[1] So stated Victor Hugo in his classic novel, Les Miserables, where we become acquainted with the story of protagonist Jean Valjean, an ex-convict, who spends his life trying to escape from his criminal past. Imprisoned for 19 years, Valjean is released, hardened by the nature of his sentence, and presumably relieved to put it behind him. But he quickly realises the true nature of his conviction and time imprisoned, which is expressed eloquently by Hugo in the following quote:

> [w]hen at the time of leaving prison Jean Valjean heard the words, 'You are free', the moment had seemed blinding and unbelievable, as though he were suddenly pierced by a shaft of light, the true light of living men. But this gleam suddenly faded. He had been dazzled by the idea of liberty. He had believed for an instant in a new life. He soon discovered the meaning of liberty when it is accompanied by a yellow ticket. (Hugo 1982, p. 103)

[1] Hugo, V. *Les Miserables*, 40th ed., Translated by Denny, N. (London: Penguin Classics, 1982), at p. 97.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_1

Despite his embittering experience, Valjean resolves to change his life but finds that this yellow ticket, which he is obliged by law to display, subjects him to prejudice and stigma and forces him to be an outcast. He is obliged to produce this ticket at work and as a result receives less pay. He is also refused accommodation because of it and his ex-convict status incurs such suspicion from external forces that he is relentlessly hounded by police inspector, Javert, almost to his dying day. Jean Valjean's redemption begins with his encounter with the Bishop Myriel, who is the first to treat him like a human being in the aftermath of his release. His initial success in overcoming his past is due to his change of identity, although he never truly escapes from the wrenches of the criminal justice system: '[a] man may leave prison, but he is still condemned' (Hugo 1982, p. 104). Jean Valjean's story has surprising resonance in today's world. Although removed from the Parisian cesspool of nineteenth-century existence, today's ex-offender must face difficulties that are often quite similar to those described in Victor Hugo's novel. Fiction and reality are not that far removed, given that the same stigma and prolonged consequences often derive from the imposition of a conviction nowadays. Unlike the 'yellow ticket' possessed by the nineteenth-century ex-convict, today's ex-offender is left with a criminal record that stays with him and that can affect his activities far into the future.

This book aims to examine the retention and use of previous criminal record information. The term criminal record is intended throughout to denote a conviction, rather than referring to cautions, arrests, or other police activity prior to actual conviction. A frequently unacknowledged fact is that once a criminal conviction is imposed, that conviction stays with the individual for life. There is a misconception that the finding of guilt at trial carries with it a de jure sentence alone and there is a failure to recognise the de facto multiple disadvantages that ex-offenders continue to experience as a result of having a criminal conviction. The reality is that a criminal record is not something that is simply imposed and subsequently forgotten about (after punishment) or left behind. The label of being an offender is one that stays with the individual for life, as a result of which he or she may encounter numerous difficulties and consequences in areas both within and outside of the criminal justice system. The law plays an instrumental role in instilling and perpetuating this

label and as such examination of the laws and policies that facilitate retention and use of criminal records will form the focal point of this book. There is a surprising lack of discussion surrounding the complete range of legal and social mechanisms through which a criminal record can be employed. Analysis is often fragmented around a particular issue such as sentencing or access to employment, for example. This book aims to move beyond such fragmented discussion and examine the entire range of areas where criminal records are taken into account in decision-making processes both within the formal criminal justice system and beyond. This is not uniquely an Irish issue, but the foundations of the book will be premised upon the approach taken in Ireland and analysis of this approach will encompass the broader international context within which policy and social changes, influencing the use of criminal records, occur.

The manner by which an ex-offender remains legally condemned is something that is of particular interest to this author, as part of the broader criminological dialogue about criminal life trajectories. An individual's life is profoundly changed after a conviction and imprisonment. The return of ex-offenders, whether from prison or just to normal activities in the aftermath of conviction, is beleaguered by particular problems posed by the status of ex-offender (Stojkovic 2017; Jacobs 2015; Maruna and Immarigeon 2004; Petersilia 2001; Maruna 2001). Rights, as they relate to privacy, liberty, and earning a livelihood, are ordinarily thought to be restored to the individual post conviction and release but this is not necessarily the case. Ex-offenders have needs and face circumstances that are unique to their situation. If they have spent time in prison then, on re-entry into society, many are ill-equipped to deal with the social and economic realities of the outside world. Thus, many find it difficult to break out of the cycle of poverty and crime. The criminal record becomes a further barrier to successful integration (Jacobs 2015; Thomas 2007). Criminal record information can be documented, accessed, and utilised by various agencies within the criminal justice system and beyond. It can be used in police investigations, in bail applications, as evidence at trial, and in sentencing hearings and decisions. It can also be used in order to impose additional constraints upon an individual in the aftermath of release, namely, through the implementation of policies such as monitoring orders, post-release supervision orders, and notification orders.

Beyond the criminal justice system, the individual can continue to experience many collateral consequences of a conviction, whereby access to employment, travel, and licences (among other areas of social activity) can be limited (Forrest 2016; Jacobs and Larrauri 2015; Thomas and Hebenton 2013; Blumstein and Nakamura 2009; Pager 2003).

The trajectory of penal policy has changed in recent times. Crime control has become an increasingly important mode of dealing with offenders and new managerial styles of governance are developing. Security, risk, public protection, and exclusion are essential concepts that have reconfigured themselves as key elements in the penal sphere, amidst overtones of politicisation of law and order and increased emotive investment in crime policy. Using criminal records, while not a new idea, has certainly become increasingly more valued in this risk-conscious age. Collecting data, categorising risk, and monitoring movement is fast becoming the currency of new age criminal policies. The commitment to such narrative is strengthened through the international sharing of criminal record information between EU states. The significance of a criminal record to agency workers is obvious. It may enable the police to generate or confirm a suspect quicker. It allows the sentencing judge to acknowledge a repetitive pattern of offending behaviour. It may allow an employer to avoid hiring a candidate who is unsuitable for the position (e.g. a paedophile from working with children). But there is not always a coherent approach taken to the use of such information and there are many other consequences, often unintended, which can arise and have a very real impact upon the person's ability to be able to move on with their lives. The stigma of the 'convict' label can be extremely difficult to break away from, leading many to become, or remain, disenfranchised and socially excluded. This narrative of marginalisation and exclusion has become increasingly interwoven into the fabric of policymaking. The law itself can create a continuum of exclusion by labelling individuals as offenders and preventing them from becoming fully integrated into normal social life. Despite national and international acknowledgement of the importance of successful reintegration of offenders, there often lacks a consistent strategic approach to dealing with re-entry, which undermines efforts to promote equality and social inclusion. Not all those who offend and are released back into society are considered to pose a high risk to the

public, and yet recidivism is high. It can be that many are simply unable to move beyond their circumstances and obtain better opportunities. For many, the shackles of a criminal record are a lingering obstacle to leading a law-abiding life, even where the positive mental attitude for change exists. This is an issue which should concern us all, especially in view of public safety.

The book begins with an analysis of the relevant theoretical literature including perspectives on control theory, governance, and desistance in order to illustrate the nature of the legal rules and principles that invoke criminal records, explain the social and political influences that have effected changes in this area, and assess the implications of this having regard to concepts such as labelling, citizenship, and the legal principle of proportionality. Contextualising the discussion with reference to such theoretical perspectives will enable us to better understand the significance of having a criminal record and why this type of information is becoming increasingly more valued in Ireland and elsewhere. The chapters that follow explore the various key areas from pretrial to post release, where prior convictions become an issue. Chapter 3 documents the role past criminal records play in the investigation of crimes and assess whether routine police practices target ex-offenders as a category and what the potential implications of this are. Chapter 4 explores the use of criminal record information in bail decisions, in particular the legislative developments, which have expressly endorsed the consideration of such information by judges hearing bail applications. Chapter 5 examines the impact that criminal records have upon the trial process and deals with the circumstances where the prosecution can introduce prior convictions as evidence in chief or cross-examine the accused on such. Chapter 6 examines the impact of criminal convictions upon the sentencing process and focuses upon explaining when past convictions are taken into consideration by a sentencing judge, the justifications for this, and the effect that its use has upon the offender. Chapters 7 and 8 move on to explore the nature of a criminal conviction in the post-release stages. Chapter 7 considers post-release measures applicable to ex-offenders, such as those under the Sex Offenders Act 2001. Chapter 8 explores the collateral consequences of a conviction throughout the life trajectory in areas like employment and access to travel. Chapter 9 looks at the international

exchange of information pertaining to criminal records in and beyond the EU and concludes with an analysis of the overall consequences of having a criminal record in light of its use and retention, not simply in the Irish context but from a broader international perspective also.

Bibliography

Blumstein, A., & Nakamura, K. (2009). Redemption in the Presence of Widespread Criminal Background Checks. *Criminology, 2*(47), 327.

Forrest, C. (2016). Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry. *Corrections Today, 78*(1), 30–31.

Hugo, V. (1982). *Les Miserables* (40th ed., N. Denny, Trans.). London: Penguin Classics.

Jacobs, J. B. (2015). *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.

Jacobs, J. B., & Larrauri, E. (2015). *European Criminal Records & Ex-Offender Employment*. New York University Public Law and Legal Theory Working Papers, Paper 532.

Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association Books.

Maruna, S., & Immarigeon, R. (Eds.). (2004). *After Crime and Punishment: Pathways to Offender Reintegration*. Devon: Willan Publishing.

Pager, D. (2003). The Mark of a Criminal Record. *American Journal of Sociology, 5108*, 937–975.

Petersilia, J. (2001). Prisoner Reentry: Public Safety and Reintegration Challenges. *The Prison Journal, 81*(3), 360–375.

Stojkovic, S. (Ed.). (2017). *Prisoner Reentry: Critical Issues and Policy Directions*. New York: Palgrave Macmillan.

Thomas, T. (2007). *Criminal Records: A Database for the Criminal Justice System and Beyond*. New York: Palgrave Macmillan.

Thomas, T., & Hebenton, B. (2013). Dilemmas and Consequences of Prior Criminal Record: A Criminological Perspective from England and Wales. *Criminal Justice Studies, 26*(2), 228–242.

2

Mapping the Criminological and Penological Landscape

It would be easy to delve straight into a discussion of the legal and social regulations upon criminal records and their impact upon ex-offenders, but to do so would omit an important part of the conversation. Legal policies do not occur in a vacuum, nor are the effects of a criminal record limited to the immediate aftermath of conviction. To fully appreciate the significance of this issue, we must understand the political, social, and cultural influences relevant to it. Theories such as control, governance, labelling, as well as social exclusion and citizenship are important to consider in establishing the narrative of this book. Understanding how such theories shape the significance of a criminal record facilitates a greater appreciation of what it means to be an ex-offender.

Security, Risk, and Controlling Ex-offenders

Managing offenders has always been a key focus of social concern and the response to deviant behaviour has evolved throughout the ages with this key issue in mind. From death to hard labour to imprisonment, the penal system has continuously strived to develop legal sanctions to

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_2

impose upon those who contravene the social contract (Foucault 1977; Beccaria). The twentieth century in particular has witnessed a number of institutional changes in penal policy, moving from penal welfarism in the early half of the century to a more control-orientated system in the latter stages (Garland 2001). Rehabilitation and individualised justice was the focus of the welfarism era. Assessing, diagnosing, and neutralising deviant behaviour in order to ensure conformity became "lodged in the framework of the penal judgment" (Foucault 1977, p. 19). This approach to punishment began to wane towards the latter part of the twentieth century, and changes emerged in the social and political reaction towards offending behaviour.[1] Rehabilitation was seen as less and less likely, and dealing with crime was becoming less about eradicating social problems and more about managing choice actors (see Rose 2000).[2] Changing social and cultural structures generated insecurity, accompanied by an obsession with risk and control which continues to play an essential role in evolutionising our responses to crime (see Garland 2001).

In this era, criminal justice systems have manoeuvred towards an actuarial stance,[3] with penal policies becoming increasingly concerned, not with causal criminality but rather with managing risk and controlling offending behaviour. An incessant fear of crime has produced greater emphasis upon harsh and expressive justice and in a stance of populist punitiveness, political will is set upon allaying fear and demonstrating to the public the will to act. The penal mode has become more security orientated (Pratt 2017; Garland 2001). Liberal interests are becoming increasingly overshadowed by security interests (Hudson

[1] The change in Ireland has perhaps not been as stark or emphatic as changes in countries like the US and UK as documented by Garland. Nonetheless, a gradual influx in control policies has been observed in this jurisdiction and such policies continue to grow in number and popularity.

[2] Rose observes that "[s]chemes of risk reduction, situational crime control and attempts to identify and modify criminogenic situations, portray the criminal as a rational agent who chooses crime in the light of a calculus of potential benefits and costs." Rose (2000, p. 322).

[3] It is argued that the preoccupation with actuarial risk in penal systems diminishes and often abrogates the idea of social justice which challenges the socio-economic constraints that often structure offenders' decisions to desist from crime. See generally O'Malley, P. (2001) Risk, Crime and Prudentialism Re-Visited. In Stenson, K. and Sullivan, R.R. (eds.) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies*. Devon: Willan, pp. 89–103.

2003) and tensions have arisen that frequently result in confrontations between longstanding concerns: right versus wrong; good versus bad; victim versus offender. It is often assumed that any adherence to offenders' rights represents a loss for the victim, and such perceptions give rise to increased scepticism when it comes to offenders' rights. This in turn can make society more complacent when it comes to control mechanisms being implemented (Hudson 2003).

When it comes to the ex-offender, increased emphasis is being placed upon the need to monitor and regulate the behaviour of anyone who has passed through the system before. Common opinion seems to be that ex-offenders are habitually dangerous and need to be monitored at all times (Maruna and LeBel 2003). Progressively restrictive measures are being taken to protect mainstream society from those perceived to be a threat because of their criminal background or because of their future criminal potential. The dominant focus is upon control and risk, and there is an ever increasing concern with risk probabilities and harm minimisation (see Young 1999a; Hudson 2003).[4] There is an assumption today that there is "no such thing as an 'ex-offender'—only offenders who have been caught before and will strike again" (Garland 2001, p. 180). The reaction is defensive and increasingly offensive in the sense of putting forward strategies that eliminate or curtail anticipated risk. We must protect ourselves against the dangerous other rather than concern ourselves with their welfare and rehabilitation (see Garland 2001, p. 184). The preoccupation with public protection has tended towards pre-empting the infliction of harm upon victims and potential victims. Risk must be identified, assessed, and managed, and the priority given to safety and security considerations has often culminated in the surrender of individual rights. Rights of liberty, privacy, and due process are often disregarded in favour of keeping tabs and monitoring potential risks. Notification laws are a prime example of the increasing desire to classify and share information about offenders on an institutional and

[4] There is nothing new in strategising towards risk and control, or with promoting public safety, or with targeting ex-offenders. However, what is new is the joining together of "the actuarial, probabilistic language of risk and the moral language of blame." Hudson (2003, pp. 52–53).

sometimes a community level. Offenders that are perceived as particularly dangerous, like sex offenders and drug offenders, are listed on registers and monitored, and there is a growing trend of utilising this form of security management for other categories of offenders, even those not originally considered to pose a high risk. As the gap between 'us' and 'them' grows wider, social stigma has become a useful tool. Marking the individual out as an offender through the lifelong retention of criminal records serves to alert the public to his danger. The criminal record becomes the instrument that enables social control of the ex-offender. Being tough on those who have already paid their debt to society has become the standard narrative of penal policy (Maruna and LeBel 2003).

The criminal record is growing as a factor to be taken into account in a wide variety of circumstances ranging from the pretrial to post-trial stages of the justice system. As crime prevention becomes a key aspect of the Garda function, increased Garda powers enable greater consideration of criminal records in the control and investigation of crime. As bail laws have tightened, the criminal record has become an express factor to be considered by the judge in determining whether to refuse a bail application. Presumptive sentencing practices are emerging and developing at an increasing pace, augmenting the significance of past record in the formal distribution of punishment. Well beyond the completion of formal punishment, the criminal record can operate to monitor and facilitate the provision of security against ex-offenders. There is an obligation to disclose prior convictions in areas like employment, travel, and obtaining licences, and this can effectively lead to exclusion from such circuits of socially inclusive activities. Legal constraints operate in the informal social setting because the ex-offender is considered to be someone who continues to pose a threat, and a precautionary logic dictates the attitude and response to such individuals in the community (Hebenton and Seddon 2009).

It should be said that assessing and managing risk is not a disingenuous task. It may be entirely necessary in many instances in order to ensure national security and to protect the public from serious harm. Moreover, it is not always true to say that individual rights are entirely forgotten in the strive for political security. The judiciary in particular remain strong

advocators for due process rights.[5] Nonetheless, it is apparent that concerns about security and control are seeping into criminal justice values at a core level, and political volition has tended towards the enactment of penal policies that emphasise such values in one way or another. In relation to the ex-offender, there is a move towards increasing control strategies upon this category of individuals. What is concerning perhaps is that many of the legal policies are targeted upon the offender 'status'. Often it is this status or the stereotype of the typical offender—the sex offender or drug offender—which provokes such a hard line approach, a sort of sanctimonious intolerance. Laws enacted to deal with ex-offenders are generalised and all-encompassing and there is often a lack of an individual- or evidence-based reaction (Hudson 2003, p. 46). The insatiable demand for security had rendered such reactions undesirable and unpopular. Thus, policies that seek to protect the public from the dangerous offender often fail to balance rights with risk concerns and favour punitiveness and post-release surveillance. The 'othering' of the offender or ex-offender neatly atones with the prioritisation of public safety. Retaliatory and expressive gestures intended to reassure a worried public have found momentum, while often sacrificing the need for polices which effectively address the underlying problems long term. Rights of the ex-offender become temporarily, or sometimes permanently, suspended. While safety is a laudable concern, it should not be all-encompassing if we are to retain the value of individual rights.

Political Governance and Ex-offenders

As observed above, the pattern of criminal justice policies in recent times has tended towards the use of actuarial styles of reasoning and technologies (Garland 1996). Governance is another relevant theory in understanding the significance of the criminal record label. Rose refers to

[5] Chief Justice Finlay commented in the case of *Kenny* that "[t]he detection of crime and the conviction of the guilty no matter how important they may be in relation to the ordering of society cannot … outweigh the unambiguously expressed constitutional obligation as far as practicable to defend and vindicate the personal rights of the citizen." *People (DPP) v Kenny* [1990] 2 I.R. 110, at p. 134.

governance as "any strategy, tactic, process, procedure or programme for controlling, regulating, shaping, mastering or exercising authority over others in a nation, organization or locality". Michel Foucault explains that historically the state has a power over its citizens, which extends to exercising a direct power over any one who contravenes the laws of the state (Foucault 1984, in Rabinow). Essentially punishment was part of the exertion of state power and control. The development of this power has been largely transformed from an exercise in the infliction of cruel and horrific punishments to the creation of a carceral system that gave new meaning to social order and punishment, which struck at the 'soul' of an offender (Foucault 1977). The penitentiary institution represented a change in the character of justice, which became concerned with punishment as corrective of human behaviour (see Foucault 1977; Garland 1990). The governmentalisation of the state (Foucault 1991, in Burchell) is the invention and application of an array of technologies connected from political spheres to community organisations, which extend the scope of state operations and the extent of their incursion into the lives of their citizen subjects. Techniques of power emerged that were designed to observe, monitor, and regulate individuals' behaviour both in the prison and in the community, where other institutions and agencies became involved in perpetuating the carceral structure and retaining infinite possession over the individual. Individuals and groups came to be governed through strategies of discipline and surveillance, and such surveillance could be de facto lifelong in nature and effect. Surveillance of offenders assumes the creation of "a documentary system, the heart of which would be the location and identification of criminals" (Foucault 1977, p. 281). This is a key element of the post-release policies emerging today. Effectiveness in crime control means activating a risk discourse in which information on offenders is vital. Discourses and technologies of risk are premised upon the idea of insurance and it is through this idea that new technologies of control and security are developed and imposed. Risk thinking has become part of politics, not purely at the level of rhetoric but in the governing of citizens—most notably within the criminal justice sphere. While the state may not be able to guarantee security or social enrichment, it can be seen to be harsh on criminals. Governing through crime cultivates the relationship between the state and its citizens

on the one hand, and excludes the offender on the other (see Simon 2007). The offender becomes the *homo sacer*, the individual upon whom state power is readily exerted and against whom political techniques can be focused to create the "docile bod[y]" (Agamben 1995, p. 3). This individual becomes what is at stake in political strategies, and violence against him becomes licit because the ordinary rights of the citizen do not pertain to him. The state's right to punish is inextricably linked with the *homo sacer*, who is excluded in the eyes of the state while at the same time forming an integral aspect of the state's assertion of authority: "no life is more political than his" (Agamben 1995, p. 183)

In today's world, it is not simply a matter of apprehending an offender and punishing him. Rather, it is a case of surveillance being 'designed in' to the flows of everyday life (Rose 2000, p. 325) and with this the continual monitoring of behaviour becomes normalised in the community. The retention and subsequent use of the criminal record meshes well with what Foucault described as the carceral archipelago, the dispersal of penal discipline throughout the social body where the power to control and punish are natural and legitimate (Foucault 1977, pp. 293–308). Control is effectuated now, as it was when Foucault wrote, through a variety of laws and agencies. It operates at every level of the social body. For the police, for example, the criminal record can be an extremely valuable tool for both generating suspects and continuing the penitentiary technique of surveillance and discipline. Contemporary penal policies seem to signal a gradual move towards enacting and exerting *deliberate* policies upon ex-offenders. There is growing popularity for laws that promote presumptive sentencing in relation to those with criminal records and political will to legislatively control groups such as sex offenders.

Rose argues that modern control strategies are diversified into techniques of inclusion and techniques of exclusion (Rose 2000). Identity is one of the most prominent examples of inclusive control strategies. There is an incessant requirement to prove identity in our society, demonstrated through the use of passports, driving licences, social security numbers, and bank cards. These forms of 'virtual identity' represent the importance of information flow, while at the same time permit access to various privileges (e.g. mortgages, telephone, electricity). Criminal record databases are connected to this flow of information and provide an important

source of identity classification for the police and government agencies, such as those dealing with insurance (Kilcommins 2002; Ellis 1990).

There are also political strategies that focus upon exclusion. Such strategies are stressed against the excluded 'other' of society, those considered to pose a threat: "the vagrant, the degenerate, the unemployable … the social problem group … the criminal" (Rose 2000, p. 330). Many of the new risk strategies are directed towards these marginalised and excluded groups.[6] In relation to offenders, there is a shift towards regulating deviance in the aftermath of formal processing through the justice system. Control here is not just about restraining risky individuals, it is about generating knowledge in order to define and classify risks and create practices of exclusion (or inclusion) based on that knowledge (see Rose 2000). A notable example of this is in relation to sex offenders. As a group, sex offenders are perceived as generally risky and are thus subjected to incessant modes of control post release from prison (Levenson 2016a; Vaughan 2002). There is a sharing of responsibility in this regime of surveillance and a relentless desire to improve techniques of knowledge amongst the relevant agencies (An Garda Síochána, the Probation Service and the Irish Prison Service).[7]

State empowerment in an age of uncertainty is often achieved through the disempowerment of the individual offender. Ex-offenders become the target of laws not always because this will effectively produce conformity or public safety but rather because it is an expression of what the state is doing for its (law-abiding) citizens. Expressive justice frequently supersedes a thought-out, evidenced-based approach, and grouping offenders

[6] Risk thinking is central to the management of exclusion in strategies of control. Ericson and Haggerty explain that in the contemporary work of police "categories and classifications of risk communication and … the technologies for communicating knowledge internally and externally, prospectively structure the actions and deliberations not just of police officers and police tactics, but also other professionals who are now enrolled in the business of control … welfare workers, psychiatrists, doctors" (Ericson and Haggerty 1997, p. 33). For an interesting work on the risk paradigm, see Trotter, C., McIvor, G., and McNeill, F. (2016) *Beyond the Risk Paradigm in Criminal Justice*. Palgrave Macmillan.

[7] Rose argues that this is despite the "incompleteness, fragmentation and failure of risk assessment and risk management" (Rose 2000, p. 333). In Ireland at present, there is little by way of a broad scale determination of the success or failure of risk assessment strategies, so it is difficult to know which way the pendulum swings. In relation to notification requirements (e.g. under the Sex Offenders Act 2001), success rates are often measured in terms of compliance, and without any reference to the effectiveness of these obligations in terms of the presumed goal of public safety.

into categories of perceived dangerousness appears to be more palatable than individualised assessments of risk. The released or 'ex' offender becomes the *homo sacer* and what is at stake in political power. The retention and utilisation of the criminal record generally is evidence that political will is upon retaining control of offenders even after they have served their time. This strategy is extremely important in perpetuating modern technologies of power and control.

The Exclusion of the Criminal 'Other'

In today's world, common perceptions of offenders are of individuals who have injured society in not abiding by the established rules and who thus deserve the consequences of their behaviour. Such consequences can extend to widespread censure of the offender even after he or she has served the formal punishment. They can face disapproval from the community at large which may culminate in him being treated like a pariah, someone to be avoided or excluded from normal engagement. The theory of social exclusion is apt for explaining the position that the ex-offender often assumes in the community, that of an outsider.

Jock Young in his book *The Exclusive Society* proffers a thought-provoking analysis of the social, cultural, and political processes within our society, with the aim of providing a causative explanation for the marginalisation of offenders. Young's analysis reveals two paradigms to be dealt with within this theory of human behaviour. These paradigms can be described as the process of inclusion and the process of exclusion. The inclusive society of the early and middle twentieth century placed emphasis upon full social, legal, and political citizenship (Young 1999a, p. 5). The deviant in this society was someone to be socialised and rehabilitated. The approach was thus primarily anthropophagic, in that the offenders were enmeshed within the social structure, with the aim of moulding them into law-abiding citizens once again (Young 1999b). Towards the latter half of the twentieth century, a breakdown in social and cultural structures that maintained and organised the dominant social classes caused people to become more cautious and unsure of each

other, largely due to ontological insecurity and material insecurity.[8] A move from an inclusive to an exclusive society occurred during this time, transitioning society from one intent on integration and assimilation to one which seeks to divide and exclude (Young 1999a).

Social exclusion can be a catalyst for deviant behaviour. From a cultural standpoint, crime occurs because of a deficiency in socialisation, of symbolic embeddedness into society and the family (Young 1999b, p. 393). The structural causes, on the other hand, are material deprivation, essentially poverty, unemployment, and inequality. Exclusion theory does not expound the idea that absolute deprivation leads unequivocally to criminal behaviour. A better view is that it is relative deprivation which can evoke a deviant response (Young 1999a). There is the dichotomy in social processes, in that while advances in society are exhorted to culturally assimilate people through education and employment, this ideal of inclusion is in reality not achievable for many. There is a bulimic quality to the social entity, and crime can occur "where there is cultural inclusion but structural exclusion" (Young 1999b, p. 394). The reactions of the state often work to strengthen and aggravate social exclusion. Security and classification become key motivators in political culture. In particular, there is a need to classify and position the deviant 'other'. This process of essentialism can quickly evolve into demonisation.[9] Young notes that in late modernity "the spatial and social pariah recurs with a vengeance in the concept of the underclass" (Young 1999a, p. 5; see also Sibley 1995). The underclass become the outgroup, but particularly, the criminal underclass become the target for dynamic expulsion and segregation. They become the dangerous other. It is important for achieving ontological security that the criminal other be as far removed from us as possible. They must be essentially different. Thus, certain types of offenders are more prone to segregation techniques. In recent times,

[8] Ontological insecurity arises from living in a diverse world where identity becomes less certain. Material insecurity arises from an increase in risk in the late modern world. See also Young, J. (2003) "Merton with Energy, Katz with Structure: The Sociology of Vindictiveness and the Criminology of Transgression" *Theoretical Criminology* 7(3): 389–414.

[9] Young explains that there are appeals to essentialising the other, namely, the provision of ontological security, the legitimisation of privilege and deference, it permits us to blame the other, and it forms the basis for protection. Young (1999a, pp. 103–104).

sex offenders and drug offenders are most fervently perceived as the dangerous other, to be rejected and expelled. Moreover, this segregation is promoted and facilitated through legal rules and principles. Increasingly harsh penal techniques are utilised to minimise the risks posed by such offenders and to promote a sense of social solidarity against them. More severe sentencing, post-release supervision in the community, notification requirements, and other monitoring orders are becoming more popular as a way of managing these offenders and indeed other types of offenders also. The general status of 'offender' incurs experiences of rejection and marginalisation.

There is somewhat of a paradox in the approach taken towards ex-offenders. On the one hand, there are attempts to include, perhaps most notably through community-run organisations and programmes aimed at rehabilitation, but such attempts are frequently overshadowed by the need to classify, isolate, and exclude. An example of such a contradiction is the Sex-offenders Act 2001, part 5 of which refers to the rehabilitation of offenders as a goal of the provisions. However, part 4 of the 2001 Act places a blanket prohibition upon those convicted of a sex offence under the Act from applying for a job without disclosure of their record, which can essentially lead to exclusion from the labour market. Facing life on the outside after imprisonment can be very difficult for any offender, especially if they have been incarcerated for a significant period of time. The welfare of released offenders is an important concern which is slowly ebbing away as populist connotations of the irredeemable offender amplify the demand for 'punitive segregation' (Garland 2001, p. 142). Policies like notification requirements emphasise that reintegrative strategies are shifting from an approach to bring the offender into the community and help him be a part of it, to an approach perpetuating his exclusion in that community. This discourse of exclusion aims to anticipate antisocial behaviour, it is concerned with the possibility of crime and with identifying, classifying, and isolating the deviant (Young 1999a).

We need to address the issue of marginalisation in order to adequately deal with the re-entry of offenders into society. Developing coherent reintegrative strategies, which will assist individuals from overcoming their criminal past, warrants consideration of the exclusionary impulses of

society and the need to address such impulses in a more holistic approach to the treatment of ex-offenders. Despite recognition of the importance of reintegration as a central goal of the justice system, the concern with security and risk means that community safety takes priority in the hierarchy of goals within the criminal justice system, often to the exclusion of offenders' rights. However, in terms of safety, exclusion may actually be counterproductive, and instead of inhibiting and controlling deviant behaviour, it may generate or encourage it. Deviancy is then amplified again through the targeting and further exclusion of the marginalised offender and thus a cycle is created and sustained through the enactment of legal policies that focus upon the ex-offender.

The Convict Label

Labelling theory examines not just deviant behaviour but also social and political actions around the offender and how such actions may affect him. The essential labelling ideology may be summarised in two questions: why and how are people defined as deviants? And how does this impact upon the person's self-image? Labelling theorists argue that acts are not inherently deviant or unlawful in themselves but rather that deviancy is a man-made idea (Glick 1995). That is, that acts only become unlawful when they are so defined. Murder, for example, is not unalterably defined as unlawful once one person kills another. It may be legally sanctioned in instances of self-defence in times of war and in some countries as a state-authorised criminal penalty. Thus, it is the reaction of others to the act that so defines it as lawful or unlawful. Moreover, the definition of certain behaviour as criminal is often dependent upon the actor. Becker asserts the proposition that "deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an offender. The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label" (Becker 1963, p. 9; see also Tannenbaum 1951; Lemert 1951). Once the label is attached, it can generate an alteration of the individual's self-identity. He comes to recognise the definition of himself as a deviant and perceive himself to be different from others

where he may not have done so before.[10] Becker described this process as labelling, which encapsulates the profound effect on an individual of tagging them as a deviant. Secondary deviance occurs when the individual comes to accept the offender label, adopting the role assigned to him, associating with other deviants and engaging in the criminal behaviour that originally attracted the label (Becker 1963; Cressey 1962, in Rose). The label thus acts as a type of self-fulfilling prophecy. It must be noted that this internalisation of the deviant label is a subjective occurrence and that not all those who are tagged as offenders will behave the same in the aftermath. The effect of being so labelled will depend upon how the individual is treated by society and also how he deals with the consequences. This will depend largely upon the actor and the type of offence committed.

The criminal record is a legally sanctioned label, a 'yellow ticket' that can follow the individual around indefinitely.[11] Entering society with this label can have extremely negative consequences (see Maruna and Immarigeon 2004; Moore et al. 2015; Mingus and Burchfield 2012). Social perceptions of this individual categorise him as different and this perception can transfer to the person's image of themselves.[12] Engaging with family, friends, and society in general with the label of 'offender' amplifies the stigma associated with deviant behaviour and makes it more difficult to assimilate oneself into the membership role.[13] Any such perceptions are exacerbated if the individual has served time in prison. Managing stigma in the aftermath of imprisonment often becomes a primary concern for ex-offenders (Uggen et al. 2004 in Maruna and Immarigeon).

---

[10] See Bernburg, J.G., Krohn, M.D., Rivera, C.J. (2006) Official labelling, criminal embeddedness, and subsequent delinquency: A longitudinal test of labelling theory. *Journal of Research in Crime and Delinquency* 43(1), 67–88; Baur et al. (2018) Beyond banning the box: A conceptual model of the stigmatisation of ex-offenders in the workplace. *Human Resource Management Review* 28(2), 204–219.

[11] See also Uggen, C., and Blahnik, L. (2015) The increasing stickiness of public labels. In Shapland, J., Farrall, S., and Bottoms, A. (eds) *Global Perspectives on Desistance*. London: Routledge, pp. 222–243.

[12] It must be said that not all those who commit crimes will necessarily have a criminal self-image. Many may separate themselves from their past criminal behaviour and some may justify their behaviour (perhaps believing that it is not really criminal).

[13] Some argue that the stigmatic function of the imposition of a conviction is not entirely bad and serves a useful function in deterring many from offending (Vold et al. 2015).

The creations of laws that focus upon the ex-offender are becoming more and more popular and the stigmatic label manifests itself in techniques of surveillance and monitoring in the aftermath of formal punishment.[14] Targeting known offenders becomes a useful tool and creates a heightened sense of suspicion—he did it once he could do it again. An increasing number of offenders are subjected to laws which create obligations to sign-on at Garda stations, restrict movement, require post-release supervision, and permit the imposition of other conditions that monitor the ex-offender. Thus offenders are being released but remain within the control of criminal justice agencies by virtue of laws that perpetuate the criminal label. The permanency of this label may be felt far into the future.[15] As an accused on trial, or a witness in a case, an individual can be cross-examined on their past offences. Accessing the labour market is made more difficult and potential employers can discriminate against an individual simply for having a conviction regardless of the nature of or length of time since the conviction. The stigma connected with the deviant label may cause the individual to gravitate further towards nonconformity and lead them to reorientate their life around the label. Of course many ex-offenders may become motivated to change their lives. The problem is that the label may prove an insurmountable obstacle. Normal social activities become an exercise in legal control of the known deviant. Accessing employment, travel, insurance, and even licences becomes exacerbated by the requirement to disclose past convictions, resulting in significant barriers to and often exclusion from such activities. There is evidence in our system of a categorical labelling of those with a criminal record, particularly in the pronouncement of laws that generate and perpetuate the label. While the criminal label has always had a role to play in areas like evidence, policing, and sentencing, its significance is increasing and new techniques have brought it to a more prominent position in criminal justice policies.

[14] The outlets for and forms of such stigma are also evolving: Lageson, S. and Maruna, S. (2018) Digital degradation: Stigma management in the internet age. *Punishment and Society* 20(1), 113–133; Lageson, S.E. (2017) Crime data, the internet, and free speech: An evolving legal consciousness. *Law & Society Review* 51(1), 8–41.

[15] See Ipsa-Landa, S., and Loeffler, C.E. (2016) *Indefinite punishment and the criminal record: Stigma reports among expungement seekers in Illinois. Criminology* 54(3): 387–412.

Citizenship and Belonging

When we think of the word citizenship, a number of concepts come to mind: rights, privileges, and responsibilities. Generally speaking, the term citizenship evokes thoughts of participation, of belonging, and sometimes as a "status bestowed on those who are full members of a community" (Uggen et al. 2006, p. 296). Vaughan describes citizenship as emerging from identification amongst people, and that it is this bond that creates the components of citizenship (Vaughan 2000). Rights pertaining to individual freedom, political participation, and social rights such as education, health, and housing are inherent within the social contract, which as Young observes, is based on the notion of a citizenship, "not merely of formal rights but of substantive incorporation into society" (Young 1999a, p. 4; see also Marshall 1977). The relationship between citizenship and the ex-offender is a complicated one and it can be said that the status of the ex-offender in society is one of partial or incomplete citizenship (Jacobs 2015; Vaughan 2000). Incarceration carries with it a loss in rights and privileges, and a suspension of the rights of citizenship pertaining to ordinary law-abiding members of society (see Behan and O'Donnell 2008). Increasingly, it is apparent that there is no automatic restoration of rights on release from prison. Released offenders must deal with social and legal barriers to becoming fully reintegrated into society. Ex-offenders are often denied access to complete participation in the community and to the exercise of all the rights enjoyed by its members.

The concept of denying rights to ex-offenders is not a new one. In early Roman times, a conviction led to the dissolution of marriage, loss of all possessions, and deprivation of all rights. In ancient Athens, an ex-offender could not attend public assemblies, hold office, or serve in the army. 'Civil death' was the effect of a conviction in medieval times, resulting in the loss of the right to vote, inherit, or bequeath property and enter into contracts (Travis 2002, in Mauer and Chesney-Lind).[16] In the mid-

[16]Travis, J. (2002) "Invisible Punishment: An Instrument of Social Exclusion" in Mauer, M. and Chesney-Lind, M. *Invisible Punishment: The Collateral Consequences of Mass Imprisonment.* The New York Press, pp. 1–36, at p. 17.

nineteenth century in Ireland, all property owned was considered forfeited to the Crown upon a conviction under the Forfeiture (Ireland) Act 1870, and the convicts were also prohibited from entering into contracts or exercising other civil rights, such as voting. The 1870 Act was only fully repealed by the Criminal Law Act 1997. The permanency of criminal records remains however, and a diminished status still pertains to ex-offenders.[17]

The increased obsession with risk and security has witnessed a diminution of consideration for the rights of offenders and ex-offenders. The conviction record and applicable restrictions in the community can exclude ex-offenders from attaining the status of full membership after they have served their time. Certain categories of offenders can be excluded from welfare entitlements and access to housing (e.g. sex offenders). Civil exclusion comes in the form of restriction of the ability to serve on a jury. Other avenues of exclusion that are evident include access to employment, background checks, job restrictions and discrimination from employers, and repress opportunities for ex-offenders, which in turn is likely to hinder them from attaining full membership in a community (Uggen et al. 2006). Not all ex-offenders will be so disadvantaged. Some will have attained sufficient educational skills and social bonds, to enable them to rejoin society in the aftermath of a conviction. Nonetheless, many will be severely inhibited in accessing legitimate means of employment, not simply by their social and educational ineptitude but by the label of 'offender' that attaches to a conviction.

In many ways, it is apparent that citizenship has become a buzz word, a political tool used to signify membership and belonging in the state (Zedner 2010). For those with a criminal past, citizenship can be restricted, through the application of preemptive and exclusionary measures which signal that they are less worthy of membership than others. The prioritisation of security and safety has widened the divide between the 'them' and 'us' in society. As Garland has observed "[p]erhaps … we have become convinced that certain offenders, once they offend, are no longer 'members of the public' and cease to be deserving of the kinds of consideration we typically afford to each other" (Garland 2001, p. 181).

[17] The Law Reform Commission argue that the permanency of criminal records reflects the consequential views expressed in the 1870 Act (Law Reform Commission 2007, p. 8).

Civil penalties imposed as a consequence of a conviction further restrict the opportunity to perform the duties of citizenship. Rather than pertaining to some factual individualised risk potential, it is more the status of offender that prevents restoration of full citizenship rights and thus participation in the community (Uggen et al. 2006). Grouping ex-offenders under the one umbrella marked as 'suspicious', seems to accord with a social and political will to segregate them from mainstream society. The further removed they are from 'us' the easier it is to deny them rights in the name of safety. Despite the importance of public safety, it is not evident that an approach of permanent stigmatisation will ensure public protection better than an approach that emphasises reintegration (see Braithwaite 1989). A sense of belonging is a vital element of the rehabilitation process, and many ex-offenders may find themselves thus excluded from this process. The National Advisory Commission on Corrections in 1973 stated that "if Corrections is to reintegrate an offender into society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system."

Reintegration and Desistance

The image of the criminal in social, media, and political contexts is not a favourable one. There is a stark process of demonising many offenders which facilitates their social amputation. They are the other, to be feared and loathed and incapacitated in any attempts to become part of our society. The process of reintegration and rehabilitation is made more difficult by attitudes towards offenders. Yet, it is argued that this notion of the irredeemable criminal simply does not fit with empirical findings which suggest that most offenders will eventually desist from crime (Maruna 2001). Desistence, rather than referring to one particular incident, is better understood as a process that occurs over time.[18] It can be viewed as a movement from nonoffending behaviour "to the assumption

[18] Sampson and Laub distinguish between termination and desistence as follows: "[t]ermination is the time at which criminal activity stops. Desistance by contrast, is the causal process that supports the termination of offending" (Sampson and Laub 2001, p. 11).

of the role or identity of a 'changed person'" (Maruna et al. 2004 in Maruna and Immarigeon, p. 19). Desistance and reintegration, if they are to be understood as the same thing, are compelling notions that require attention. Is it really a case of once an offender always an offender? Can a person change his life, and if so, what are the influencing factors affecting this process? While proposing an analysis of why people desist from crime and what that means is beyond the scope of this book, what is relevant to consider is whether the processes of desistance may be unintentionally affected by the use of criminal records.

Research has found that most criminal careers are short-lived (Maruna 2001). The majority of crime tends to be committed by young people and adults in their early 20s (Smith 2007 in Maguire et al.) and, generally speaking, there is a steady decline in offending behaviour after the age of 25 (Gottfredson and Hirschi 1990; Soothill et al. 2002). As the dynamic processes of a person's life span evolve, their perspectives and attitudes change and offending trajectories are altered.[19] Forming ties to family and friends, employment, and other social bonds become important (Maruna 1999; Sampson and Laub 1993). Acquiring a 'stake in conformity' motivates young offenders to take responsibility for their lives and those of any dependants, making them significantly more likely to desist from crime.[20] A decision to desist is also an important element, however, in altering life trajectories (Maruna and Roy 2006). Maruna notes that "former offenders may need to make sense of their past lives of crime in specific ways" before desistance can be successful (Maruna 2004, p. 155). Qualitative studies of offenders and ex-offenders have pointed to the notion that changes to the 'self-identity' affects long-term desistance patterns (Farrall and Caverley 2006). Maruna et al. argue that "an additional

[19] It must be noted that there is no absolute formula for desisting with criminal conduct, and many factors including identity narratives, psychological characteristics, addiction problems, family ties, education, employment histories, and self-esteem can affect the reintegration process.

[20] This is not to suggest that all those who form a partnership or have children or get a job stop offending. Rather it may be that it is the quality of and attitude to the social bonds that motivate change (see Farrall and Bowling 1999). Moreover, individuals respond differently to social stimuli (Maruna 1999).

… aspect of maintaining successful desistance from crime might involve the negotiation of a reformed identity through a process of prosocial labeling" (Maruna et al. 2004, p. 279).

Overcoming the criminal label is not an easy task, however, even where there is a commitment to desist and develop a 'coherent prosocial identity' (Maruna 2001, p. 7; see also Burnett and Maruna 2006). Reintegration means more than just leaving prison and returning home. It means being connected to the community at a deeper social level, but the ex-offender status is one plagued by stigma and there are limitations placed upon citizenship and participation (Uggen et al. 2004 in Maruna and Immarigeon). Having a criminal record affects the individual's opportunity to succeed in many of the areas that are considered to be important to the desistance process. A criminal record can effectively restrict or inhibit access to employment, for example. Moreover, altering the perception that society has, and one's self-perception, is made more difficult when one has to flag their past record in many public access circuits. Incessantly having to reveal ones record in job applications, insurance applications, licence applications, in attempting to acquire a passport or other travel documents, can be very disheartening. The offender label is never removed and this can make it more difficult to project a positive self-image.

Furthermore, surveillance technologies that perpetuate the criminal stamp and the stigma associated could have the unintended consequence of interfering with the process of desistance and further separating the individual from forming the social bonds that promote rehabilitation. Notification laws are an acute example here insofar as they keep individuals within the system who might otherwise have disconnected from it. There is arguably a disadvantage in attempting to coerce compliance and conformity through control and risk-oriented strategies. There is a benefit in enabling and motivating change in behaviour through participation in activities that connect the individual with the community and enhance self-esteem (Maruna and LeBel 2003). Continued exertion of powers of stop, arrest, and detention by the police as a result of being 'known' may also negate rehabilitative efforts, at least to the extent that we accept the potential for police targeting of ex-offenders.

The perpetual nature of a criminal record is not a recent phenomenon and desistance can occur even though the record remains. Even so, we can still acknowledge as a possibility that the use of criminal records may inhibit ex-offenders from desisting at an earlier point in their lives or prevent some from reintegrating at all. It would certainly appear that as security and control become more demanding priorities of criminal justice policies, the criminal label may prove harder and harder to relinquish. Only time will tell how this will impact upon crime trajectories and desistance processes in the long run.

Legality, Rights, and Proportionality

Any consideration of laws that impact upon ex-offenders, must consider the body of legal rights ordinarily pertaining to individuals. The right to liberty, the right not to be punished without lawful cause, the presumption of innocence, the right to a fair trial, and the principle of proportionate punishment are just a few of the important rights protected by the Constitution and by international human rights (see Bacik 2001; Ashworth et al. 2012; Kilkelly 2009). In recent times, the preoccupation with controlling risks posed by dangerous persons has resulted in tension between public interest considerations and individual liberties, and greater prioritisation of security may be at the expense of adherence to important individual rights in our criminal justice system (Kilcommins and Vaughan 2008).

The law is not a body of neutral rules and principles but rather structural inequalities and disparities of power are woven into the foundations of the legal system (see Hunter et al. 1995). The criminal law can sometimes be a powerful tool for discriminatory targeting and social exclusion. In a society preoccupied with risks and safety, defending the rights of offenders and ex-offenders has become increasingly unpopular, and with liberty and security at opposing fields, punitive policies seek to redress the balance in favour of public security. Consideration of previous criminal convictions in order to deny bail illustrates the implementation of provisions that curtail liberty in the public interest. The criminal record becomes the vehicle of rights deprivation even if we accept that at times this may be necessary.

The principle of legality requires that law must be foreseeable and certain (see *King v Attorney General and DPP* [1981] I.R. 233; Shute 2002). Citizens should know what laws affect them and how to conduct themselves accordingly (O'Malley 2009). This concept dates back to the writings of Cesare Beccaria who expounded the ideals of certainty and finality in the imposition of punishment in his essay *On Crimes and Punishments* (Beccaria 1963). Thus, laws must be clearly defined and offenders should be able to foresee the degree to which they may be acceptably punished. Sentencing is an area which gives rise to questions concerning foreseeability of punishment, and for those with criminal records it is not always clear how their conviction may affect them in the future. How a criminal record will impact the de jure sentence and what collateral consequences may derive from the original sentence are not always clear or pre-established. Collateral consequences that affect re-entry are even less comprehensive. While the collateral consequences of a conviction may not be perceived as punishments, they flow from the imposition of a conviction, directly or indirectly, and they can impact profoundly upon the individual. Thus, at the very least we must recognise that infinite retention and use of criminal records, both within the justice system and beyond, potentially conflicts with the principles of finality and certainty in our system.

It may also conflict with our understanding of proportionality in the justice system. The principle of proportionality, a fundamental principle of sentencing dictates that just as it is wrong to find someone guilty on the basis of a crime they did not commit, or without lawful justification, so too is it wrong to punish the person in a manner that is excessive in terms of his culpability (see Ashworth 2005; Von Hirsch 1992; Headley 2004; Fish 2008). Punishment must be proportionate to the offence and the offender who committed it. This is a concept deeply rooted in notions of justice and fairness. The use of criminal records in sentencing is well known and will be discussed in subsequent chapters of this book. For now, what may be worth bearing in mind is that it is difficult to predict exactly how past convictions will impact upon the punishment given, partly due to an unstructured and inconsistent sentencing system. Furthermore, it is undetermined what impact the principle has or ought to have upon the ancillary penalties that are growing in terms of sentencing. A sentencing judge, in addition to a range of ordinary penalties, can

impose all of the following upon certain categories of offenders: notification orders, supervision orders, restriction orders, and monitoring orders. These orders affect the way the proportionality principle ordinarily works. Are such orders and ancillary requirements taken into consideration in meting out a penalty that is entirely proportionate? Only notification orders under the Sex Offenders Act 2001 have been challenged in the courts and the High Court has found such requirements to be nonpunitive in nature (*Enright v Ireland* [2003] 2 IR 321). Nonetheless, the Court did acknowledge that the requirements could be taken into account by a sentencing judge, thus recognising that there is a burden imposed upon offenders. It is difficult to follow the reasoning that an element of a sentence can be considered a burden on the offender and yet be classed as nonpunitive in nature (O'Malley 2016). Whether considered punishment or not, the burden imposed through such ancillary measures should at the very least be proportionate to the conviction and the objective of public safety.

The Perpetual Record

It can be difficult to relinquish that which makes us feel more secure. Holding onto the criminal record and keeping tabs on those who have offended in the past makes sense. Our security-minded interests dictate as such. There is nothing wrong with this per se. It is nonetheless incumbent upon us as a responsible society to consider the effect that this has upon the individual. When previous criminal record is taken into account, both within the formal system and beyond, the result is a blurring of the lines between criminal justice control and autonomous living free from the restraints of the system. There is little public opposition to laws that retain and utilise the criminal stamp, because society has to some extent been socialised to the idea that such an approach is needed. Appearing sympathetic to the needs or rights of these individuals is commonly denounced. They are the ones who have wronged society after all. The consequence of being an ex-offender in a world obsessed by security and risk is that one is perceived through a prism of perpetual suspicion. There is an immovable reluctance to afford such individuals a second

chance (King and Maruna 2009). Legal policies and social regulations actively promote the use of criminal records, often perpetuating the demonisation of the stereotypical repeat offender. This perception has a number of consequences. First, and most generally, it means that the stigma of the criminal label is more difficult to overcome and this can essentially alter the individual's life trajectory. As Maruna notes, once the criminal label is attached "the bogeyman stigma is likely to persist even when deviant behaviors do not" (Maruna 2001, p. 5). The result can be a loss of full citizenship status and exclusion from many avenues of normal social engagement. Furthermore, in recent times the consequences of having a criminal record are even more profound by virtue of deliberate control and risk-oriented strategies that derive from attaining a conviction. Ex-offenders are subjected to monitoring orders, supervision orders, restriction of movement orders, and notification orders, which ultimately perpetuate their existence in the criminal justice sphere. Such policies which retain possession of the individual, sometimes infinitely, fail to acknowledge that people grow out of crime. Moreover, there is a lack of balance in the approach to augmenting the significance of a criminal record. Advocating the need for measures like notification requirements and other community controls, through the rhetoric of public safety, is unsupported by empirical data. This is a major concern in the Irish system at present. Elsewhere, there is little to no evidence to suggest that post-release measures are effective in deterring people from reoffending. Instead, additional control increases the probability that technical infringements will lead to additional punishments and greater use of incarceration (Petersilia and Turner in Tonry 1993). Moreover, as later chapters will explore, there is not always an evidence-based policy to the approach taken in particular circumstances. It seems to be the status of 'offender' that impacts most upon decision making, rather than the relevance of or necessity for considering past convictions. Thus, there is no guarantee that its use is always proportionate or fair.

This author would argue that there must come a point when we acknowledge that an offender has paid his debt to society and permit him to move on with his life. Many individuals who want to 'make good' will find it extremely hard to do so on account of their criminal record and the legal policies that invoke its use. A lifelong criminal record is not a

proportionate response to the majority of offending behaviour (Law Reform Commission 2007). The subsequent chapters of this book will examine how a criminal record can follow an individual throughout his life, intersecting with key decision making in areas of the justice system and in normal everyday circuits of social life. The longevity of a criminal conviction reverberates beyond the courtroom or prison gates to areas of mundane social existence like travel and employment, coming back around to impact areas of pretrial and trial investigation such as bail and sentencing.

Bibliography

Agamben, G. (1995). *Homo Sacer: Sovereign Power and Bare Life* (D. Heller-Roazen, Trans.). Stanford: Stanford University Press.

Ashworth, A. (2005). *Sentencing and Criminal Justice* (4th ed.). Cambridge: Cambridge University Press.

Ashworth, A., Emmerson, B., & MacDonald, A. (2012). *Human Rights and Criminal Justice*. London: Sweet and Maxwell.

Bacik, I. (2001). Incorporation of the European Convention on Human Rights. *Irish Criminal Law Journal, 11*(1), 18–21.

Baur, J. E., Hall, A. V., Daniels, S. R., Buckley, M. R., & Anderson, H. J. (2018). Beyond Banning the Box: A Conceptual Model of the Stigmatization of Ex-Offenders in the Workplace. *Human Resources Management Review, 28*(2), 204–219.

Beccaria, C. (1963). *On Crimes and Punishments* (H. Paolucci, Trans.). Bobbs-Merrill Company.

Becker, H. (1963). *Outsiders: Studies in the Sociology of Deviance*. New York: The Free Press.

Behan, C., & O'Donnell, I. (2008). Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility. *The British Journal of Criminology, 48*, 319–336.

Bernburg, J. G., Krohn, M. D., & Rivera, C. J. (2006). Official Labelling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labelling Theory. *Journal of Research in Crime and Delinquency, 43*(1), 67–88.

Braithwaite, J. (1989). *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

Burnett, R., & Maruna, S. (2006). The Kindness of Prisoners: Strengths-Based Resettlement in Theory and in Action. *Criminology and Criminal Justice, 6*(1), 83–106.

Cressey, D. (1962). Role Theory, Differential Association and Compulsive Crimes. In A. M. Rose (Ed.), *Human Behaviour and Social Processes: An Interactionist Approach*. Boston: Houghton Mifflin.

Ellis, H. (1990). Disclosure and Good Faith in Insurance Contracts. *Irish Law Times, 8*, 45.

Ericson, R., & Haggerty, K. (1997). *Policing the Risk Society*. Toronto: University of Toronto Press.

Farrall, S., & Bowling, B. (1999). Structuration, Human Development and Desistance from Crime. *British Journal of Criminology, 39*(2), 253–268.

Farrall, S., & Caverley, A. (2006). *Understanding Desistance from Crime: Theoretical Directions in Resettlement and Rehabilitation*. Maidenhead: Open University Press.

Fish, M. J. (2008). An Eye for and Eye: Proportionality as a Moral Principle of Punishment. *Oxford Journal of Legal Studies, 28*(1), 57–71.

Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans.). London: Penguin Books.

Foucault, M. (1984). Right of Death and Power over Life. In P. Rabinow (Ed.), *The Foucault Reader*. England: Penguin Books.

Foucault, M. (1991). Governmentality. In G. Burchell, C. Gordon, & P. Miller (Eds.), *The Foucault Effect*. Chicago: The University of Chicago Press.

Garland, D. (1990). *Punishment and Modern Society: A Study in Social Theory*. Oxford: Clarendon Press.

Garland, D. (1996). The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society. *The British Journal of Criminology, 36*, 445–471.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Glick, L. B. (1995). *Criminology*. Boston: Allyn & Bacon.

Gottfredson, M., & Hirschi, T. (1990). *A General Theory of Crime*. Stanford: Stanford University Press.

Headley, J. (2004). Proportionality Between Crimes, Offences and Punishments. *St. Thomas Law Review, 17*, 247.

Hebenton, B., & Seddon, T. (2009). From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age. *The British Journal of Criminology, 49*(3), 343–362.

Hudson, B. (2003). *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2nd ed.). Buckingham: Open University Press.

Hunter, R., Ingleby, R., & Johnstone, R. (Eds.). (1995). *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*. St Leonards: Alan and Unwin.

Ipsa-Landa, S., & Loeffler, C. E. (2016). Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement Seekers in Illinois. *Criminology, 54*(3), 387–412.

Jacobs, J. B. (2015). *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.

Kilcommins, S. (2002). The Duty to Disclose Previous Criminal Convictions in Irish Insurance Law. *The Irish Jurist, 37*, 167–186.

Kilcommins, S., & Vaughan, B. (2008). *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland*. Devon: Willan Publishing.

Kilkelly, U. (2009). *ECHR and Irish Law* (2nd ed.). Briston: Jordans.

King, A., & Maruna, S. (2009). Once a Criminal, Always a Criminal?: 'Redeemability' and the Psychology of Punitive Public Attitudes. *European Journal of Crime Policy and Research, 15*, 7–24.

Lageson, S. E. (2017). Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness. *Law & Society Review, 51*(1), 8–41.

Lageson, S. E., & Maruna, S. (2018). Digital Degradation: Stigma Management in the Internet Age. *Punishment and Society, 20*(1), 113–133.

Law Reform Commission. (LRC 84-2007). *Report on Spent Convictions*. Dublin: Law Reform Commission.

Lemert, E. M. (1951). *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behavior*. New York: McGraw-Hill.

Levenson, J. S. (2016a). Community Control of Sex Offenders. In R. Laws & W. O'Donoghue (Eds.), *Treatment of Sex Offenders: Strengths and Weaknesses in Assessment and Intervention*. New York: Springer.

Marshall, T. H. (1977). *Class, Citizenship and Social Development*. London: University of Chicago Press.

Maruna, S. (1999). *Desistance and Development: The Psychosocial Process of 'Going Straight'*. Belfast: British Criminology Conference Queens University. Retrieved from http://www.britsoccrim.org/volume2/003.pdf.

Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association Books.

Maruna, S. (2004). Desistance from Crime and Explanatory Style: A New Direction in the Psychology of Reform. *Journal of Contemporary Criminal Justice, 20*(2), 184–200.

Maruna, S., & Immarigeon, R. (Eds.). (2004). *After Crime and Punishment: Pathways to Offender Reintegration*. Devon: Willan Publishing.

Maruna, S., & LeBel, T. P. (2003). Welcome Home? Examining the "Reentry Court" Concept from a Strengthsbased Perspective. *Western Criminology Review, 4*(2), 91–107.

Maruna, S., LeBel, T. P., Mitchell, N., & Naples, M. (2004). Pygmalion in the Reintegration Process: Desistance from Crime Through the Looking Glass. *Psychology, Crime and Law, 10*(3), 271–281.

Mingus, W., & Burchfield, K. B. (2012). From Prison to Integration: Applying Modified Labeling Theory to Sex Offenders. *Criminal Justice Studies, 25*(1), 97–109.

Moore, K., Stuewig, J., & Tangney, J. (2015). The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediational Model. *Deviant Behaviour, 37*(2), 196–218.

O'Malley, P. (2001). Risk, Crime and Prudentialism Re-visited. In K. Stenson & R. R. Sullivan (Eds.), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies*. Devon: Willan.

O'Malley, T. (2009). *The Criminal Process*. Dublin: Thomson Reuters, Round Hall.

O'Malley, T. (2016). *Sentencing Law and Practice* (3rd ed.). Dublin: Round Hall.

Petersilia, J., & Turner, S. (1993). Intensive Probation and Parole. In M. Tonry (Ed.), *Crime and Justice: An Annual Review of Research* (Vol. 19). Chicago: University of Chicago Press.

Pratt, J. (2017). Risk Control, Rights and Legitimacy in the Limited Liability State. *British Journal of Criminology, 57*(6), 1322–1339.

Rose, N. (2000). Government and Control. *British Journal of Criminology, 40*, 321–339.

Sampson, R., & Laub, J. (1993). *Crime in the Making: Pathways and Turning Points Through Life*. Cambridge: Harvard University Press.

Sampson, R., & Laub, J. (2001). Understanding Desistence from Crime. *Crime and Justice: A Review of Research, 28*, 1–70.

Shute, S. (2002). Appropriation and the Law of Theft. *Criminal Law Review*, 445–458.

Sibley, D. (1995). *Geographies of Exclusion*. London: Routledge.

Simon, J. (2007). *Governing Through Crime*. New York: Oxford University Press.
Smith, D. J. (2007). Crime and the Life Course. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.
Soothill, K., Francis, B., & Fligelsone, R. (2002). *Patterns of Offending Behaviour: A New Approach, Research Findings No. 171*. London: Home Office.
Tannenbaum, F. (1951). *Crime and the Community*. New York: Columbia University Press.
Travis, J. (2002). Invisible Punishment: An Instrument of Social Exclusion. In M. Mauer & M. Chesney-Lind (Eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: The New Press.
Trotter, C., McIvor, G., & McNeill, F. (Eds.). (2016). *Beyond the Risk Paradigm in Criminal Justice. Series: Beyond the Risk Paradigm*. Basingstoke: Palgrave Macmillan.
Uggen, C., & Blahnik, L. (2015). The Increasing Stickiness of Public Labels. In J. Shapland, S. Farrall, & A. Bottoms (Eds.), *Global Perspectives on Desistance*. London: Routledge.
Uggen, C., Manza, J., & Behrens, A. (2004). 'Less Than the Average Citizen': Stigma, Role Transition and the Civic Reintegration of Convicted Felons. In S. Maruna & R. Immarigeon (Eds.), *After Crime and Punishment: Pathways to Offender Reintegration*. Cullompton, Devon: Willan Publishing.
Uggen, C., Manza, J., & Thompson, M. (2006). Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders. *The Annals of the American Academy of Political and Social Science, 605*, 281–310.
Vaughan, B. (2000). Punishment and Conditional Citizenship. *Punishment and Society, 2*(1), 23–39.
Vaughan, B. (2002). The Potential Dangers of Risk Analysis for the Criminal Justice System. *Irish Criminal Law Journal, 12*(3), 3–7.
Vold, G., Bernard, T., Snipes, J., & Gerould, A. L. (2015). *Vold's Theoretical Criminology* (7th ed.). New York: Oxford University Press.
Von Hirsch, A. (1992). Proportionality in the Philosophy of Punishment. *Crime and Justice, 16*, 55–98.
Young, J. (1999a). *The Exclusive Society*. London: Sage Publications.
Young, J. (1999b). Cannibalism and Bulimia: Patterns of Social Control in Late Modernity. *Theoretical Criminology, 3*(4), 387–407.
Young, J. (2003). Merton with Energy, Katz with Structure: The Sociology of Vindictiveness and the Criminology of Transgression. *Theoretical Criminology, 7*(3), 389–414.
Zedner, L. (2010). Security, the State, and the Citizen: The Changing Architecture of Crime Control. *New Criminal Law Review, 13*, 379–403.

Part II

Criminal Record from Pretrial to Post Punishment

Pretrial

3

Policing the Criminal Record

Foucault observed that the perceived security threat posed by ex-convicts in the early 1800s led to a fervour of police surveillance, which at its core presupposed the setting up of "…a documentary system, the heart of which would be the location and identification of criminals".[1] A direct consequence of having a criminal record is that it can be used at every stage of law enforcement and criminal justice processes. It can be a significant determinant of how suspects, arrestees, and those on trial are treated and processed through the criminal justice system. Most governments across the world place deep emphasis upon the need for strong and efficient policing. Ensuring that the police have the tools, both legal and otherwise, to investigate crime and keep society safe ranks highly among crime policies in Ireland as it does elsewhere. In Ireland the National police force is known as An Garda Síochána, with its members referred to collectively as the Gardaí or individually as a Garda. A criminal record can be an extremely valuable tool for the Gardaí both in terms of generating suspects and providing a continuum for the penitentiary technique of

[1] Foucault, M. *Discipline and Punish: The Birth of the Prison*, Translated by Sheridan, A. (London: Penguin Books, 1977–1995, at p. 281).

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_3

surveillance and control. This chapter aims firstly to examine the scope of the powers exercisable by the Gardaí and to assess the role discretion plays in the exercise of these powers. It then examines the extent to which discretion facilitates consideration of prior convictions and the scope for targeting of 'known' persons. It must be noted that the lack of empirical data in Ireland makes it difficult to definitively say when past record is invoked and what the implications of this are for the ex-offender. Thus, the emphasis throughout this chapter will be upon documenting how and when past convictions are utilised by the Gardaí and assessing the scope for targeting practices. Due to the existence of criminal record databases, it is unsurprising and usually practical that suspects are drawn from the 'known criminal population'. Previous criminal history can be a very valuable and effective tool for the Gardaí in investigating crime. While it is not the intention of this author to argue that this is a bad thing—in fact its use is often warranted, even desirable—it would be naive not to point out that there is potential for overuse and perhaps even abuse of this information. At present, there is little formal limit or regulation on how and when the Gardaí employ a past conviction. Thus, an ex-offender long since disengaged from the system could find himself continuously and perhaps unfairly subject to interrogation on the basis of his past offence. This holds implications for individual rights such as liberty, privacy, and proportionality. The need for a balanced approach is important and the author aims to explore both issues pertaining to public interest considerations and rights of the individual throughout the chapter.

The Gardaí play an important role in the criminal justice system. Essentially their function is to detect and investigate crime, to protect life and property, and to prevent crime. The initial police process impacts on all subsequent criminal proceedings. The issue of who faces trial is very much a product of (among other factors[2]) police discretion. Who and what a suspect is, the decision of whether to simply stop and search, or arrest, interrogate, or ultimately to charge an individual, is all a matter of police discretion. Who enters the system and why, or more controversially, who is 'targeted' for the purpose of asserting authority and imple-

[2] Another important factor is whether the Director of Public Prosecutions (DPP) decides to prosecute.

menting crime control policies is based on a construct of police rules and police principles. It is in the context of police discretion that past record becomes an important factor. In the areas of stop and search, arrest, and prosecution, criminal record information can be invaluable and has the potential to yield efficient and effective results. This chapter seeks to document the use of this information by the Gardaí exercising their powers under law in the areas mentioned above. It is through such powers that discretionary consideration of criminal history information becomes important. It must be acknowledged at the outset that empirical research and documentation into this particular area is palpably lacking in Ireland, and thus, any arguments made emphasise the likely and potential nature of its use and effects, rather than the actual nature of the power. In attempting to explain its relevance, the author will draw from international research as well as evidence of targeting practices already acknowledged within this jurisdiction. The exercise of police powers is not a neutral, unbiased process and we can be certain that criminal records become a useful if not always fair factor in this process.

Part of the issue in discussing the impact of prior record on the police process is the relative obscurity surrounding the exercise of police powers. Given that the Gardaí form the frontline when it comes to maintaining social order and enhancing security and regulation, it is surprising that comparatively little is known or documented about how Garda use information or reach decisions with regard to powers exercisable under the law. The lack of visibility into decision-making by the Gardaí is regrettable given that it not only prevents concrete conclusions being drawn as to the nature and scope of Garda powers but also prevents regulation over the exercise of these powers in order to safeguard individual rights.[3] From the perspective of the ex-offender, the police process is a vital element to examine, as it is the first point of contact with the criminal justice process. This contact can have many implications for those stopped and processed as part of this initial step in the system, and in the context of the ex-offender, there are many questions that may be asked. Are ex-offenders a targeted group for policing? Is this targeting unfair?

[3] One must of course acknowledge Garda accountability (Garda Siochana Act 2005) and the important function of the Garda Siochana Ombudsman Commission. One must also acknowledge the role of the courts in safeguarding the rights of the suspect or detainee.

Are they subjected to unfair attention purely because of their past record? If so, how does this affect their rights? Does increased control and surveillance affect their opportunity to become properly integrated into mainstream society? Does the use of past record information by the Gardaí create or perpetuate the offender label and enhance the stigma associated with this label? Furthermore, it is important to acknowledge that the initial police process impacts upon all subsequent criminal processes. Charging and prosecuting an individual is directly dependent upon the preliminary police investigations, and thus upon police constructs of the accused and possible subjective decisions made in his regard. Everything that follows in terms of prosecution, conviction, and sentence is directly or indirectly affected by the initial decisions made by the Gardaí. Thus, it is vital to examine this decision-making process and the factors that affect it.

It is important that a proper measure of balance be struck here. On the one hand, access to and use of criminal records by the Gardaí is frequently desirable for the practice of efficient and effective policing. On the other hand, it is also desirable that the ex-offender be permitted to move on with his life and not be subjected to continuous policing by virtue of his past convictions. Individual rights of liberty, privacy, and presumption of innocence must be safeguarded as far as practicable. Although this issue of balance will be discussed at a further point in the course of this chapter, it is necessary to point out that it cannot be definitively ascertained whether a proper balance is being maintained in the approach in this area at present, given the lack of research into Garda decision-making in Ireland.

Criminal Record Databases

Assessing the true impact of a criminal record upon policing is an arduous task, given that at present there is no consolidated statistic as to how many people in Ireland have a criminal record. What we do have is an extensive criminal records database, informed by the number of persons

convicted and incarcerated in prison each year.[4] The criminal records of those convicted of a criminal offence and details of their convictions are kept in the Dublin Criminal Records Office.[5] Access to these records has been greatly improved by the new information technology system PULSE. The Garda PULSE[6] information system is the primary IT application in An Garda Síochána. Its use is extended to logging complaints by victims, recording crimes committed, and storing information on the offenders, particularly resulting convictions. Access to criminal records through the PULSE system plays an important role in the marking and tracing of all those who have been convicted of a crime. It may also play a very significant role in generating suspects.[7]

Monitoring the release of offenders into society as well as providing harsher sentences for subsequent offences committed are practices in operation today and whether viewed as punitive or a means of controlling and managing risk, the value of such practices is increasing in today's crime-conscious world. Today, however, monitoring and controlling the ex-offender is made easier through the electronic codification of offender history and the PULSE system will go a long way towards increasing the use of the criminal record data post-conviction.[8] Up until 1972, there were two main criminal record offices: the Dublin Criminal Registry

[4] See the Irish Prison Service Annual Reports available at www.irishprisons.ie.

[5] A centralised system for accessing criminal records nationally was established by the Probation Service, in their Head office in Athlumney House, Navan, where contact between the Probation Service and the Garda Vetting Unit is co-ordinated. The Probation Service have reported that this system has been very effective and efficient and has meant greater communication between services. The Probation Press, Vol. 3 (1), August 2009.

[6] PULSE stands for Police Using Leading Systems Effectively. PULSE provides two-way access to central records at all Garda stations in Dublin and all divisional and district headquarters throughout the country. It plays an important part in facilitating police intelligence on crime and criminals.

[7] It is said that the main objectives of criminal record information are the "identification of suspects, aiding criminal investigations … determining how strict to apply a sentence in a criminal trial and clarifying and evaluating a person's suitability for particular employments." Joint Committee on Justice, Equality, Defence and Women's Rights, 7 May 2008.

[8] Garland believes that in the era of new technology the detailed gathering of crime data has given rise to a new generation of 'smart' crime control. Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society.* Oxford: Oxford University Press, at p. 189.

(1865–2004) and the Criminal Records Office, Dublin Castle (1800s–1973). In 1972, following internal Garda review, these two offices were amalgamated into one which is now known as the Garda Criminal Records Offices (GCRO).

In recent years, there have been calls for additional Garda Intelligence by way of an EU-wide database to monitor criminals. Certain crimes committed by foreigners, for example, the rape and murder of Sharon Coughlan, have raised outcries as to why those with past convictions are allowed into Ireland. Sharon Coughlan's killer, David Brozovsky, had 25 prior convictions in his home country, the Czech Republic, and two prior convictions in Belgium, leading to calls for an EU-wide database to allow the Gardaí to check the criminal records of those entering the country.[9] As it stands, the Gardaí investigating a crime can access the criminal record of foreign nationals either bilaterally with the other country through the EU Mutual Assistance Agreement,[10] through the Europol[11] if it involves organised crime, and through Interpol.[12]

There are plans for Ireland to join the Schengen Information System (SIS) which will link the Garda Computer system with other EU Member States and allow them to access crime records of foreign nationals (Kelpie 2018). SIS is a large-scale information system that supports external border control and law enforcement cooperation in the Schengen States, enabling authorities such as police and border guards, to enter and consult alerts on certain categories of wanted or missing persons and objects.[13] An enhanced system, SIS II, entered into operation on 9 April 2013 and has been implemented in all EU Member States, apart from Cyprus,

[9] See O'Keefe, C. (2008, January 23) We need EU-wide Database to Monitor Criminals. *Irish Examiner*; Editorial (2008, January 23) Coughlan Murder—Why was this Criminal in Ireland? *Irish Examiner*.

[10] By virtue of the Criminal Justice (Mutual Assistance) Act 2008, any country may make a request to Ireland for legal assistance in criminal investigations or criminal proceedings.

[11] Europol is a European security architecture which supports member states in dealing with terrorism, cybercrime, and other serious organised crime.

[12] Interpol is the world's largest international police organisation, facilitating police cooperation amongst its members. In order to achieve its objectives of enhancing safety worldwide, Interpol provides targeted training, expert investigative support, data sharing, and secure communication across states.

[13] A SIS alert not only contains information about a particular person or object but also clear instructions on what to do when the person or object has been found.

Croatia, and Ireland. Ireland is currently carrying out preparatory activities to integrate into the SIS II, which would allow it access to the database for the purpose of law enforcement cooperation. This will enable the 'flagging' of certain criminals who pose a particular threat.

In 2012, the European criminal records information system (ECRIS) was created in response to a perceived gap in the information sharing amongst EU member states. ECRIS facilitated and standardised the exchange of information on criminal records throughout the EU. The sharing of such data electronically means the Irish authorities will receive information on the convictions of Irish citizens received in other states, and of the convictions of citizens of other states living in Ireland.[14] ECRIS will be discussed in greater detail later in this book.

Once in the country, the control and monitoring of foreign nationals is also called for. Currently the Garda National Immigration Bureau (GNIB) is responsible for the control of immigrants entering the State, their control while in the State, and the removal of non-nationals.[15] New laws are being sought, on a regular basis, to allow the Gardaí to trace the movement of foreign nationals with criminal records. Under any such law, the Gardaí should be able to document those with criminal records at a very early stage, should compel them to sign on the sex-offenders register if that applies and be able to share information in order to keep a close eye on their movements. This would widen the net of control of 'known' offenders to other nationalities.

It is also important to observe that the function of the Gardaí in vetting job applicants is improved by the availability of electronically codified information on criminal records. The criminal record is used by the Garda Vetting Unit to screen applicants applying for posts involving

[14] Gardaí can at present access this information under the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, but must actively search for it. Under the ECRIS, member states are obliged to transmit such information, and equally obliged to store information received (EU Council framework decision, Article 4 and Article 5). The instigation for the establishment of this system was the increasing number of criminal convictions being received outside the member state of nationality (Joint Committee on Justice, Equality, Defence and Women's Rights, 7 May 2008).

[15] Under article 5(2) of the Aliens Order 1946 (S.I. No. 395) a non-EEA national may be refused entry for, among other reasons, having a criminal record.

unsupervised access to children and vulnerable adults (see Chaps. 7 and 8 for more information).

The general public do not have access to the criminal record of an individual in this jurisdiction. In some other countries, the US, for example, databases permit any member of the public to search criminal records online, so anyone can know who has a record, for what, and where they now reside.[16] An individual can however apply for information, including on criminal record, which the authorities may have on themselves. It has been acknowledged that due to the highly sensitive nature of the records contained in the Criminal Records Database, and how profoundly such information can affect a person's character, the greatest of care must be taken with respect to the accuracy of such records and the processing of this information. The processing of personal data relating to criminal convictions and offences is now provided for under the Data Protection Act 2018, which is discussed later in this book.

Identity Databases

Various legislations in Ireland make provision for the obtaining of photographs, fingerprints, palm prints, and other samples from suspects following on from a lawful arrest. Storing and retention of these are quite restrictive and indefinite retention of such data is normally only permitted once the person has been tried and convicted before a court of law.[17] Thus, apart from the record of the conviction, the Gardaí also have access to this other data if they are investigating the individual again. This is hardly a controversial issue, and in this age of securitisation, seems a sound insurance policy for those working in the field. It still attests, however, to the permanency of the record, both symbolically and in physical form through the retention of things like fingerprint evidence.

[16] See for e.g. www.govtregistry.com; www.criminal-check.com.

[17] A practice of seeking voluntary consent of detained persons had also emerged in Ireland. While administratively convenient for the Gardaí, the problem is that the use and retention of such data would then fall outside the protection of the relevant legal provisions in operation. See also DPP v Boyce [2008] IESC 62.

What has been more controversial is the move towards establishing a DNA database in Ireland similar to those existing elsewhere. A DNA database is a repository of DNA profiles that essentially permits the linking of suspect to crime scenes. Such DNA profiling is not limited to identified suspects (as it is at present) but permits generation of suspects by identifying matches for the material left at a scene electronically from the profiles on the database.[18] Pursuant to a report by the Law Reform Commission,[19] the government published the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2010, which proposed to establish such a database in this jurisdiction. The proposed initiative was intended to equip the Gardaí with "access to intelligence on a scale and of a quality that has never been available in this country."[20] The Bill originally proposed to retain 'suspect profiles' indefinitely, but was altered in light of the ECtHR decision in the case of *R(S) and Marper v The United Kingdom*, to the effect that such indefinite retention (in the UK) was "disproportionate in a democratic society."[21]

In 2014, the Criminal Justice (Forensic Evidence and DNA Database System) Act came into force, and in addition to replacing the existing statutory and common law arrangements governing the taking of samples for forensic testing as evidence, it provides for the establishment of a DNA database for use by the Garda Síochána as an intelligence source for criminal investigations (in addition to finding missing persons and identify unknown persons). It also significantly implements the Prum Council Decision providing for the exchange of DNA and fingerprint evidence as

[18] See Heffernan, L. (2008) A DNA Database. *Irish Criminal Law Journal* 18(4), 105–111.

[19] See the Law Reform Commission, LRC 78-2005, *Report on the Establishment of a DNA Database* (Dublin: Law Reform Commission, 2005), preceded by a Consultation Paper: Law Reform Commission, LRC CP 29-2004, *Consultation Paper on the Establishment of a DNA Database* (Dublin: Law Reform Commission, 2004).

[20] Then Minister for Justice, Mr Dermot Ahern, Dáil Debates, 2 February 2010.

[21] *R(S) and Marper v The United Kingdom*—30562/04 [2008] E.C.H.R. 1581 (4 December 2008). For an in-depth analysis of this case and its implications see Heffernan, L. (2009). The Retention of DNA and Fingerprint Data. In Bacik, I. and Heffernan, L. (eds.) *Criminal Law and Procedure: Current Issues and Emerging Trends.* Dublin: First Law, at pp. 163–173. See also Johnson, H. (2015) Data retention—scope of police powers: R (on the application of Catt) v Commissioner of Police of the Metropolis and Anor and R (on the application of T) v Commissioner of Police of the Metropolis [2015] UKSC 9" *Communications Law*, 20(2), 56–59.

part of increased cross-border cooperation among member States.[22] The management and operation of the DNA Database is entrusted to Forensic Science Ireland.[23] The Act permits profiles to be developed from samples taken from most suspects (other than children under 14 years and protected persons) detained by the Gardaí in connection with serious offences (offences subject to a sentence of 5 years or more), registered sex offenders, prisoners, and some former offenders who are no longer subject to sentence. Once the profile is created, the sample is to be destroyed within six months. In the case of persons proceeded against or are not convicted, the Act includes a presumption in favour of the removal from the database of the DNA profiles of such persons, subject to the Garda Commissioner having the power to authorise retention on the database where he is satisfied that this is necessary.[24] In accordance with recommendations received prior to the enactment of the provisions, the Act provides that the management and operation of the database is to be subject to independent oversight by a statutory committee for the purpose of ensuring its integrity and security.[25]

While a DNA database may be viewed positively as an investigative tool in the criminal process, there are lingering concerns with regard to privacy rights and the presumption of innocence. The Irish Council for Civil Liberties (ICCL) has observed that "there is an entirely legitimate public interest in the creation of a DNA database that makes it easier to catch criminals; however, the sampling, retention and sharing of DNA requires special safeguards to ensure that the private lives of innocent people are protected."[26] It is crucial that the right balance be struck between tackling crime and protecting fundamental human rights.

[22] Council Decision 2008/615/JHA and Implementing Council Decision 2008/616/JHA.

[23] Section 60 provides that the database system may only be used for the investigation and prosecution of criminal offences, in order to address concerns that the Database might be accessed by third parties or be made the subject of discovery orders in non-criminal matters. A further safeguard is that disclosure of information relating to biological samples or information on the database is a criminal offence triable summarily or on indictment.

[24] The retention periods allowed are 6 years in the case of adults and 3 years in the case of children.

[25] Oversight Committee is to be chaired by a former judge of the Circuit Court and include a representative of the Data Protection Commissioner.

[26] Mark Kelly from the ICCL (2010, January 19) Rights watchdog to scrutinise privacy safeguards in DNA Database Bill. *Irish Council for Civil Liberties Press Release*.

Gathering intelligence, DNA or otherwise, is essential to the Gardaí in order to perform the function of crime control in recent times. But for the ex-offender, this means he/she is often kept on permanent suspect status and within the control of the police and the criminal justice system in general. Although it is too early to predict the actual nature and effect of a DNA database in Ireland, it is likely, at least to some extent, to enhance the divide between the them (known offenders) and us (rest of society) mantra pervading modern social consciousness.

Police Powers and the Discretionary Role of Criminal Record

Stop and Search

Stop and search is an important and routine part of police work. Brogden believes that it is a "critical gatekeeping part of the criminal process."[27] It is often the process through which crimes are discovered that otherwise might have gone undetected. It is considered important in the detection of crime and the proper functioning of their duties that the police are able to investigate if their suspicions are substantiated. In the case of *Glasbrook Brothers Ltd. v Glamorgan County Council*,[28] Viscount Cave L.C. mentioned an "absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, and for protecting property from criminal injury."[29] Such proactive policing is important in the detection and processing of many types of crimes, ranging from public order and road traffic offences to offences of drug possession.

In Ireland, the power to stop and search developed under common law and is usually exercisable on the basis of general or reasonable suspicion. This was confirmed by the Supreme Court in the case of *DPP (Stratford)*

[27] Brogden, M. (1994) "Gatekeeping and the Seamless Web of the Criminal Justice Process" In McConville, M. and Bridges, L. (eds.) *Criminal Justice in Crisis* (London: Edward Elgar, at p. 153).

[28] *Glasbrook Brothers Ltd. v Glamorgan County Council* [1925] A.C. 270.

[29] *Glasbrook Brothers Ltd. v Glamorgan County Council* [1925] A.C. 270, at p. 277.

v Fagan.[30] The Court accepted that in order to adequately detect and deal with crime there exists a common law power to stop and search and that furthermore this power may take place under the premise of general suspicion.[31] Moreover, it seems that when it comes to conducting stops, the Gardaí are entitled to approach anyone and speak informally with them. No particular suspicion need be present to justify a stop, and this will not preclude the Garda from making a valid arrest if it comes to light that an arrestable offence has been or is being committed.[32]

In modern times the power to stop and search has been conferred under various statutory provisions. For example, a statutory power to stop is exercisable under the Road Traffic Acts, and this power is not necessarily dependent upon the existence of 'suspicion.' So section 109(1) of the Road Traffic Act 1961, as amended by the schedule to the Road Traffic Act 1968, provides that "[a] person driving a vehicle in a public place shall stop the vehicle on being so required by a member of the Garda Síochána and shall keep it stationary for such period as is reasonably necessary…"[33] Furthermore, section 4 of the Road Traffic Act 2006 permits Gardaí to set up checkpoints for breath testing to detect drink-driving upon the authorisation of an Inspector or Garda of higher rank.[34] Another example of statutory provision for the power of stop and search is in relation to offences of drug misuse, possession of offensive weapons and other related crimes. Section 23 of the Misuse of Drugs Act 1977, as amended by section 12 of the Misuse of Drugs Act 1984, expressly permits a person to be searched by a member of the Garda Síochána who with 'reasonable cause suspects' that the person is in possession of a con-

[30] *DPP (Stratford) v Fagan* [1993] 2 I.R. 95.

[31] In the case the Court accepted that a garda would be able to stop a motorist on the basis of a general suspicion that drink-driving laws are being breached by the driver.

[32] *DPP v Cowman* [1993] 1 I.R. 335.

[33] It was confirmed in *DPP (Stratford) v Fagan* [1993] 2 I.R. 95, that the Gardaí could stop the driver under the section even though no reasonable suspicion existed for doing so.

[34] The court in *DPP (Goodman) v Weir* [2008] I.E.S.C. 268 (per O'Neill J.) considered this to be a departure from the norm, since it authorises the Gardaí to carry out random checks without having to form an opinion about the driver or vehicle and to arrest and detain the individual for breath-testing purposes. Proof of written authorisation is essential for a prosecution under the section, to ensure that the evidence was obtained in accordance with law.

trolled drug in contravention of the Act.[35] Furthermore, the person may be asked to accompany the Garda to the station for the purpose of effecting a search (section 1A), and failure to comply may lead to arrest (section 1C).[36] The constitutionality of the section was upheld by the Supreme Court in *O'Callaghan v Ireland*,[37] who relied upon and approved Kenny J's statement in the case of *Ryan v AG*[38] to the effect that the personal rights of the individual may be reconciled in legislation with the claims of the common good. Significantly, however, the Court stressed the need to safeguard the rights of the individual and the need to ensure a balance in the approach of the Gardaí. The Court said that "[i]f any member of the Garda Síochána should in purported exercise of the powers conferred on him by s.23 of the … Act … expose any person to unnecessary harassment, distress or embarrassment, it would be an abuse of the powers and an unconstitutional violation of that persons rights, for which that person would have the appropriate and correct remedies."[39] This is quite a strong statement to the effect of enunciating the judicial role in protecting individuals from abuse of power exercisable through discretion.

Judicial statements to this effect can also be found elsewhere. In *Fagan*, O'Flaherty J felt that "the power to stop must be exercised (like all powers) not in a capricious manner but in a constant fashion."[40] Moreover, the suspect must be informed of the nature and description of the statutory power that is being invoked. This principle, established in the case of

[35] The person and/or his vehicle or vessel may be searched, and examination and seizure of anything found (which appears to the Garda to be something required as evidence) is also permitted.

[36] Section 21 (4) further provides that it is an offence to impede or obstruct a member of the Gardaí or other authorised person in the lawful exercise of a power under the Act.

[37] *O'Callaghan v Ireland* [1994] 1 I.R. 555. The challenge was made on the basis of Articles 40.3 and 40.4.1 of the Irish Constitution.

[38] *Ryan v Attorney General* [1965] I.R. 294, at p. 312.

[39] *O'Callaghan v Ireland* [1994] 1 I.R. 555, at p. 563. O'Malley argues that there are difficulties/ambiguities remaining with this statement (i.e. convincing the court that the individual has been harassed, identifying when this has happened to an unnecessary degree and what the appropriate remedies actually are). See O'Malley, T. (2009). *The Criminal Process.* Dublin: Thomson Reuters, Round Hall, at pp. 347–348.

[40] *DPP (Stratford) v Fagan* [1993] 2 I.R. 95, per O'Flaherty J.

DPP v Rooney,[41] was endorsed in *Farrelly v Devally*[42] and *DPP v O'Donnell*.[43] In *DPP v O'Donnell* the Court of Criminal Appeal determined that "a search is unlawful unless it can be justified under powers vested by law in the person exercising the power of search, and the person to be searched is informed of the legal basis relied on as justifying the search before it takes place."[44] In the case, the search was carried out under section 30 of the Offences Against the State Act 1939,[45] but the Court held that the requirement to inform only applied if the search was involuntary.

The essence of the power to stop and search is that it forms the earliest point of contact between police and suspect (or potential suspect). The power is exercisable generally under common law and furthermore exists under specific statutory provisions. The general requirement for the lawful exercise of this power is that of reasonable suspicion, but some statutory provisions (notably Road Traffic legislation) permit the Gardaí to exercise power to stop in the absence of such a requirement. The significance of reasonable suspicion lies in the level of discretion pertaining to the Garda making the stop and/or search.

The Power of Arrest

Stop and search is an important aspect of proactive policing. Arrests on the other hand are often made during or following investigation of a reported crime (reactive policing), and are made to facilitate investigation, bringing, as Sanders and Young observe "the formal rules into line with a crime-control reality."[46] Arrest is a particularly important proce-

[41] *DPP v Rooney* [1992] 2 I.R. 7. In the case, O' Hanlon extended this principle which pertained to the power of arrest (*Christie v Leachinsky* [1947] A.C. 573) to the power of search under the Police Act 1842.

[42] *Farrelly v Devally* [1998] 4 I.R. 76.

[43] *DPP v O'Donnell* [1995] 3 I.R. 551.

[44] *DPP v O'Donnell* [1995] 3 I.R. 551, at p. 556.

[45] Section 30 permits a Garda to stop, search, interrogate, and arrest any person whom he suspects of having committed or being about to commit an offence under that Act or a scheduled offence.

[46] Sanders, A. and Young, R. (2007) "From Suspect to Trial" In Maguire, M., Morgan, R., and Reiner, R. (eds.) *The Oxford Handbook of Criminology*, 4th ed. (Oxford: Oxford University Press, at p. 956).

dure in the criminal process. It shapes the future course of investigation as well as the other processes in the system. Who is arrested and charged and why, what types of offences are dealt with, and what types are disregarded are matters that shape the overall picture of crime in our society and are taken as indicators of how efficiently and effectively the Gardaí, and the justice system in general, deal with crime.

Arrest has been defined by Hederman J in the case of *DPP v McCreesh* as consisting of or involving "the seizure or touching of a person's body accompanied by some form of words which indicate to that person that he is under restraint."[47] Restraining an individual is clearly in contravention of their right to liberty under the Irish constitution[48] and international human rights law,[49] and thus strict legal justification is required before an arrest can be considered valid. Showing probable cause is a vital prerequisite to an arrest. A person should always be informed of the reason for the arrest and failure to do so, or communicating a false reason, will result in the arrest being unlawful.[50] Sometimes the circumstances of the arrest will supply the reason and this is considered to be sufficient in terms of communication.[51] It has been determined that the person does not have to be informed of the reason for his arrest in technical language, and that it is sufficient for him to know in substance why he is being arrested.[52]

The law on arrest has undergone considerable reform in the last two decades. At common law, arrest was a means of ensuring the attendance of the individual at court. It was not permitted "for the purpose of inter-

[47] *DPP v McCreesh* [1992] 2 I.R. 239, at p. 250. Physical apprehension is insufficient unless accompanied by words indicating to the person that he is under restraint: *People (DPP) v McCormack* [1999] 4 I.R. 158.

[48] Bunreacht Na hÉireann, Article 40.4.1.

[49] The European Convention on Human Rights, Article 5 (1).

[50] It was established in the case of *Christie v Leachinsky* [1947] A.C. 573 that a person must be informed of the reason for which he is being arrested, and this has been consistently adopted by the Irish Courts (*Re O'Laighleis* [1960] I.R. 93). The duty to communicate the reason for the arrest is to ensure that the person is "aware of his rights and may have regard to his rights in order to use then as speedily as possible to regain his liberty." *People (DPP) v Towson* [1978] I.L.R.M. 122, at p. 124.

[51] In *DPP v Mooney* [1992] 1 I.R. 548, the accused had blown into the breathalyser and the results were positive. Thus the reason for the arrest was obvious.

[52] *People (DPP) v McCormack* [1999] 4 I.R.158.

rogation or the securing of evidence from that person."[53] The power to arrest without a warrant under common law was limited to where the officer had reasonable suspicion that a felony had been committed. Such a power did not exist in relation to a misdemeanour. Statutory power of arrest also existed under some statutes.[54] Furthermore, the power to detain a suspect for questioning upon a lawful arrest was not common place under statute.[55] An individual could be questioned in a station but this was voluntary, and it was imperative that he knew he could leave at any time.

The general circumstances whereby an individual can be arrested without a warrant are now governed by the Criminal Law Act 1997.[56] This Act abolished the distinction between felony and misdemeanour, and created the new distinction between arrestable and non-arrestable offence. An 'arrestable offence,' is defined as an offence which may be punished by imprisonment for a term of five years or more and includes an attempt to commit such an offence.[57] The power of arrest in relation to such offences is provided for under section 4 of the Act.[58] Section 6 of this Act provides for the power to enter any premises with or without a warrant in order to effect an arrest if the person is, or is reasonably suspected to be, on the premises. Without a warrant, however, the premises, if it is a dwelling, may not be entered without the consent of the occupier unless one of a

[53] Per Walsh, J. in *People v Shaw* [1982] I.R. 1 at p. 29.

[54] For example, The Misuse of Drugs Act 1977, section 25, and the Offences Against the Person Act (OASA), 1939, section 30.

[55] A limited power to detain existed under the OASA 1939. Detention for further questioning or investigation was not recognised under common law: *Dunne v Clinton* [1930] I.R. 366 (HC).

[56] This Act does not affect the common law power to arrest for breach of the peace: section 4(6) provides that the arrest powers conferred by that section shall not prejudice any power of arrest otherwise conferred by law.

[57] The Criminal Law Act 1997 section 2 (1). This section has been amended by section 8 of the Criminal Justice Act 2006 to bring common law offences carrying a term of imprisonment of five years or more for which there is no statutory penalty within the definition of 'arrestable offences.'

[58] Other statutory powers of arrest include under the Road Traffic Act 1961, sections 49–50 (drunken driving); the Criminal Justice (Public Order) Act 1994, section 24 (supplements the common law power to arrest for breach of the peace); the Criminal Justice (Sexual Offences) Act 1993, section 13.

number of conditions listed under section 6 (2) are fulfilled.[59] O'Malley observes that the extension of the power to arrest under the 1997 Act, and under other more specific statutory provisions, represents a significant transfer of power to the police, given that warrantless arrests are effected without prior judicial authorisation (O'Malley 2009).

Many statutes authorise the Gardaí to arrest without warrant for specific purposes. For example, the Road Traffic Acts permit a member of the Gardaí to arrest a person whom he suspects with reasonable cause to be committing a specified offence. Any arrest made under such a provision must be strict for the prescribed statutory purpose and subsequent detention should last no longer than is reasonably permitted in the circumstances.[60] The power to arrest without warrant also exists under section 30 of the Offences Against the State Act 1939. This section provides that any member of the Gardaí can stop, search, interrogate, and arrest any person he suspects of being involved in the commission of a relevant offence.[61] The basis of the arrest is that the arresting Garda holds a 'suspicion' at the time of the arrest, and this suspicion must be honestly and reasonably held. The existence and authenticity of the requisite suspicion may be subject to judicial check. In the case of *People (DPP) v Quilligan*, Walsh J stated that "[t]he 'suspicion' of a member of the Gardaí in relation to section 30 [of the Offences Against the State Act 1939] is not beyond judicial review as is clearly established by the decision of this Court in *State (Timbole) v Governor of Mountjoy Prison*."[62] Evidence of the requisite suspicion may be inferred from the circumstances of the arrest, but such is dependent upon the existence of credible grounds.

Once an individual is arrested (with or without warrant) he must be processed in accordance with section 15 of the Criminal Justice Act 1951 as substituted by section 18 of the Criminal Justice (Miscellaneous

[59] There are four conditions listed, one of which is that the Garda has reasonable cause to suspect that the person will abscond or obstruct the course of justice. The courts are cautious of construing such power strictly.

[60] The test for compliance with statutory procedure is judged objectively and must be proved by the prosecution.

[61] A relevant offence is an offence under any provision of the Act or a scheduled offence.

[62] *People (DPP) v Quilligan* [1986] I.R. 495, at p. 507.

Provisions) Act 1997. This section provides that the arrestee must be brought as soon as practicable after the arrest (with warrant), or after being charged (without warrant), to a judge of the District Court who has jurisdiction to deal with the offence involved. Section 15(6) makes clear that the provisions are not intended to interfere with specific statutory provisions. Thus, for example, section 4 of the Criminal Justice Act 1984, as amended, which permits detention following arrest for proper investigation, is not affected.

The matter of detention is important to consider in the context of Garda powers, to the extent that it is a power derived or flowing from the power of arrest. Subsequent to a valid arrest, an individual may be detained by the Gardaí. Such detention is permitted only for as long as the law allows or as long as is reasonable in the particular circumstances. Murray J in *DPP v Finn* emphasised that when the reasonableness of the period of detention is challenged, the onus is on the prosecution to prove the period was no longer than necessary in the circumstances.[63] As noted above, historically the power to detain a suspect did not exist apart from under the Offences Against the State Act 1939. Now, however, it is commonly provided for under statute. Section 30 of the Offences Against the State Act 1939 permits detention of a suspect for up to 48 hours, and for up to 72 hours in the event of a judicial warrant being obtained.[64] Similarly, the Criminal Justice (Drug Trafficking) Act 1996 permits police-authorised detention of up to 48 hours to be extended to a maximum of seven days on judicial authority.[65] Section 4 of the Criminal Justice Act 1984 as amended[66] permits an individual to be detained for

[63] *DPP v Finn* [2003] 1 I.R. 372, at p. 380.

[64] By virtue of the Offences Against the State (Amendment) Act 1998, s.10.

[65] Note that the Gardaí are obliged to keep a record of the detention and interviews of a suspect, which includes particulars of the arrest and charge, authorisation for the detention and any extension, and requests for a solicitor. For in-depth discussion of the law on detention see O'Malley (2009) op. cit., at pp. 307–337; Ryan, A. (2000) Arrest and Detention: A Review of the Law. *Irish Criminal Law Journal* 10(1), 2–10; White, J.P.M. (2000b) The Confessional State-Police Interrogation in the Irish Republic: Part I. *Irish Criminal Law Journal* 10(1), 17–20; White, J.P.M. (2000a) The Confessional State-Police Interrogation in the Irish Republic: Part II. *Irish Criminal Law Journal* 10(2), 2–6.

[66] The section is amended by the following provisions: Criminal Justice (Miscellaneous Provisions) Act 1997, s.2; Criminal Justice Act 1999, s.34; Criminal Justice Act 2006, s.9 (this provision raised the maximum period of detention from 12 to 24 hours); Criminal Justice Act 2011. The provision

up to 24 hours, for the purpose of investigation. The provision provides that the person may be detained in a Garda Síochána station "for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which the person is taken on arrest or in which he or she is arrested has at the time of the person's arrival at the station or his or her arrest in the station, as may be appropriate, reasonable grounds for believing that his or her detention is necessary for the proper investigation of the offence."[67] The member in charge cannot have been involved in the arrest and must independently form a *bona fide* belief that the person's detention is necessary for the proper investigation of the offence. A judge must in turn be satisfied by this belief.[68] This section applies only to offences carrying a maximum sentence of five years imprisonment or more.[69] The provision is applicable even where offences can be defined as triable either on indictment or summarily. Thus, the detention will not be invalid if the person was arrested and detained on suspicion of committing an offence which, if tried, on indictment would attract a maximum penalty of five years or more, but which was in fact tried summarily.[70]

Once detained, the suspect may be interrogated subject to the Judge's Rules and the Custody Regulations.[71] Because of the importance attached to the right to liberty, there are safeguards pertaining to the detention of a suspect. For one, it is imperative to proper procedure that the individual be brought to a Garda station for the purpose of detention as soon as possible after the arrest is affected. Any unreasonable delay in doing so jeopardises the rights and safeguards that a suspect is afforded when in

---

applies only to offences carrying a maximum of five years imprisonment or more and the member in charge must have reasonable grounds for believing that detention is necessary for the proper investigation of an offence. In the case of *People (DPP) v Reddan* [1995] 3 I.R. 560, the court determined that the detention should not be solely for questioning but for the 'proper investigation of the offence.'

[67] See also s.7 of the Criminal Justice Act 2011 which amends s.4 of the Criminal Justice Act 1984 in relation to the suspension of detention.

[68] The necessary belief may be sustained through information given to the member in charge before or after the arrest is made: *DPP (Dillane) v Alcock* [2008] 1 I.R. 200.

[69] The same as for arrestable offences.

[70] *DPP (Dillane) v Alcock* [2006] I.E.H.C. 437.

[71] For more see Ryan (2000) op. cit., at pp. 7–10.

custody and thus may defeat the purpose of the Custody Regulations.[72] In the case of *People (DPP) v Boylan*,[73] the defendant had been arrested and detained under the Criminal Justice Act 1984 section 4. Although stopped at 9:30 p.m., he was not brought to a Garda station until shortly before midnight (with a further extension order made at 5:30 a.m.). Court of Criminal Appeal in quashing the appellant's conviction for offences in relation to drug possession held that section 4 requires that an arrested person be brought to a Garda station as soon as reasonably possible. The Court felt that the arrest had effectively occurred at 9:30 p.m. and thus the original detention and all that followed was tainted. Furthermore, if judicial extension of the detention period is sought, the detainee must be brought before a District Court judge who is obliged to hear any submissions on his behalf. Regardless of the authorisation granted for extended detention, if, at any point, there are no longer reasonable grounds for believing that the detention is necessary, then the individual must be released immediately.[74]

It is apparent from the discussion of the arrest provisions above that most summary arrest powers are exercisable only once there is 'reasonable suspicion' to arrest. Section 4 of the Criminal Law Act 1997 provides that

---

[72] The Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, and Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) (Amendment) Regulations 2006. See *People (DPP) v Boylan* [1991] 1 I.R. 477; *People (DPP) v Cleary*, unreported, High Court, December 7, 2001. Contrast with *People (DPP) v O'Toole*, unreported CCA, 25 March 2003. Note that in the context of the Custody Regulations, failure to abide by them will not necessarily render the detention unlawful or lead to the exclusion of evidence or quashing of a conviction. A judge has discretion as to whether to exclude the evidence obtained as a result of a breach (*People (DPP) v Spratt* [1995] 1 I.R. 585; *People (DPP) v O'Shea* [1996] 1 I.R. 556).

[73] *People (DPP) v Boylan* [1991] 1 I.R. 477.

[74] Once a person is detained, regard must be had to the custody regulations. Both Article 8 of the Regulations and s. 5 (1) of the Criminal Justice Act 1984 require the member in charge to immediately inform the detainee of his right to consult a solicitor, and to have notification of his detention sent to one other person. This right to be informed is merely a legal right. The right to access to a solicitor, on the other hand, was determined by the Supreme Court in *DPP v Paul Healy* [1990] 2 I.R. 73, to be a constitutional right. The right to a solicitor is limited to right of 'reasonable access.' Police practice is to define this as amounting to one hour in every six hours of detention. There is also a constitutional right to silence (*Heaney v Ireland* [1994] 2 I.L.R.M), although this right has been severely curtailed in recent years. Statutory encroachments on the right to silence include the following: Offences Against the State Act 1939 s.52; Criminal Justice Act 1984, ss.18–19 (adverse inferences); Offences Against the State Act 1998, s.5 (adverse inferences).

an arrest may be made without a warrant by any person[75] who with *reasonable cause suspects* another to be in the act of committing an *arrestable* offence or (under section 4 (2)) to arrest another where an arrestable offence has been committed and the person seeking to make the arrest has reasonable cause to suspect that that other is guilty of it. The validity of the power exercisable is not dependent upon an offence actually having been committed but purely upon a suspicion being reasonably held that it has been committed.

This legal requirement is important to prevent powers being exercised arbitrarily. As the court in *People (DPP) v Tyndall* determined, suspicion must be "*bona fide* and not irrational."[76] The test for 'reasonable suspicion,' if there is one, is said to be an objective test. Lord Diplock in the case of *Dallison v Caffrey* set it down as follows: "[t]he test whether there was reasonable and probable cause for the arrest … is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause."[77] The test is also however partly subjective, being that suspicion must be formed in the mind of the individual officer.[78] In *Walshe v Fennessy*, Kearns J said that where a statutory power of arrest exists "it is the state of mind of the arresting garda or policeman alone which is critical."[79] The court in *DPP (Dillane) v Alcock* determined, however, that 'reasonable cause' requires showing 'reasoned and sound judgement'[80] as a ground for taking action. In forming the requisite suspicion, the entire range of circumstances sur-

[75] 'Any person' includes citizens as well as Gardaí, but if the arresting individual is not a Garda they may arrest only if an offence has been or is being committed, and only if they suspect the individual will resist or is resisting Garda arrest.

[76] *People (DPP) v Tyndall* [2005] 1 I.R. 593, at p. 599. See also *DPP v Rourke* [2009] I.E.H.C. 314.

[77] *Dallison v Caffrey* [1964] 2 All E.R. 610, at p. 619.

[78] Note that although a Garda may make and arrest on order from a superior officer, the requisite suspicion must be founded on something more than the order, and the arresting officer must have "some understanding of the underlying rationale or basis for the arrest." Per Murray CJ in *Walshe v Fennessy* [2005] 3 I.R. 516, at p. 518.

[79] *Walshe v Fennessy* [2005] 3 I.R. 516, at p. 536. This is similar to what the court determined in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All E.R. 129. As there was very little material before the court in the case as to what information the arresting officer had, the court considered what was in the arresting officer's mind was sufficient to satisfy the standard.

[80] *DPP (Dillane) v Alcock* [2008] 1 I.R. 200.

rounding the event must be considered. The European Court of Human Rights has held that reasonable suspicion requires "the existence of some facts or information which would satisfy an objective observer that the person concerned may have committed the offence, though what may be regarded as reasonable will depend on all the circumstances of the case."[81]

Given that 'reasonable suspicion' forms the basis for an arrest without statutory definition being given to this term, a substantial amount of discretion is bestowed upon the arresting officer. Walsh notes that An Garda Síochána encourage their members to exercise discretion when deciding whether to effect an arrest, but internal force policies do offer guidance on the circumstances when the Garda should give a summons or caution where the power of arrest is given as an option.[82] Still, when the power of arrest comes into play, it is ultimately the decision of the individual officer whether to exercise this power, and as long as it is exercised lawfully and in good faith[83] then this is permitted. There are a whole range of factors to which a Garda may have regard in deciding whether their suspicion is reasonable enough to make an arrest or not, even non-admissible evidence.

The question of whether previous record can form the basis of reasonable suspicion arose in the case of *DPP v Keogh*.[84] In this case, the accused was charged with the offence of failing to comply without reasonable cause with the direction of a member of An Garda Síochána to leave immediately the street or public place in question contrary to Section 8 of the Criminal Law (Sexual Offences) Act, 1993, where the member had reasonable cause to suspect the accused of loitering for the purpose of soliciting or importuning another person or persons for the purpose of prostitution. On the said date, the member of the Gardaí had cautioned

[81] *O'Hara v United Kingdom* [2002] 34 E.H.R.R. 32, at para. 34. If the circumstances mandated a swift approach to arrest the suspect then the courts may be more lenient than if there had been sufficient time to make proper investigations.

[82] See Walsh, D. (2016) *Criminal Procedure*. 2nd ed. Dublin: Thomson Round Hall. Walsh further notes that failure to take into account the relevant force guidelines could be a factor in determining whether the arrest was an unlawful exercise of discretion.

[83] If the power is exercised for a purpose alien to that for which it is granted this is an unlawful exercise of discretion. This is also the case where the power is exercised in bad faith.

[84] *DPP v Keogh* [1998] 4 I.R. 416.

the accused (who was one of four women cautioned) under section 8 of the 1993 Act and informed them that they must leave the area immediately and he informed them of the consequences of their failure to obey that direction. A few hours later the Garda returned to the scene and found two of the women, including the accused still standing in the area. He then arrested the accused under section 8(2) for failing to comply with his direction. The member stated to the court that he had formed the requisite suspicion on the basis that the area was well known to him as a 'red light' area and that he had known the accused for a period of two and a half years, and had seen her on prior occasions approaching cars. The defence contended that this particular statement of the Garda could not be admitted on the basis that previous conduct is generally inadmissible evidence.[85] It was submitted that facts relating to the reasonableness of the Garda's suspicion must relate to circumstances on the date on which he directed her to leave the area, and could not be formed by reference to her past conduct or being 'known' to the Gardaí. In the District Court, the judge proposed three possibilities for the situation at hand. These were as follows: he could discount the evidence if he held it to be inadmissible and continue to hear the case; he could discount the evidence if he held it to be inadmissible and disbar himself from further hearing the case or; he could dismiss the case as a result of the prejudicial evidence having been offered. The High Court was consequently asked to determine whether the prosecution was entitled to adduce evidence of the previous character and activities of an accused person similar to the current charge in order to establish the necessary element of reasonable cause by the Garda. Moreover if the answer was 'no', the court was asked to consider whether there was sufficient admissible evidence to warrant a finding that there had been reasonable cause.

No issue or contention arose from reasonable suspicion being derived from the nature and type of area in which the offence was alleged to have occurred.[86] Thus the High Court focused upon the issue of previous conduct. Kelly J determined that the prosecution must adduce evidence as to

[85] The case of *King v The Attorney General and Another* [1981] I.R. 233, was cited. See Chaps. 4 and 5.

[86] This being the other basis upon which the Garda had formed his suspicion.

the basis upon which reasonable suspicion was formed to justify an arrest under the Criminal Law (Sexual Offences) Act 1993, section 8. He furthermore contended that such proof could not rest upon a member's prior knowledge of the accused. Kelly J considered that "[i]nsofar as a Garda may rely upon knowledge of the previous character and activities on the part of the Accused, I am of opinion that he is not entitled to adduce evidence of such character or activities as part of his testimony in chief." The learned judge went on to explain his reasoning, essentially founding it upon the well-established principle of the inadmissibility of character evidence at trial. It was his view that the adducing of such evidence would run counter to the basic concept of justice inherent in our legal system. Having answered the first question put in the negative, the Court then went on to determine that the second issue was one for the trial judge to consider. Thus Kelly J concluded that the District Court judge was capable of determining that there was alternative sufficient evidence to satisfy the member's reasonable suspicion (the area) and that he had the discretion to disregard the other part of the Garda evidence from his mind.

A number of consequences flow from the judgement in Keogh. On the facts of the case it was agreed that the accused was not in peril of being convicted on the basis of her past character.[87] However the Court still contended that her character was given relevance in the proceedings because of the evidence adduced by Sergeant Kyne, and consequently the Court could determine that such evidence was inadmissible. Thus the case would arguably be stronger for an accused, where he was in peril of being convicted on the basis of his character. Furthermore, the court in *Keogh* did not determine that past record cannot or does not form part of the reason for the exercise of Garda powers. It does not *per se* exclude such information from being used to form the requisite suspicion. What it essentially does, from a judicial perspective at least, is prevent this information from being the sole basis for the arrest. The reason for this is that when the arresting Garda is stating in court how he formed the requisite suspicion he may not disclose statements to the effect of revealing the accused's past record. The judgement is also important as it demonstrates

[87] The issue was the accused's compliance with the direction of the Garda.

the degree of judicial scrutiny over the conduct of the Gardaí when it comes to exercising their powers, at least where matters of contention are brought before the courts.

So what do all of the features above mean in the context of the individual with a criminal past? First, they demonstrate what powers the Gardaí have, in so far as they are permitted to stop, search, arrest, and detain a suspect largely under provisions of legislation. Second, they reveal that the powers exercisable are at best open to interpretation and at worst vague and imprecise. While the powers must be exercised pursuant to the specific statutory provision in question, in relation to the prescribed offence, and with the prerequisite of reasonable suspicion, no other guidelines are given as to how the powers are to be exercised. Thus, from a practical perspective, discretion becomes a necessary and integral part of the police function. The lack of explicit direction under statute compels this element when the Gardaí are purporting to act under a power conferred on them by law.

Because discretion is such a key part of how the Gardaí exercise their powers, it is within this context or framework that the ambit for consideration of the criminal record of a suspect is laid. It is evident from the case of *DPP v Keogh* above that previous character and being 'known' to the Gardaí does factor into Garda decision-making and can be an important basis upon which suspects are created and processed. This case sheds some light on the policing of those with criminal pasts. It also to some extent demonstrates the manner in which discretion may allow the Gardaí some control over who they investigate and why, what the charge is, what questions to ask in interviews, what leads to follow and what witnesses to rely upon. The generation of evidence and evaluation of the facts depends, to some extent at least, upon police constructions of what they think happened and who they think is responsible. The significance of this in the context of the ex-offender is that previous history may then impact upon the evaluation process and may influence decisions made with regard to verifying Gardaí expectations and theories.[88] For example,

[88] See Zuckerman, A.A.S. (1992). Miscarriage of Justice-A Root Treatment. *Criminal Law Review* 323–345. McConville et al. have argued that the police objective often becomes one of tying the suspect to the narrative that has been constructed. See McConville, M. Sanders, A., and Leng, R. (1991) *The Case for the Prosecution*. London: Routledge, at p. 80 (republished online 22

British studies have revealed that apart from the seriousness of the offence involved, the presence of prior convictions most affected an officer's decision to charge (Philips & Brown 1998; Leng et al. 1996).

Furthermore, discretion continues to be important in building or shaping the prosecution's case, when the decision is made to proceed with prosecution. Rottman points out that police discretion is "inherent in deciding whether to seek a court prosecution in the first instance and the ability to determine the manner of prosecution in the lower court."[89] Prosecution usually takes place only when there is a realistic prospect of conviction and when it is in the public interest. The evidential threshold for prosecution is more stringent than that for arrest and charge. Reasonable suspicion alone will not support a prosecution case: evidence is required. The 'truth' of the evidence is not black and white, however. It can be argued that the police, in their position as investigators, are able to control the extent to which the evidence incriminates the suspect.[90] Moreover, a prior conviction can become important in this narrative, especially if some of the other evidence is weak. The prospect of having prior conviction(s) introduced at trial can be a strong bargaining tool for the police, in attempting to secure a guilty plea to the original or lesser offence in court.

Thus discretion becomes the important basis for consideration of criminal record information by the Gardaí. The laws under which Garda powers are exercised are interpretive and facilitate the inclusion of such information into the decision-making process. This can be extremely necessary from a practical perspective and from the perspective of efficient and effective policing. Moreover, there is the legal requirement not to act capriciously which regulates the exercise of discretion. Having said this however, the extent to which previous record factors into decision making at this stage is unclear and consequentially unregulated. This give rise

November 2017). Also see Leng, R. McConville, M., and Sanders, A. (1996). Researching the Discretions to Charge and to Prosecute. In Sanders, A. (ed.) *Prosecution in Common Law Jurisdictions.* Aldershot: Dartmouth, pp. 119–243.

[89] Rottman, D.B. *The Criminal Justice System: Policy and Performance* (Dublin: National Economic and Social Council, 1984, at p. 64).

[90] McConville et al. (1991) op. cit., at p. 80.

to questions regarding the legitimacy of its use, and the scope for disproportionate attention being focused upon this factor.

Targeting: The Scope for Differential Policing

Discretion is an essential aspect in the exercise of powers and it becomes an important element in the context of differential policing. Policing is a very unique task. There is low visibility of everyday police work and of street encounters, and "the police department has the special property … that within it, discretion increases as one moves down the hierarchy."[91] Vigilance by the courts to adhere to due process considerations of fairness ensures that the exercise of powers does not go unchecked. Nonetheless, discretion remains wide and the problem is that although discretion may be necessary, it can lead to abuses. McCullagh observes that differential policing is one abuse that can arise from police discretion (McCullagh 1996).

The ambit of discretion in exercising powers under statute arguably runs counter to the concept of the rule of law. Two elements of the rule of law that are relevant in the context of police powers are equality under the law and control of State officials. In relation to the latter element, Carey poses the question of whether the Irish system endorses the idea of control of the police, or control by the police (Carey 1998). If crime control is the favoured approach, then the latter idea is clearly endorsed, while due process values clearly prefer the former option. Equality under the law is an especially important concept that must be considered in the context of police discretion. Equality would essentially require that the Gardaí investigate all crimes that are brought to their attention,[92] and police all individuals the same. Differential treatment is thus not permissible. It is argued that it is a fundamental element of the law to "constrain

[91] Wilson, J.Q. *Varieties of Police Behaviour: The Management of Law and Order in Eight Communities* (Harvard: Harvard University Press, 1968), at p. 7.

[92] Whether through proactive or reactive policing.

… the discretion of the agents of enforcement and implementation."[93] In the Irish case of *King v AG*, Henchy J stated that there is a "basic concept in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal."[94] If one accepts that targeting practices exist, then this serves to undermine the substance of the rule of law, as enunciated by Henchy J. This situation is exacerbated by the lack of transparency into the exercise of police discretion.

International Evidence of Targeting

It is argued that the suspect population is not a subset of the criminal population, but it is the reverse that is in fact true. The 'criminal' population (those convicted of offences) is a subset of the suspect population.[95] Newburn and Reiner have observed that police discretion is not an equal opportunity phenomenon (Newburn & Reiner 2007). The notion that the police indiscriminately use their powers to deal with crime and criminals is to deny the role that discretion plays in the police function.[96] Police work is to a large extent focused upon controlling the 'margin' or 'police property' groups. The practice of targeting refers to when police suspicion attaches to particular groups in society. Targeting is a very subtle process; "a particular mindset of the police."[97] The term does not necessarily involve abuse of suspects by the police or abuse of the position the police have in terms of law and due process rights. The element of labelling is in operation and because the police have the same biases and preju-

[93] Jowell, J. (1989) "The Rule of Law Today" In Jowell, J. and Oliver, D. (eds.) *The Changing Constitution*, 6th ed. (Oxford: Oxford University Press, at p. 19).

[94] *King v AG* [1981] I.R. 233, at p. 257.

[95] McConville et al. (1991) op. cit., at p. 14.

[96] It is possible for the police to use such a rule because either: (a) the law as applied is a product of State agencies, the police in particular, or (b) the law is sufficiently flexible to accommodate what the police want to do. Sanders, A. and Young, R. (1994) "The Rule of Law, Due Process and Pretrial Criminal Justice" C.L.P. 47: 125, at pp. 128–129.

[97] Carey, G. (1998) 'The Rule of Law, Public Order Targeting and the Construction of Crime,' I.C.L.J. 8(1): 26, at p. 34.

dices as ordinary citizens, targeting becomes socially patterned.[98] Sanders and Young note that suspect populations are actively policed, irrespective of whether they are doing wrong at the particular time or not, in favour of crime control.[99] Whether such policing is effective remains unclear and in doubt.

The ex-offender group, it appears, is one to whom the status of 'suspect' permanently attaches. In Ireland, targeting of known criminals has been encouraged at the highest levels. This is seen in the government-led policies and laws discussed throughout this book. Bias towards those with past records is viewed as a desirable aspect of policing also. Traditionally in the UK, a number of working rules have influenced the police in the exercise of their powers. These include *Previous*—that is being 'known to the police'; *General suspiciousness*—stereotypical cues form an important basis for police decision-making. "The police service itself tends to put people in boxes. If your lifestyle or appearance is out of the ordinary then they stick another label on you"[100]; *Disorder and police authority*—stop, search, and even arrest may be justified if disorderliness is interpreted as an attack on police authority and more abstractly on the authority of the law; other factors influencing the decision to stop and search include age, gender, race, workload, information received, and consideration of victims.[101] These working rules illustrated on what basis individuals were likely to be targeted by the police. The prospects of being investigated are high when the individual is 'known' to the police. This knowledge can be used in at least three ways; as a basis for arrest in itself, as the first lead in a crime reported, or to follow the individual and watch for suspicious activity.[102] In terms of effectiveness and efficiency, those with past records

[98] In England, racial targeting is hugely prominent and research shows that young black males are more likely to be stopped and searched than other ethnic groups; Willis, C. (1983) *The Use, Effectiveness and Impact of Police Stop and Search Powers*. London: Home Office.

[99] Sanders, A. and Young, R. "From Suspect to Trial" in McConville et al. (2007, at p. 960).

[100] Officer quoted in McConville (1991) op. cit., at p. 26. It should be noted that previous convictions alone cannot be used as reasonable grounds for suspicion: Police and Criminal Evidence Act 1984, Code A.

[101] This list of working rules is discussed in McConville et al. (1991) op. cit., at pp. 22–34. See also Maguire et al. (2007) op. cit., at pp. 953–983.

[102] McConville et al. (1991) op. cit., at p. 23. It can also trigger arrest for a trivial offence where a background check reveals the past conviction.

will inevitably be the easiest targets for policing. Such targeting is not wrong *per se* and may often reveal evidence of some illegal activity, such as possession of drugs. Arrest would then follow and the police decision justified. What is perceived to be problematic in this scenario, is that it leaves 'respectable' people from society out of the process. A person with no previous offences would not be discovered (unless of course they were acting or otherwise appeared suspicious). The pattern becomes one of targeting those who look suspicious and who have records. Soon this pattern becomes justified when those individuals assume the role given to them, that of the 'criminal.'

This is not to suggest that all exercise of powers include elements of bias and prejudicial influence. Nonetheless, there are frequently subconscious elements at play. Skolnick has argued that there are five factors which must be considered in the context of police discretion and conduct: the social psychology of police work (i.e. environment, working personality, etc.); the police officer's stake in maintaining his or her position of authority; police socialisation; pressure put on police officers to 'produce'; the opportunity for police to behave inconsistently with the rule of law due to the 'low visibility' of much of their conduct (Skolnick 1979). These considerations will inevitably influence the use of previous record. Some studies have suggested that individuals are frequently suspected and arrested purely because they had criminal convictions for offences similar to the ones reported.[103] The criminal record then is a valuable resource for the police, and targeting this group is acknowledged in the interests of effective policing. It is interesting to note the statement made by an arresting officer in one such study: "I think that's our stock in trade … recognising people who were arrested in the past has got to be what we do for a living."[104]

It has been noted that utilising previous record is likely to disproportionately affect those from lower margins in society. Farrell and Swigert comment that "since today's conviction is tomorrow's record, a relation-

[103] See Smith and Gray (1983); McConville et al. (1991).

[104] McConville et al. (1991) op. cit., at p. 23. This officer felt that it would be valuable to spend time with prisoners and get to know them in order to recognise them in the future.

ship between social status and prior offence record must be expected."[105] For the marginalised lower classes, the pattern begins with targeting and differential treatment.[106] Within the system, class biases influence the legal treatment of these offenders, from legal representation to pretrial release and sentence severity. The criminal record subsequently affects the individual's activities economically and socially. Subsequent detection, police discretion to charge, the prospect of bail, the use of past convictions at trial and sentencing, are all affected by the prior record and increases the probability of exacerbating that record. The influence of prior conviction within the justice system produces a cyclic reconfirmation of criminality. The lower classes will inevitably accumulate more convictions and this causes them to become further marginalised and excluded within society. Even if the stop and search does not lead to arrest and charge, the process of stop and search can itself be a humiliating experience. The feeling of being singled out from other members of society can intensify the sense of exclusion from society or cultivate a self-identification with the criminal mould.[107]

In the US, targeting practices have also been recognised, emanating from the vast discretion of officers on the beat.[108] While research on targeting tends to focus upon the socially and economically disadvantaged as well as investigating the effect of police discretion on race, it is also widely acknowledged that the criminal record has a prominent effect on decisions to arrest and/or detain individuals. Under the Model Rules for Arrest, some of the purposes "for which release of arrest and conviction information may be made to criminal justice personnel are: (i) in decid-

[105] Farrell, R. and Swigert, L. (1978) Prior Offence Record as a Self-Fulfilling Prophecy. *Law & Society Review* 12(3), 437–453, at p. 445.

[106] See also Schulenberg, J. (2016) Police Decision-Making in the Gray Zone. *Criminal Justice and Behavior*, 43(4), 459–448.

[107] Brogden writes that stops are counterproductive in the long term, leading to wider alienation from the criminal justice process amongst those stopped and their peers and in some cases to criminal careers from within that group. Brogden, M. (1994) Gatekeeping the Seamless Web of the Criminal Justice Process. In McConville, M. and Bridges, L. (eds.) *Criminal Justice in Crisis*. London: Edward Elgar.

[108] It is observed that "[a]lthough the discretion to arrest is legally restricted, in practice, when enforcing the law, the police exercise enormous discretion to arrest." "The Impact of Arrest Records on the Exercise of Police Discretion" *Law and Contemporary Problems*, 47 (4) (1984), 287–302, at p. 292.

ing whether to charge an individual with an offence; … (iii) in deciding whether to arrest or to summon…"[109] Easy access to arrest and criminal record information by police officers, inevitably means that this information will play a greater role than other factors in exercising discretion. The fact that an individual has a criminal record makes him a strong candidate for future policing, and this is a widely accepted and acceptable fact in the American system.

From an international perspective, it seems that the existence of a criminal record can impact profoundly upon police decision making. Sometimes the exercise of discretion points towards "a skewed suspect population."[110] Targeting those who are 'known' because of their criminal past is often an efficient way to discover criminal behaviour. However, it may be acknowledged that there will be some instances where innocent persons are be targeted on the basis of their record, provoking feelings of alienation and discrimination.[111] Rights of privacy and presumption of innocence that pertain to other citizens become suspended for ex-offenders.

Targeting Practices in Ireland

In Ireland, the lack of empirical data on and research into the exercise of Garda discretion makes it difficult to ascertain the true extent of the 'previous' working rule in this jurisdiction. The existence of such a factor in decision-making can still be acknowledged however. As a consequence of police discretion it has been recognised in this jurisdiction that targeting practices do exist. The concept of labelling is often at play when the Gardaí make stops and arrests, and specific groups who do not con-

[109] LaSota, J.A. and Bromley, G.W. *Release of Arrest and Conviction Records: Project on Law Enforcement Policy and Rulemaking* (Arizona: Arizona State University, 1974), at p. 23. Thus even an arrest record can impact greatly on the individual in future processes.

[110] Sanders et al. (2010), at p. 192.

[111] Some studies have shown that targeting for whatever reason makes many (young males in particular) feel discriminated against, resulting in social unrest and a spiral of more policing and more unrest. Keith, M. (1993). *Race, Riots and Policing: Law and Disorder in a Multi-Racist Society*. London: University College London Press; Macpherson, W. (1999). *The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262-1. London: Stationary Office.

form to 'normal' social standards (margin groups) are frequently classed as suspects. The 'prior record' group is also likely to be one upon whom suspect status falls in the exercise of discretion.

Labelling and Class Bias

In Ireland, there are certain types of people who attract permanent suspect status (McCullagh 2014). Particular individuals or groups are associated with certain areas[112] or certain behaviour depending upon police knowledge and constructs; physical demeanour or apparel can be classed as suspicious depending on police perception; and the label of 'deviant' or 'outsider' is attached to those that are deemed—because of where they are from, their social situation, appearance, associates, or being otherwise known to the police—to be different from mainstream society (Becker 1963). McCullagh in his research on crime in Ireland outlined how the justice system "criminalises the offences of young working class men and systematically ignores the crimes of the middle class."[113] The image of the typical criminal then is one of a "young, tough, closely cropped, denim-clad man. Liberal images of him would add the features of unemployment and social deprivation."[114]

Studies on the Irish prison population support this view of the typical criminal. In the leading study (O'Mahony 1997), the conclusion was that the typical Mountjoy prisoner was in his early to mid-twenties, came from a large family, had experience of personal adversity, 88% had been unemployed prior to committal and 94% were categorised in the lowest

[112] In Ireland, the effect of area or geographic location has been examined more generally; O'Donnell, I., Teljeur, C., Hughes, N., Baumer, E., and Kelly, A. (2007). When Prisoners go Home: Punishment, Social Deprivation and the Geography of Reintegration. *Irish Criminal Law Journal* 17(4), 3–9; Bacik, I., Kelly, A., O'Connell, M., and Sinclair, H. (1997). Crime and Poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity. *Irish Criminal Law Journal* 7, 104–133.

[113] McCullagh, C. *Crime in Ireland: A Sociological Introduction* (Cork: Cork University Press, 1996, at p. 66).

[114] See McCullagh, C. (1995) Getting the Criminals We Want- The Social Production of the Criminal Population. In Clancy, P., Drury, S., Lynch, K., and O'Dowd, L. (eds.) *Irish Society: Sociological Perspectives.* Dublin: Institution of Public Administration, at p. 410; McCullagh, C. (2010) Two-Tier Society; Two-Tier Crime; Two Tier Justice. In Kilcommins, S. and Kilkelly, U. (eds.) *Regulatory Crime in Ireland.* Dublin: First Law.

socio-economic classes. This correlates with the findings of the Healthcare study on prison population in 2003, which confirmed that the majority of Irish prisoners come from disadvantaged backgrounds. Studies on female prisoners[115] also stipulate that a large proportion share characteristics of environmental and personal disadvantage. O'Mahony's study, for example, discovered that a large majority of female prisoners, much more than was the case with males, came from the lowest socio-economic grouping and had poorer educational and employment records than the male prisoners.[116] O'Donnell comments that "it is difficult to say to what extent the consistency in the characteristics of those incarcerated in Ireland reflects a genuine difference in criminal activity among the poor, or is a result of differential reporting, policing, prosecution and sentencing"[117] It seems reasonable to assert however that differential treatment is frequently an issue in the criminal justice system.

Targeting of 'Suspect' Groups

Differential treatment of groups within the social system has become apparent in Ireland. It may be seen in differential treatment of victim groups, disproportionate focus upon lower socio-economic classes as suspects, and the frequently disinterested approach to crimes of the wealthier classes (below). In constituting the 'suspect' population, it is important to again acknowledge that targeting is not necessarily a product of deliberate bias, and is often more likely to be the product of socially patterned

[115] Women make up around 3.8% of the prison population of Ireland, which is relatively low by international standards. See Irish Penal reform Trust website (www.iprt.ie/women-offenders. Last accessed 13/09/2018; Bacik, I. (2002) Women and the Criminal Justice system. In O'Mahony, P. (ed.) *Criminal Justice in Ireland*. Dublin: Institute of Public Administration, at p. 145. The fact that such a small percentage of prisoners are female may to some extent reflect the chivalry ethos with which women are treated by the justice system and that the police can overlook certain offences by women unless particularly serious or unfeminine. This is an example of how the Garda use their powers discriminatory.

[116] See O'Mahony (1997) op. cit., at p. 185. See also Walklate, S. (2001) *Gender, Crime and Crime Justice*. Devon: Willan.

[117] See O'Donnell, I. (1997). Crime, Punishment and Poverty. *Irish Criminal Law Journal* (7) 2 134 –151, at pp. 146–147.

criteria and objectives. One Garda expressed the view: "[y]ou become narrow-minded … [y]ou put labels on people."[118]

Recourse to official data on the extent to which margin groups are targeted, particularly in the area of stop and search, is also difficult,[119] but the concept of targeting has been raised as an issue in Dáil Debates, particularly with reference to the Criminal Justice (Public Order) Act 1994, where the potential for young people from the lower socio-economic groups and squatters, homeless, and other needy people to be targeted was strong.[120] The National Crime Forum in an early report also recognised that public order laws allow greater opportunity for targeting to occur and that these laws, which rely a great deal on discretion, can sustain the exclusion of certain groups in society (National Crime Forum 1998). O'Donnell and O'Sullivan document the vast increase, since the introduction of the 1994 Act, in the number of proceedings taken against those who are perceived as offending against public order (O'Donnell & O'Sullivan 2001). In looking at the extent to which police powers are directed disproportionally towards certain groups in Irish society—beggars, prostitutes, the disorderly—they found that the Gardaí do tend to target these 'visible' offenders, often to the exclusion of other groups.[121] Moreover, targeting (in relation to public order offences) has become even less apparent as a result of the provisions of the Criminal Justice Act 2006 which provides for fixed penalty orders for public order offences.[122]

---

[118] Garda quoted by Regan, L. (1995). *Taken Down in Evidence.* Dublin: Gill & Macmillan, at p. 75.

[119] The Department of Justice has recognised the lack of research into stereotyping by the Gardaí as an impediment to a more empirically founded criminal justice system. Department of Justice and Equality (1997). *Tackling Crime: Discussion Paper*. Dublin: Stationary Office, at p. 45.

[120] Such concerns were raised in the Dáil Debates on the 1994 Act: for example, Deputy Joe Costello, 433 Dáil Debates Cols. 1006 et seq. In particular, concerns were raised regarding the provisions (sections 8, 11–13) providing for trespass and move-ons against young people from the lower-economic groups, the homeless, and other indigent people.

[121] O'Donnell and O'Sullivan found that there is a marked contrast between the policing of the poor and socially inadequate and the time devoted to investigating white collar crimes for example or sexual offences which often take place in private spheres not subject to aggressive policing. O'Donnell and O'Sullivan (2001) op. cit., at pp. 53–59.

[122] Section 184 of the Criminal Justice Act 2006 amends s.23 of the Criminal Justice (Public Order) Act 1994, by inserting after s.23, s.23A.

Zero tolerance policing is also a good example of how the Gardaí can focus upon 'margin' groups. Ireland has witnessed spurts of zero tolerance policing in recent decades, perhaps most notably in 1996/1997, when a marked increase in proceedings initiated against public order offenders reflected the political ethos of the time (that being that the tolerance of small crimes allowed more serious crimes to flourish as there is an inextricable link between the two).[123] It has been pointed out that the problem with such zero tolerance policing is that it institutionalises within the police infrastructure practices that discriminate against marginalised groups in society (Mulcahy & O'Mahony 2005; Kilcommins et al. 2004; O'Donnell 1997; Bacik et al. 1997). In comparison to the suspicion attaching to margin groups, there is a stark contrast in the treatment of crimes of the middle and upper classes.[124] White-collar crime, for example, tends to be regulated rather than punished, even though the overall effect of such crime can be far more serious.[125] Only recently have we witnessed a willingness to prosecute and punish the perpetrators of such crimes, and at the same time a recognition of the need to provide stricter monitoring of financial institutions and the big players who may use their position for criminal wrongdoing (Law Reform Commission 2016).

[123] See the Institute of Criminology (2003). *Public Order Offences in Ireland: a report by the Institute of Criminology*, Faculty of Law, University College Dublin for the National Crime Council (Dublin: Stationary Office).

[124] McCullagh has argued that crimes of financial dishonesty have a pervasive presence in Irish society, but this is not reflected in official statistical reports on crime or in the prison population, which are both dominated by crimes of burglary and property theft committed by offenders from the recognised, marginalised 'criminal classes.' McCullagh, C. (1996). *Crime in Ireland: A Sociological Introduction.* Cork: Cork University Press, at p. 66. Kilcommins et al. have argued that when it comes to crimes like theft or corporate fraud "the golden handshake and silence are preferable to the iron handcuff and public awareness." Kilcommins et al. (2004) op. cit., at p. 107. See also the National Crime Forum (1998). *Report of the National Crime Forum.* Dublin: Institute of Public Administration; McCullagh, C. (2002) How Dirty is the White Collar? Analysing White Collar Crime. In O'Mahony (2002) op. cit., at pp. 155–175.

[125] O'Donnell and O'Sullivan argue that while white collar crime like tax evasion might not be as threatening as physical assault, crime such as pollution, the mass marketing of defective drugs, or the deliberate neglect of safety standards do pose very real dangers to society. O'Donnell and O'Sullivan (2001) op. cit., at p. 22.

Targeting Ex-offenders

There is little doubt that prior record is valuable in the context of police work. Notwithstanding the fact that its use will often be entirely reasonable and necessary, this does not preclude the possibility of it negatively and disproportionately impacting upon some ex-offenders who are innocent of the alleged crime.[126,127] The legal databases that exist and the expansion of such on an international scale, means that accessing criminal history information has never been easier. It has been observed that the easier the access to criminal records, the more likely that past convictions will factor into decision-making. In Ireland, like in most countries that keep electronic recording of conviction data, the availability of such data is a valuable tool in investigating crimes and it may become especially valuable in accessing the records of ex-offenders in order to generate suspects and determine the validity of police suspicion.[128] It is acknowledged that when it comes to deciding whether to arrest or detain a suspect the availability of criminal history information on the suspect can assist in this decision process. On the basis of this information, the Gardaí may hold and perhaps even charge a suspect who might otherwise not have been arrested and investigated for that offence. One cannot deny the value of this. Effective policing is the key ingredient in the investigation of crime and in the maintenance of social order.[129]

[126] See further O'Loingsigh, G. (2004). *Getting Out, Staying Out: The experiences of prisoners upon release.* Dublin: Community Technical Aid.

[127] Moreover, it is suggested that the targeting of lower socio-economic classes augments their chances of receiving a criminal record, which in turn makes it probable that the Gardaí will inevitably end up policing a higher number of ex-offenders. O'Mahony has observed that suspicion is more likely to attach if past convictions are present, and furthermore that being the associate of a known criminal makes a person a target. See O'Mahony, P. (1993). *Crime and Punishment in Ireland*. Dublin: Round Hall Press, at p. 224.

[128] This is perhaps most visible in relation to driving offences or drink-driving offences (proactive policing). The availability of in-car computers and mobile phones enables Gardaí to check if the individual has a prior record and this can influence the decision of whether to arrest and detain.

[129] This certainly makes sense from the point of view of efficiency. Efficiency, meaning the justice system's "capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders" (Packer 1964, p. 10) is the main criteria of the Crime Control Model of the criminal process according to Packer. The use of criminal record meshes well with this model, hinged upon the values of speed, finality, and an underlying presumption of guilt. Efficiency is not always a good thing however. It shortcuts around reliability in that it is tolerable of error to a certain extent. As

Advancements in international information sharing are equally important in enhancing public safety and ensuring that those who deserve to be prosecuted do not slip through the cracks. What should be avoided however is unnecessary over-reliance upon criminal records,[130] leading to continuous and disproportionate targeting. While it could be argued that this targeting is necessary in the interests of proper investigation, it carries the further risk of inhibiting ex-offenders from being truly integrated into society and it encroaches upon the legal element of finality (in punishment).

Bibliography

Allen, R. J. (1984). The Impact of Arrest Records on the Exercise of Police Discretion. *Law and Contemporary Problems, 47*(4), 287–302.

Bacik, I. (2002). Women and the Criminal Justice System. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.

Bacik, I., Kelly, A., O'Connell, M., & Sinclair, H. (1997). Crime and Poverty in Dublin: An Analysis of the Association Between Community Deprivation, District Court Appearance and Sentence Severity. *Irish Criminal Law Journal, 7*, 104–133.

Becker, H. (1963). *Outsiders: Studies in the Sociology of Deviance*. New York: The Free Press.

Brogden, M. (1994). Gatekeeping and the Seamless Web of the Criminal Justice Process. In M. McConville & L. Bridges (Eds.), *Criminal Justice in Crisis*. London: Edward Elgar.

Carey, G. (1998). The Rule of Law, Public Order Targeting and the Construction of Crime. *Irish Criminal Law Journal, 8*(1), 26–50.

Department of Justice and Equality. (1997). *Tackling Crime: Discussion Paper*. Dublin: Stationary Office.

opposed to the Due Process Model which insists upon the elimination and prevention of mistakes even at the expense of finality, the primal role of efficiency within the Control Model ensures that rights (esp. personal freedom and privacy) are not as important as repressing crime. See generally Packer, H.L. (1964) Two Models of the Criminal Process. *University of Pennsylvania Law Review* 113, 1–68.

[130] Sir James Stephen stated in 1883: "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence." Sir James Stephen, History of criminal law (New York: Norton WW, 1952, at p. 1883).

Editorial. (2008, January 23). Coughlan Murder—Why was This Criminal in Ireland? *Irish Examiner*.

Farrell, R. A., & Swigert, V. L. (1978). Prior Offence Record as a Self-Fulfilling Prophecy. *Law & Society Review, 12*(3), 437–453.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Heffernan, L. (2008). A DNA Database. *Irish Criminal Law Journal, 18*(4), 105–111.

Heffernan, L. (2009). The Retention of DNA and Fingerprint Data. In I. Bacik & L. Heffernan (Eds.), *Criminal Law and Procedure: Current Issues and Emerging Trends*. Dublin: First Law.

Institute of Criminology. (2003). *Public Order Offences in Ireland: A Report by the Institute of Criminology, Faculty of Law, University College Dublin for the National Crime Council*. Dublin: Stationary Office.

Irish Council for Civil Liberties. (2010, January 19). Rights Watchdog to Scrutinise Privacy Safeguards in DNA Database Bill. *Press Release.*

Johnson, H. (2015). Data Retention—Scope of Police Powers: R (on the Application of Catt) v Commissioner of Police of the Metropolis and Anor and R (on the Application of T) v Commissioner of Police of the Metropolis [2015] UKSC 9. *Communications Law, 20*(2), 56–59.

Jowell, J. (1989). The Rule of Law Today. In J. Jowell & D. Oliver (Eds.), *The Changing Constitution* (6th ed.). Oxford: Oxford University Press.

Keith, M. (1993). *Race, Riots and Policing: Law and Disorder in a Multi-racist Society*. London: University College London Press.

Kelpie, C. (2018, July 3). Gardaí to Get Access to Top EU Security Database. *Irish Independent*.

Kilcommins, S., O'Donnell, I., O'Sullivan, E., & Vaughan, B. (2004). *Crime, Punishment and the Search for Order in Ireland*. Dublin: Institute of Public Administration.

LaSota, J. A., & Bromley, G. W. (1974). *Release of Arrest and Conviction Records: Project on Law Enforcement Policy and Rulemaking*. Arizona: Arizona State University.

Law Reform Commission. (LRC 78-2005). *Report on the Establishment of a DNA Database*. Dublin: Law Reform Commission.

Law Reform Commission. (LRC CP 29-2004). *Consultation Paper on the Establishment of a DNA Database*. Dublin: Law Reform Commission.

Law Reform Commission. (LRC IP 8-2016). *Regulatory Enforcement and Corporate Offences*. Dublin: Law Reform Commission.

Leng, R., McConville, M., & Sanders, A. (1996). Researching the Discretions to Charge and to Prosecute. In A. Sanders (Ed.), *Prosecution in Common Law Jurisdictions*. Aldershot: Dartmouth.

Macpherson, W. (1999). *The Stephen Lawrence Inquiry, Cm 4262-1*. London: Stationary Office.

Maguire, M., Morgan, R., & Reiner, R. (2007). *The Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.

McConville, M., Sanders, A., & Leng, R. (1991). *The Case for the Prosecution*. London: Routledge.

McCullagh, C. (1995). Getting the Criminals We Want—The Social Production of the Criminal Population. In P. Clancy, S. Drury, K. Lynch, & L. O'Dowd (Eds.), *Irish Society: Sociological Perspectives*. Dublin: Institution of Public Administration.

McCullagh, C. (2002). How Dirty Is the White Collar? Analysing White Collar Crime. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.

McCullagh, C. (1996). *Crime in Ireland: A Sociological Introduction*. Cork: Cork University Press.

McCullagh, C. (2010). Two-Tier Society; Two-Tier Crime; Two Tier Justice. In S. Kilcommins & U. Kilkelly (Eds.), *Regulatory Crime in Ireland*. Dublin: First Law.

McCullagh, C. (2014). From Offenders to Scumbags: Changing Understandings of Crime and Criminals in Contemporary Ireland. *Irish Journal of Sociology, 22*(1), 8–27.

Mulcahy, A., & O'Mahony, E. (2005). *Policing and Social Marginalisation in Ireland*. Working Paper 05/02. Dublin: Combat Poverty Agency.

National Crime Forum. (1998). *Report of the National Crime Forum*. Dublin: Institute of Public Administration.

Newburn, T., & Reiner, R. (2007). Policing and the Police. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *The Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.

O'Donnell, I. (1997). Crime, Punishment and Poverty. *Irish Criminal Law Journal, 7*(2), 134–151.

O'Donnell, I., & O'Sullivan, E. (2001). *Crime Control in Ireland: The Politics of Intolerance*. Cork: Cork University Press.

O'Donnell, I., Teljeur, C., Hughes, N., Baumer, E., & Kelly, A. (2007). When Prisoners Go Home: Punishment, Social Deprivation and the Geography of Reintegration. *Irish Criminal Law Journal, 17*(4), 3–9.

O'Donnell, I., Baumer, E. P., & Hughes, N. (2008). Recidivism in the Republic of Ireland. *Criminology & Criminal Justice, 8*(2), 123–146.
O'Keefe, C. (2008, January 23). We Need EU-Wide Database to Monitor Criminals. *Irish Examiner.*
O'Loingsigh, G. (2004). *Getting Out, Staying Out: The Experiences of Prisoners Upon Release*. Dublin: Community Technical Aid.
O'Mahony, P. (1993). *Crime and Punishment in Ireland*. Dublin: Round Hall Press.
O'Mahony, P. (1997). *Mountjoy Prisoners: A Sociological and Criminological Profile*. Dublin: Stationary Office.
O'Mahony, P. (2002). The Constitution and Criminal Justice. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.
O'Malley, T. (2009). *The Criminal Process*. Dublin: Thomson Reuters, Round Hall.
Packer, H. L. (1964). Two Models of the Criminal Process. *University of Pennsylvania Law Review, 113*, 1–68.
Phillips, C., & Brown, D. (1998). *Entry Into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes, A Research and Statistics Directorate Report, No. 185*. London: Home Office.
Regan, L. (1995). *Taken Down in Evidence*. Dublin: Gill & Macmillan.
Rottman, D. B. (1984). *The Criminal Justice System: Policy and Performance*. Dublin: National Economic and Social Council.
Ryan, A. (2000). Arrest and Detention: A Review of the Law. *Irish Criminal Law Journal, 10*(1), 2–10.
Sanders, A., & Young, R. (1994). The Rule of Law, Due Process and Pre-trial Criminal Justice. *Current Legal Problems, 47*, 125.
Sanders, A., & Young, R. (2007). From Suspect to Trial. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *The Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.
Sanders, A., Young, R., & Burton, M. (2010). *Criminal Justice* (4th ed.). New York: Oxford University Press.
Schulenberg, J. (2016). Police Decision-Making in the Gray Zone. *Criminal Justice and Behavior, 43*(4), 459–448.
Skolnick, J. (1979). Police Work. In C. Campbell & J. Wiles (Eds.), *Law and Society: Readings in the Sociology of Law*. Oxford: Oxford University Press.
Smith, D. (1986). The Neighbourhood Context of Police Behaviour. In A. Reiss & M. Tonry (Eds.), *Communities and Crime*. Chicago: University of Chicago Press.
Smith, D., & Gray, J. (1983). *Police and People in London*. Aldershot: Gower.
Stephen, J. (1883). *A History of the Criminal Law of England*. London: Macmillan & Co.

Walklate, S. (2001). *Gender, Crime and Crime Justice*. Devon: Willan.
Walsh, D. (2016). *Criminal Procedure*. 2nd ed. Dublin: Thomson Round Hall.
White, J. (2000a). The Confessional State-Police Interrogation in the Irish Republic: Part 2. *Irish Criminal Law Journal, 10*(1), 2–6.
White, J. (2000b). The Confessional State-Police Interrogation in the Irish Republic: Part I. *Irish Criminal Law Journal, 10*(1), 17–20.
Willis, C. (1983). *The Use, Effectiveness and Impact of Police Stop and Search Powers*. London: Home Office.
Wilson, J. Q. (1968). *Varieties of Police Behaviour: The Management of Law and Order in Eight Communities*. Harvard: Harvard University Press.
Zuckerman, A. A. S. (1992). Miscarriage of Justice—A Root Treatment. *Criminal Law Review*, 323–345.

4

The Role of Criminal Record in Bail

Once an individual is charged with an offence, an important decision is whether to grant or refuse bail. Bail is the release of a person from custody by the courts or by the Gardaí, subject to the condition that he or she will appear in court for trial or at a Garda station as requested at an appointed time in the future. To deny bail is to deprive someone of his or her liberty in circumstances where guilt has not yet been established. This has implications for constitutional rights such as the presumption of innocence and personal freedom.[1] Ireland operates a comparatively fair system of bail, with due consideration to constitutional standards of fairness. Strong justifications must be adduced in order to deny an individual their fundamental rights under the Constitution. One High Court judge in this jurisdiction presented the view that: "Obviously, the starting position is these are innocent people. We shouldn't be interfering with their liberty either by detaining them or imposing conditions" (High Court Judge, Irish Penal Reform Trust 2016).

The law on pretrial detention has altered and evolved in recent times, enhancing the significance of particular factors in the decision-making

[1] These rights are protected under Article 38 and Article 40 of the Irish Constitution.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_4

process, including previous criminal convictions. It would seem a foregone conclusion for criminal records to be considered in bail hearings, but up until 1997 in Ireland, its use was relatively restricted. The Supreme Court in particular was sceptical of the relevance of introducing criminal record in the pretrial stages of the justice system. Legislative developments in 1997 altered this stance through mandated factors which have transformed the significance of previous convictions in light of bail decisions.

Bail Law

Bail prior to 1997 was fundamentally a common law issue. The judge in the District Court or High Court hearing the application determined what factors were relevant in considering whether to grant or deny bail. The decision to grant or refuse bail is not a simplistic task. The right not to be punished without lawful authority and the right to be presumed innocent until found guilty are especially important in the context of bail decisions. The presumption of innocence in particular is a fundamental principle inherent in the law. In Ireland, it is a constitutionally protected right, enjoying a stable, though by no means unchallenged, position in the legal process.[2] It goes hand in hand with the right to liberty. The democratic nature of the Irish State requires that all legally innocent individuals have the right to freedom. Enshrined in the Constitution under article 40.4.1 is the proposition that no citizen shall be deprived of his personal liberty save in accordance with law. The right to liberty is one of the most highly respected rights in the world today.[3] Given that detention prior to conviction is inconsistent with such rights, any refusal of bail must be carefully justified and subject to limitations. Moreover, there

[2] The right to presumption of innocence is not expressly stated in the Constitution, but is derived from the express right to a fair trial in due course of law under Article 38. See *O'Leary v. Attorney General* [1995] 1 I.R. 254 and *POC v Director of Public Prosecutions* [2000] 3 I.R. 87.

[3] The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) article 5(3) requires that a person charged with an offence must be released pending trial unless the State can show that there are relevant and sufficient reasons to justify detention. Note however that The European Convention on Human Rights (ECHR) article 5(1) allows for the deprivation of liberty "when considered necessary to prevent the person committing an offence."

are other interests that must also be weighed in the balance. These include the need to ensure the individual's appearance before the court, the need to maintain the integrity of the judicial process, and public protection.

Up until the 1997 Act, there were two reasons why bail could be refused: if there was a risk of the accused absconding and/or if there was a risk of the accused interfering with witnesses and/or evidence. These grounds were confirmed by the Supreme Court in the cases of *AG v O'Callaghan* (1966)[4] and *Ryan v DPP* (1989).[5] Much of the discussion in the Supreme Court in *O'Callaghan* surrounded the factors set down by Murnaghan J in the High Court. Amongst the factors considered relevant to bail decisions (such as seriousness of charge and evidence in support), the judge had included the likelihood of the commission of further offences while on bail. This factor could rely upon previous convictions to form an assumption that the accused may offend again. The Supreme Court (per Walsh J and O'Dalaigh CJ) emphatically rejected consideration of such a factor on the basis that this would lead to "a form of preventative justice which has no place in our legal system and is quite alien to the true purposes of refusing bail" (p. 516). The rejection of refusing bail as a preventative measure may be seen as a reflection of the firm judicial respect for individual and constitutional rights. The Court was of the opinion that preventative measures are to be appropriately applied at sentencing stage and no earlier, and to do otherwise would be "contrary to the concept of personal liberty enshrined in the Constitution" (per Walsh, p. 516). The Supreme Court emphasised that the purpose of bail was to secure the attendance of the accused at trial. Ensuring that he or she did not evade justice was essential to the whole criminal and judicial process. Evading justice then by a similar measure would encompass the interfering with witnesses or the destroying of evidence, and thus the Court accepted that this was a further factor for which bail could legitimately be refused. Walsh J stressed, "from time to time necessity demands that some unconvicted persons should be held in custody pending trial, to secure their attendance at the trial but in such cases 'necessity' is the operative test" (p. 513). The Court did not feel it necessary to consider the

[4] *People (AG) v O'Callaghan* [1966] I.R. 501.

[5] *Ryan v DPP* [1989] I.R. 399.

likelihood of reoffending behaviour or previous criminal convictions in establishing this likelihood. The Supreme Court in the case of *Ryan* went so far as to exclaim that consideration of this factor would 'constitute an abuse of power' as the exercise of discretion in relation to a crime not yet committed (only apprehended) was strictly outside the court's scope (p. 407).

Three main justifications thus emerge from these cases for rejecting the notion that bail could be refused to prevent the commission of an offence. These are an adherence to and respect for personal or fundamental rights, especially the presumption of innocence; that this type of preventative justice is not acceptable in the legal process; and that remanding and inevitably incarcerating accused persons amounts to punishment, which could only be justified on grounds of absolute necessity. The Supreme Court of Ireland demonstrated a scepticism of utilising previous convictions in bail decisions largely because it was considered to conflict with the true purpose of bail. The purpose of bail historically is not preventative; it is to ensure that the accused will surrender for trial and thus not evade justice.[6] Crime prevention measures were traditionally seen to belong to the social arena. Preventative measures in a social setting (e.g. locking gates into parks at night and so preventing youths from drinking or taking drugs) are distinguishable from introducing preventative measures within the criminal justice process where rights become a more fervent consideration. Majoritarian notions of public justice and protection could not outweigh the need for balance in the court's decision-making, especially where such considerations would disproportionately affect the liberty rights of a yet untried and unconvicted person. The Court in *O'Callaghan* felt that the "presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial" (p. 513). The view that preventative detention is completely irreconcilable with the presumption of innocence may be a contradiction, however, considering that even refusing bail to prevent evasion of justice can be classed as preventative (O'Mahony 1995).

[6] Ashworth has argued, however, that even the refusal of bail on the grounds that the suspect might evade justice can still be interpreted as preventative. The law aims to prevent the suspect from doing something illegal, whether that be jumping bail or committing some other offence (Ashworth 1994).

Otherwise bail could never legitimately be refused. Nonetheless, the courts have habitually favoured a cautious approach to increasing the preventative measures emanating within the criminal justice system, lest it recalibrate the scales of justice too far away from its core values.

The cautious approach to the use of the arrestee's criminal record may appear overly reliant upon the idea of rights, but there is another reason why the Irish courts rejected this factor. In addition to undermining the presumption of innocence, utilising this factor would allow the courts to infer from the fact that the person has previous convictions, that he has a propensity to reoffend, again an issue the courts deemed to be at odds with the true purpose of bail—to procure the attendance of the accused at trial. The rejection of this factor was also linked to the element of intention, evident in allowing refusal to be based upon prevention. In the law, there are two elements of a crime: actus reus (physical action) and mens rea (mental element). Normally the criminal law requires both elements before a crime has occurred, although some exceptions exist (e.g. conspiracy).[7] Contemplating a crime in one's own mind without any act in furtherance of this has never been considered to be an offence which merits punishment. Finlay CJ in the Supreme Court in *Ryan* remarked that "the criminalizing of mere intention has been usually a badge of an oppressive or unjust system" (p. 407). The Court continued that if this is now allowed to apply in relation to those coming within the system, there is little reason why "another citizen not so charged, might not be detained upon a similar contention, supported by similar evidence; the 'pointing finger' of accusation not of crime done, but of crime feared, would become the test" (p. 407). Such policy was not acceptable to the judiciary. Combining both elements of criminal record and intention together, the court felt that what was being proposed was for them to incorporate into their exercise of discretion, a finely-tuned art of speculation and guessing. Referring to criminal past and intention would, it was suggested, be intended to facilitate predictions of who might offend

[7] The offence of conspiracy is an agreement between two or more persons to commit an unlawful act. To establish the offence however, there must be some evidence of progression towards committing the act of crime. Conspiracy to murder, for example, requires some agreement between individuals to commit the act of murder; the agreement is the progression towards committing the act itself.

again. As Walsh J emphasised that "[e]ven if one were to assume that the accused is guilty of the offence charged that fact does not in any way establish the likelihood of the commission of another offence…. In the vast majority of cases, even of persons with known criminal records, an attempt to predict who is likely to commit an offence while awaiting trial on bail can never be more than speculative" (p. 516). The judiciary rejected such a practice as an unsound social and legal policy. While research in this jurisdiction is scant, research elsewhere has indicated that it is extremely difficult to accurately predict who is likely to reoffend (Gottfredson and Gottfredson 1988; Morgan and Jones 1992; Law Reform Commission 1995; Goldcamp 1985) and that predictions are likely to be exaggerated and can even produce erroneous decisions (Walker 1996).

The other reasoning emerging from the case law is that detaining an individual in custody (in prison) amounts to punishment. Classing a measure as punitive or regulatory is important. Punishment is something suffered or inflicted for a wrong done (legal), whereas regulatory measures are aimed at preventing behaviour, including criminal behaviour, which has not yet occurred and operate for the most part outside the legal system.[8] Historically, imprisonment has been viewed as punishment, but this may be because it has usually been confined to punishment after conviction. Do the punitive elements of imprisonment cease to exist then, if the detention is in the pretrial stage of the process? One view is that they do[9] and given that the aim of pretrial detention is prevention, the social benefit exceeds any punitive elements in remanding individuals in custody. A contrary view is that imprisonment *is* classed as a punishment (see Hart 1968, p. 4), and thus it is reasonable to conclude that the punitive elements are active whether the detention is post-trial or pretrial. This is so, despite the measure having some preventative aim. In

[8] Once a crime has been committed the legal process begins and the aim is either to set free innocent individuals or punish those who have been found guilty in a court of law. Prevention can be traced to community-based measures such as lighting in dark corners, CCTV, locking access to certain areas. Regulatory measures, however, can be evidenced within the criminal justice system itself (e.g. Anti-Social Behaviour Orders, requirements for offenders to sign on in Garda stations, conditions imposed by a court granting bail).

[9] The Supreme Court in *US v Salerno* (1987) 481 U.S. 739, considered pretrial detention to prevent the commission of an offence to be regulatory rather than punitive.

O'Callaghan, O'Dalaigh CJ determined that "it transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted. I say punish, for deprivation of liberty must be considered a punishment unless it can be required to ensure that an accused person will stand his trial when called upon." There is a contradiction in this statement. If pretrial detention is viewed as a punishment, then the punitive elements apply regardless of the reason behind the decision to detain. All pretrial detention is to some degree punitive. Nonetheless, the evasion of justice is deemed the only justifiable reason for the courts to impose preventative custody, as this purpose (to ensure attendance at trial) does not negatively affect the presumption of innocence (O'Mahony 1995).[10]

Up until the 1990s, there was little dispute as to the law governing bail, except perhaps amongst government officials. Any disquiet was voiced in courtroom battles, but for the most part the judiciary upheld the principles set down in *O'Callaghan* and *Ryan*. In 1996, however, the wheels of legislative change began to turn encompassing calls for reform of the law pertaining to bail. The two motivating events which led to a demand for change were the murders of journalist, Veronica Guerin, and Detective Garda, John McCabe. A media-driven alarm and anger at a perceived rise in organised crime became a prominent theme in the summer of 1996 in the aftermath of these killings (Kilcommins et al. 2004, p. 137). The idea that criminals were essentially free to roam and kill became a pervasive political concern, bubbling over into the crime package introduced later that year.[11] Bail was also put on the political agenda in a move that directly contradicted the government's previous stance on the matter. The first change was the referendum in November which resulted in the addition of article 40.4.7 to the constitution, which stated: "Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered

[10] Tribe observes that determination of whether the accused will abscond or interfere with the trial process does not involve any assumptions of guilt. The purpose is to ensure his appearance at trial and so does not reflect negatively on the presumption of innocence (Tribe 1970, p. 404).

[11] This crime package included the significant Criminal Justice (Drug Trafficking) Act 1996 which extends the period of detention for questioning suspects in relation to drug offences and allows inferences to be drawn from silence.

necessary to prevent the commission of a serious offence by that person." This provision conforms to international standards on personal liberty. The European Convention on Human Rights (ECHR) article 5(1) while generally upholding the importance of personal liberty allows for its deprivation "when considered necessary to prevent the person committing an offence."[12] In the wake of the referendum, an unyielding concern had arisen that more and more people were committing crimes while on bail with percentages increasing for bail crime in robberies and other offences. The Garda claimed that more than 3000 indictable offences were attributed to so-called bail bandits. The need to control the situation came fast and furious and the referendum paved the way for the Bail Act, which had been drafted and advocated for a number of years before eventually making it into law in 1997.[13] The Bail Act addressed extensively the law governing bail applications and in particular the factor of allowing bail to be refused to prevent the commission of an offence.[14] By virtue of s. 2(1) the following now has effect within the Irish system: "Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that

[12] The European Court of Human Rights has validated this reason for refusing bail in a number of cases: see, for example, *Matznetter* (1969) 1 E.H.R.R. 198; *Toth v Austria* (1991) 14 E.H.R.R. 551. Note also the case of *Clooth v Belgium* (1991) 14 E.H.R.R. 717, where the European Court determined that although pretrial detention was permitted to prevent reoffending, it was necessary that the danger be a plausible one and appropriate in light of the accused's history and personality. In this case, the accused's prior convictions (for theft and desertion) were not comparable to the present charges (arson and murder), and so after a certain point this ground ceased to be a justification for the continued detention of the individual.

[13] The introduction of this new legislation was not uncontroversial. The 'For' camp argued greater public protection and considered the legislation to be a "reasonable measure" in line with article 5 (1) of the ECHR. In the 'Against' camp arguments circled around the importance of fundamental rights and principles and the great threat which this form of preventative detention would pose upon such principles. Arguments against also focused upon the standard of proof which would apply and it is worth noting that the dangers which were anticipated have been realised as there is not yet an established standard of proof regarding the evidence which is given in bail hearings or regarding the factors which can be considered in refusing bail. If any standard is applied, it seems to be the balance of probabilities standard rather than the criminal standard of beyond reasonable doubt. See Walsh J's comments in *People (AG) v O'Callaghan* [1966] I.R. 501 and Keane J's comments in *McGinley v DPP* [1998] 2 I.R. 408.

[14] The Act can be seen to follow the route taken in other jurisdictions. In England and Wales, the Bail Act 1976 permits the refusal of bail if there are substantial grounds for believing that the accused would commit an offence, while a similar provision exists in the US under the Bail Reform Act 1984.

such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person." In exercising its discretion, the court *must* consider a range of factors (s.2(2)) including, expressly, any conviction the accused has for an offence committed on bail and any previous convictions the person has. These factors are deemed to be as relevant to consider as the nature and seriousness of the offence charged, and the nature and strength of the evidence in support of the charge. The application of the provision is limited to serious offences which the act defines as an offence specified in the schedule (which has been amended and added to by subsequent legislation[15]) for which a person may be punished by a term of imprisonment of five years or more. The term is not as limiting as it may initially appear, however, and there is a broad range of offences to which the term 'serious' is applicable.[16]

The Act does attempt to limit the potentially prejudicial effect of the requirement to consider past convictions. Section 4(1) provides: "In any proceedings in relation to an application referred to in s.2(1), the previous criminal record of the person applying for bail shall not be referred to in a manner which may prejudice his or her right to a fair trial." To this end, the court may hear such evidence in private or may exclude certain individuals from the courtroom during the entering in of such evidence (s.4(2)(a)–(b)). This section is supported by s.4(3) and s.4(4), which provide respectively that no information of the criminal record of an accused can be published or broadcast and to do so will be an offence liable to a fine or imprisonment. Such safeguards may have been adopted in view of Walsh J's statements in *O'Callaghan* to the same effect, although this is not clear. Those with a criminal record are also entitled to the generic safeguards applied in bail decisions. They are entitled to be given notice of objections to bail, to challenge such objections, and appeal a refusal of

[15] The most recent amendment is under s.50 of the Criminal Law (Sexual Offences) Act 2017.

[16] The offences include: Murder, manslaughter, sexual offences, traffic offences, most offences under the Non-Fatal Offences Against the Person Act *1997*, firearms offences, organised crime offences (inserted by s.79 of the Criminal Justice Act 2007, and s.15 of the Criminal Justice [Amendment] Act 2009), offences under the Criminal Justice Theft and Fraud Act 2001, drug trafficking offences, any offence under the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (s.113), offences relating to psychoactive substances under the Criminal Justice (Psychoactive Substances) Act 2010, an offence under s.2, 3, or 4 of the Criminal Justice (Female Genital Mutilation) Act 2012.

bail.[17] Where bail has been refused and the accused's trial has not commenced within four months, he may reapply on the ground of delay. The court will grant bail if it is in the interests of justice. The burden of proof rests with the prosecution and, despite some ambiguity on the issue, it seems that the standard of proof in bail hearings is the balance of probabilities, not the criminal standard of beyond a reasonable doubt.[18] The prosecution will succeed so long as the Court is satisfied that refusal of bail is considered necessary and there is no need to establish that the commission of a specified offence is apprehended.

Subsequent changes to bail law came in the form of the Criminal Justice Act 2007, part 2 of which amends the Bail Act 1997. It is interesting to note that, similar to the circumstances surrounding the introduction of the 1997 Act, legislative mandate arose in the aftermath of the deaths of gang boss Martin Hyland and innocent plumber Anthony Campbell in December 2006. When it came to light that at least two of the suspects had been out on bail, this sparked huge debate from the political sphere as to whether judges were being 'soft on criminals' in relation to bail applications. The Minister for Justice at the time, Michael McDowell, in what has been termed by some as an 'unprecedented' attack on the judiciary, demanded a tightening of bail procedures, a populist move which evoked much support. Additional legislation was sought which would place the Gardaí and the prosecution authorities in a much stronger position when objecting to bail applications (Department of Justice 2007). The provisions of the Criminal Justice Act 2007 were described by Mr McDowell as 'proportionate to the threat we face.'[19] Among many significant changes made by the 2007 Act, a bail applicant is now required to furnish the prosecutor with a written statement, signed, and containing a range of detail. Section 6, which amends the 1997 Act by inserting this section (to be known as 1A) after s.1, provides for such a statement and requires detail of name, occupation, income, and any property owned. Disclosure

[17] *McDonagh v Governor of Cloverhill Prison* [2005] 1 I.L.R.M. 340.

[18] Both Walsh J in *People (AG) v O'Callaghan* [1966] I.R. 501 and Keane J in *McGinley v DPP* [1998] 2 I.R. 408 refer to the balance of probability standard. The implications for accused persons are that the full benefit of due process rights pertaining to them pretrial are diminished.

[19] These comments were made in a speech by the Minister in Limerick in September 2006.

must be made of previous convictions for a serious offence, previous convictions for an offence committed on bail, and any applications made for bail before, indicating reasons for being refused or granted and any conditions attaching (s.1A (1) (e)(f)(g), respectively). Safeguards are put in place under s.1 (8)–(10) forbidding such a statement to be published 'unless the court directs otherwise' and under s.1(12) such a statement may not be used in any other proceedings against the applicant. The Act also allows for opinion evidence in bail applications. This is a significant development in the law and is likely to be particularly relevant for those with a criminal past. Being 'known' to the Gardaí will be important when the decision to oppose bail is taken. A Garda not below the rank of Chief Superintendent, may state in evidence that he or she believes that refusal of the application is reasonably necessary to prevent the commission of a serious offence by that person and this statement is admissible as evidence that refusal of the application is reasonably necessary for that purpose. Such evidence may not, however, be used in subsequent proceedings. Section 11 of the Act also provides that where a person, charged with an offence or appealing against conviction, is released on bail and enters into a recognisance, the Court may impose the condition that the individual's movements be monitored electronically. For this purpose, a monitoring device may be required to be attached to his person.[20] Section 12 then goes on to provide for the use of such evidence in relation to the electronic monitoring of the individual by statement or certificate. The most recent amendments to the 1997 Act have emerged under the Criminal Justice Act 2017, which, in substituting a new section 2, includes a provision (s 2(f)(ii)) for the court to consider "the extent to which the number and frequency of any previous convictions of the accused person for serious offences indicate persistent serious offending by the accused person." Such a phrase must surely exhibit the complete transformation of the law on bail from the common law position of the Supreme Court in cases like *O'Callaghan*. The Act also allows a court to receive evidence or hear submissions in relation to section 2 applications. The most significant of these is undoubtedly the opportunity to hear complainant

[20] Subsection 9 makes clear that this section does not apply to those under the age of 18 years.

evidence in deciding whether or not to grant bail. Such an innocuous amendment signals Ireland's commitment to incorporating the voices of victims into the criminal justice system in a worthy attempt to reshuffle the focus away from the state versus offender narrative dominating to date.[21]

Pretrial Detention: Rights and Regulations

The combined changes of both the 1997 and 2007 Acts signal a significant departure from the common law approach prior to 1997. The common law approach is now reserved for cases where the accused is not charged with a serious offence, and unless there is a significant risk of the accused committing a serious offence on bail, consideration of factors such as criminal record should not be relevant. The judiciary in the immediate aftermath of the 1997 Act remained cautious, even where the legislative provisions applied. The Courts in both *DPP v Corbally* (2001)[22] and *DPP v Maguire* (2005)[23] emphasised that evidence of past behaviour will not necessarily preclude release on bail. In *DPP v Corbally*, the Supreme Court considered that the fact that the person is coming before the court as a convicted person (or a person with a criminal record) would not in itself preclude a decision to grant bail. The court felt that such a decision must be in the interests of justice.[24] Similarly, in *Maguire* the Supreme Court in both cases considered that s.2(2) of the Bail Act 1997 did not exclude consideration of any other matter whether in favour of or against the accused person by the judiciary.

Predictions of an increase in pretrial detention have borne fruit, however, as the judiciary have been placed under intense scrutiny and criticism. Both the Irish Prison Service and the Irish Penal Reform Trust have

[21] The Criminal Justice (Victims of Crime) Act 2017 has recently been enacted in order to honour Ireland's commitments under the EU Victims' Directive (Directive 2012/29/EU).

[22] *DPP v Corbally* [2001] 1 IR 180.

[23] *DPP v Maguire* [2005] 1 ILRM 52.

[24] This was so even though the rights of the individual appealing conviction are not quite the same as when they were charged to begin with. The presumption of innocence has been rebutted by the guilty verdict.

noted the significant increase in the number of committals on remand since the Bail Act 1997. There has also been an increase in the length of time spent on remand (Irish Penal Reform Trust 2006). In 1992, there were 101 remand prisoners in Irish prisons. In 2001, that number had risen to 458, representing an increase of 42% from the previous year alone (prior to the commencement of the Act). Since then the number of remand prisoners has fluctuated. The snapshot figure was 602 in 2009 (Irish Prison Service 2009) subsequent to the 2007 provisions, with the total number of committals on remand for that year standing at 4519, just less than half the figure for committal under sentence (10, 226). The latest available figure (December 2017) stood at 664 (within a prison population of 3646; Irish Prison Service 2017), with the total number of committals on remand for 2017 at 3355. The provisions of the act have indeed had a substantial impact on the number of persons in custody (O'Donnell and O'Sullivan 2003) and even where bail is granted, conditional bail is more likely. A report by the Irish Penal Reform Trust in 2016 found that, of the cases observed, none of the cases where bail was granted involved the absence of conditions (Irish Penal Reform Trust 2016). The report found a general overuse of bail conditions, despite the fact that the applications were drawn from a very wide range of offences from minor to serious. Moreover, while it appears that the Gardaí are frequently reluctant to see an accused released on bail without onerous conditions, there is inadequate monitoring of compliance with bail conditions, which begs the question of how necessary the conditions are in the first place, particularly where the offence is minor.

Parallel to the introduction of the provisions, sceptics perceived a significant attack on the presumption of innocence in our system and pitied the unenviable turmoil of the judiciary forced to operate a bail system which "they had consistently declared incompatible with the provisions of the Constitution" (Hamilton 2002). Would the result then be a diminution of the judiciary's ability to apply the principles of justice and fairness in the circumstances where the provisions of the Acts apply? (O'Mahony 2002). Concerns lingered around issues such as opinion evidence and the extent to which the applicant has the opportunity to cross-examine the witness, particularly in circumstances where privilege is

claimed (Irish Human Rights Commission 2007, p. 17). Whether this witness is considered expert or non-expert[25] the evidence this individual gives may weigh the scales further in favour of limiting the right to bail, as interests of crime control take hold. The Irish Human Rights Commission for one expressed concerns that this could "in effect amount to executive detention of the accused; refusal of a bail application being a responsibility that rests under law with the judiciary alone" (p. 18). The wording under both Acts, however, make clear that the decision still remains firmly with the judge, and in practice bail may still be granted notwithstanding the application of the provisions.

Previous criminal convictions have undoubtedly become a more fruitful prosecution tool since the coming into force of the legislation above and the judiciary are more comfortable with acknowledging this factor than they were two decades ago. One Irish High Court judge commented that most people who come before the court "are a fair distance from first time offenders. A pattern of very heavy offending and a history of warrants would cause concern" (Irish Penal Reform Trust 2016). Recent research finds that the prosecution often cite previous convictions as a basis for persuading the court of the risk of future offending under s.2 of the Bail Act 1997 (Irish Penal Reform Trust 2016). Despite this, the risk of reoffending was cited as a ground for refusing bail in respect of only 13% applicants in the study. It may be that the judiciary are more influenced by surrounding factors such as the applicant's bench warrant history or the existence of prior offences committed on bail. This would suggest a deference to the *O'Callaghan* principles, where evasion of justice remains a key concern for judges. In the study where bail was denied, the decisions were well reasoned and clearly based on the evidence presented in court. The default position is that bail should be granted and the prosecution must provide strong evidence to persuade the judge otherwise.

What is also evident from the emergence of the legislative provisions over the past two decades is a strong executive mandate for harsher bail laws and an increased emphasis upon the use of previous criminal convictions. Despite incorporating safeguards to alleviate their oppressive or restrictive nature, the general tenor of the provisions governing bail is

[25] Both types are allowed, as exceptions to the general rule that opinion evidence is inadmissible.

premised upon control and monitoring. Liberty interests are downplayed, particularly in light of increasingly restrictive conditions that can be imposed under statute, even when bail is granted.[26] The introduction of electronic monitoring is a prime example of this. This conditional measure of bail was primarily pioneered to target those involved in gangland crime,[27] but apart from this, no clear rationale for introducing electronic monitoring has been presented and research into its effectiveness remains inconclusive (Hogan 2007). It could simply be political rhetoric, reflecting the populist belief that that bail is a 'privilege' and that so-called bail bandits are breaching the trust the court has bestowed upon them in granting bail (Law Reform Commission 1995). While it may be a better alternative to imprisonment, tagging an accused in the pretrial stages of the criminal process still involves infringements on the individual's right to privacy, personal liberty, and bodily integrity, which require strong safeguards and restrictions. There are no such restrictions provided for under the provisions of the 2007 Act, raising doubts as to whether electronic monitoring is a measured response (Hogan 2007). It would also be regrettable if used as a net-widening instrument, restricting those who might otherwise have been entitled to bail without conditions (See Griffin 2005).[28] While at present it does not appear that electronic monitoring is used very often as a bail condition, this position may change in the near future. The General Scheme of the Bail (Amendment) Bill 2017 seeks to reinforce pretrial electronic tagging as a means of social control in the community for those granted bail. The existence of a prior record is likely to weigh heavily into the decision to tag. Electronic tagging may be useful if it is used as a reasonable and proportionate alternative to prison, but there should be caution against resorting to it merely as a pro forma bail condition where it ordinarily would not have been considered. This

[26] The key conditions of bail are entering a recognisance, providing sureties, and surrendering for trial. See further s.6 of the Bail Act 1997.

[27] The changes were "specifically designed to ensure that it will be more difficult for those charged with gangland offences to get bail." Department of Justice, "McDowell publishes draft legislation to counter gangland crime" *Press Release*, 19 December 2006.

[28] There is also a concern regarding the prospect of private agencies taking responsibilities in monitoring mechanisms. The idea of responsible monitoring, which preserves due process in the pretrial stages of the system, become more tenuous when married with the prospect of removing this function from criminal justice agencies.

would be especially prudent in light of evidence suggesting an over-reliance upon the use of bail conditions (IPRT 2016). Conditional bail (typically conditions regarding curfews, residence, good behaviour, reporting to Garda stations, and keeping away from certain individuals including witnesses) has become increasingly significant in this area and while it may be preferable to remanding an accused in custody, it raises concerns of its own.[29] For one it restricts the liberty of an individual who remains legally innocent at that point in time. Moreover, the longer the bail and the greater the conditions the more likely it will be that the accused will breach some condition of his bail. The effect of this will be a rehearing of the bail application and often a denial of bail or the imposition of greater, more restrictive conditions if released. Conditional bail makes clear the ambit of control that the criminal system has over individuals and conveys the broadening of the net over a greater number of individuals than ever before. Nonetheless, conditions imposed cannot be unduly restrictive having regard to the circumstances of the case and must be based on evidence. The superior courts have always been guarded against unwarranted, unlawful, and unnecessary restrictions upon and interference with the applicant's constitutional right to liberty (*Ronan v District Judge John Coughlan and the DPP* [2005] I.E.H.C. 370).

A renewed commitment to target those with a criminal past has also emerged under the proposed new Bail (Amendment) Bill 2017. This Bill seeks to provide further restrictions upon access to bail, while aiming to "get tougher on serious and repeat offenders" (Minister Fitzgerald announcing the Bill). The Bill imposes new requirements on the court in considering bail and a new power of arrest for the Gardaí for breach of bail conditions. The Bill also proposes to require the Courts to give reasons for their decisions. However, it is unclear whether this provision will make it into the final Act, given that such a proposal has now been introduced under the Criminal Justice Act 2017, section 9 of which requires reasons to be given concerning the grant/refusal of bail and in relation to the decision to impose or vary any conditions to be contained in the recognisance. This is a welcome provision and will introduce greater trans-

[29] Failure to comply with conditions of bail is subject to a number of statutory provisions including forfeiture of monies under s.9 of the Bail Act 1997 as inserted and aggravated sentencing for offences on bail under s.10.

parency into bail decisions. It will also undoubtedly assist in determining the basis for appeals. The Criminal Justice (Burglary of Dwellings) Act 2015, which amends s.2 of the Bail Act 1997, further reinforces the focus upon the criminal record, with particular emphasis upon offences perpetrated in the dwelling. Given the sanctity of the dwelling, invasion of such for the purpose of criminal activity is viewed strictly by the legislature and the courts, and this legislation expressly intends to "keep repeat burglars off the streets" (Minister for Justice). The Act provides that in s.2 objections to bail, evidence of a likelihood to commit further burglaries can be drawn from the existence of prior convictions for offences committed in a dwelling. The legislation has been criticised for further negating the presumption of innocence, in light of its targeting of domestic burglars (IPRT 2016). The Act goes far enough to create a legislative presumption in favour of preventative detention, which is strictly at odds with constitutional respect for personal liberty and the presumption of innocence.

Concluding Observations

Despite the criminal record being considered a factor "fraught with danger of excesses and injustice" (Jackson J in *Williamson v US* [908]),[30] bail legislation has narrowed the gap between judicial discords by requiring judges to consider the criminal history of the applicant in evaluating bail applications. To some extent, this renders the exercise more transparent than pre-1996, at least where the legislative provisions apply. The clear objective is to target repeat offenders in order to better protect the public. Controversy that has surrounded bail centres on the social and political belief that bail is granted too readily (a belief which is contradicted by statistics revealing a high number of those committed on remand). A sense of outrage at the prospect that someone who has been charged with an offence would remain at large permeates throughout the social consciousness overshadowing consideration of other issues. A charge does not equal to a finding of guilt, the person must still be tried and until

[30] *Williamson v US* (1908) 207 U.S. 425.

then he or she remains legally innocent. If the person is ultimately acquitted, then most people would deem a lengthy remand period in prison to be unjust.[31] The decision to grant or refuse bail is not taken lightly and there are many rights and interests to weigh in the balance.

Human nature is difficult to predict and while previous convictions can be useful in some circumstances, they will not always be an indicator of future reoffending behaviour. The Supreme Court in *O'Callaghan* viewed such predictions as tentative at best and considered that in order to avoid unnecessary prejudice it is 'highly undesirable' that criminal record be referred to at all (Walsh, p. 510). But the obsession with the 'criminal other' dictates the political agenda. Assisted by media portrayal of crime rates among those out on bail, the rights of the public and victims are frequently offset against those of the accused.[32] It often appears that the whims of moral panics and public opinion are the dictators of legislative change and constitutional considerations become inconvenient obstacles in the way of public safety concerns. Perceived instances of crime crises rallies support for harsh measures, but it is not always clear that these measures are a reasoned or proportionate response to the circumstance. Moreover, the effectiveness of these measures remains unclear. While it is desirable that judges retain the power to consider previous criminal record, it will not always be necessary or proportionate that this factor be used to deny bail. In some circumstances, this may lead to a situation of unjustly targeting the so-called known criminals, where past convictions and suspicion become the definitions of guilt. Individual rights are not to be dismissed as purely liberal rhetoric. The presumption

[31] Research prior to the 1997 legislation observed a high rate of non-custodial outcomes for individuals who have been detained on pretrial custody. Only 38% of the remand prisoners dealt with in 1992 were subsequently recommitted to prison (Department of Justice Annual Report on Prisons 1992). The remaining 62% were either acquitted at trial, proceedings were dropped, or were given a non-custodial sentence. Of those charged with very serious offences, 30% were not recommitted. Since then, research has been lacking in tracking non-custodial outcomes for those remanded on pretrial detention, despite recommendations that such analysis would be useful in assessing the necessity of using pretrial detention to the extent it is currently used (Irish Penal Reform Trust 2015).

[32] For example, Kane, C. (2008) "43 killings in 4 years were by people out on bail" *Irish Examiner*, 28 October 2008, in which it was reported that almost 90,000 crimes were committed by suspects on bail since 2004. In the report victims group Advic commented on the pain suffered by victims and that "very often the families are not listened to … [b]ut in the Constitution, there seems to be a God-given right to bail."

of innocence and right to liberty are fundamental rights in the criminal justice system and should only be interfered with when it is clearly necessary and proportionate to do so. The political agenda in securing public confidence and sense of security is more adductive to a society where control is the flagship of criminal policies, and where the rights of the individual are downtrodden and often unjustifiably so. The fact that the criminal record is an express factor which is considered in refusing bail, to some extent represents the continuing suspension of rights pertaining to ex-offenders. In this context, the perpetuation of the 'suspect' label may intensify into the 'offender' label. Whether necessary or not, what is evident is the application of control techniques upon the accused, exacerbated when this individual has past convictions. Public protection is the propeller behind the decision to utilise prior record in bail decisions. It is an important element that must be taken into account. The public have the right to be protected, and as such the consideration of this factor and the refusal of bail can be entirely legitimate and necessary. Nonetheless, this does not mean that refusing bail is always justified or that past record is always relevant. With regard to the principle of indivisibility of past record, there is nothing under the Acts which dictates that the past conviction must bear some specific relevance to the current charge (with the exception of the Criminal Justice [Burglary of Dwellings] Act 2015). Thus it seems any and all past convictions may be considered in deciding whether to refuse bail. Similarly, the legislation does not preclude old convictions from being considered, and thus any offence committed, even old offences, may be brought to bear on the proceedings regardless of relevance. Judicial discretion stands as the only means of lessening the harsh effect this can have. Undoubtedly, the more recent and relevant the offence is, the more weight it will have for the judge making the decision.

The right to bail, while it is not an express constitutional right, has emerged as recognition by the courts that every accused person is to be presumed innocent until proven guilty and shall not be deprived of his liberty unnecessarily pending his trial (article 38.1 and article 40.4.1of the Constitution). Pretrial detention has evolved in an era where such rights are not deemed as important as protecting the public through preventative detention. The argument of prevention denies the impact

which detaining an accused in custody can have upon them and their families (Law Reform Commission 1995; NACRO 1992). The person, yet untried and unconvicted, may endure financial losses, may lose jobs or employment prospects, and their family may also suffer as a result of this. Preparation of a defence is also made more difficult, arguably impossible, by being detained in custody, although there remains a right of access to a lawyer.[33] Emotional problems are most likely to ensue from being away from family and friends, being confined in the prison environment and exposed to prison conditions, and such consequences are more significant if the accused is later acquitted of the crime. Suicide is also a problem among remand prisoners. Replacing prison with an alternative place of detention, such as bail hostels as the place for pretrial detention, would be a positive step in removing remand prisoners from the prison environment and thus from the negative consequences of pretrial incarceration (O'Donnell 2005; Law Reform Commission 1995; Ni Raifeartaigh 1997; Irish Penal Reform Trust 2016). For the ex-offender, there is almost a presumption of guilt arising, dominating policy developments in this area. The de facto lifelong nature of a conviction becomes clearer. Perpetual suspicion follows and it becomes easier to deny pretrial liberty on the basis of such suspicion. The presumption of innocence is inevitably diminished as a result.[34]

Bibliography

Ashworth, A. (1994). *The Criminal Process: An Evaluative Study*. Oxford: Clarendon Press.

Bottomley, K. (1973). *Decision in the Penal Process*. London: Martin Robertson.

Department of Justice and Equality. (2007, March 15). Criminal Justice Bill Published. *Press Release*.

[33] Research in America and Britain indicates that the very fact that the accused was detained before trial can lead to discrimination against the individual at trial. It appears that jurors tend to view pretrial custody as a mark of guilt (Reaves 1991; Bottomley 1973).

[34] O'Mahony has remarked that "denying people their liberty on the basis of something they might do in the future strikes at the heart of our liberal democratic society. It is a form of 'thought-crime' and it must be opposed. It is also a short step away from imprisoning anyone on a suspicion that might commit a crime in the future."

Goldcamp, J. S. (1985). Danger and Detention: A Second Generation of Bail Reform. *Journal of Criminal Law and Criminology, 76*, 1–74.

Gottfredson, M., & Gottfredson, D. (1988). *Decision Making in Criminal Justice: Towards the Rational Exercise of Discretion*. New York: Plenum Press.

Griffin, D. (2005). Restorative Justice: A Real Alternative? *Irish Criminal Law Journal, 15*, 2.

Hamilton, C. (2002). Presumed Guilty? The Summer Anti-Crime Package of 1996 and the Presumption of Innocence. *Irish Student Law Review*, 10.

Hart, H. L. A. (1968). *Punishment and Responsibility: Essays in the Philosophy of Law*. New York and Toronto: Oxford University Press.

Hogan, D. (2007). *Applying a Human Rights Perspective to Criminal Justice Policy and Legislation in Ireland*. Annual Conference for Human Rights and Criminal Justice. Irish Human Rights Commission and Law Society of Ireland.

Irish Human Rights Commission. (2007). *Observations on the Criminal Justice Bill 2007*. Dublin: Irish Human Rights Commission.

Irish Penal Reform Trust. (2006). *Submission of the IPRT to the EU Committee for the Prevention of Torture or Degrading Treatment or Punishment*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2015). *Position Paper 11, Bail and Remand*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2016). *The Practice of Pre-Trial Detention in Ireland, Research Report*. Dublin: Irish Penal Reform Trust.

Irish Prison Service. (2009). *Sex Offender Management Policy: Reducing Re-offending, Enhancing Public Safety*. Dublin: Irish Prison Service.

Irish Prison Service. (2017). *Annual Report*. Dublin: Irish Prison Service.

Kane, C. (2008, October 28). 43 Killings in 4 Years Were by People Out on Bail. *Irish Examiner*.

Kilcommins, S., O'Donnell, I., O'Sullivan, E., & Vaughan, B. (2004). *Crime, Punishment and the Search for Order in Ireland*. Dublin: Institute of Public Administration.

Law Reform Commission. (LRC-50-1995). *Report on An Examination of the Law of Bail*. Dublin: Law Reform Commission.

Morgan, R., & Jones, P. (1992). Jail or Bail? In S. Casale & E. Stockdale (Eds.), *Criminal Justice Under Stress*. London: Blackstone Press.

NACRO. (1992). *Legislation on Bail: What Should be Done?* London: NACRO.

Ni Raifeartaigh, U. (1997). Reconciling Bail Law with the Presumption of Innocence. *Oxford Journal of Legal Studies, 17*(1), 17.

O'Donnell, I. (2005). Putting Prison in Its Place. *Judicial Studies Institute Journal, 5*(2), 54–68.
O'Donnell, I., & O'Sullivan, E. (2003). Imprisonment and the Crime Rate in Ireland. *Economic & Social Review, 34*(1), 33–64.
O'Mahony, P. (1995). The Proposed Constitutional Referendum on Bail: An Unholy Grail? *Irish Law Times, 13*, 234.
O'Mahony, P. (2002). The Constitution and Criminal Justice. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.
Reaves, B. A. (1991). *Pre-trial Release of Felony Defendants*. Washington, DC: Bureau of Justice Statistics.
Tribe, L. H. (1970). An Ounce of Detention: Preventive Justice in the World of John Mitchell. *Virginia Law Review, 56*, 371.
Walker, N. (Ed.). (1996). *Dangerous People*. London: Blackstone.

Trial and Sentencing

5

The Criminal Record on Trial

While the majority of cases are resolved outside of a courtroom, when a case does go to trial the existence of a criminal record becomes an evidentiary issue for both defendants and witnesses. Once at trial, an accused's character can be a key factor in determining his fate, or more specifically, evidence of his bad character can provide an insurmountable prejudice. The relevance of character at trial is not a modern embellishment of evidentiary procedure. Historically, character formed a crucial part of a criminal case. As Beattie[1] explained, both the judge and the jury were deeply motivated by 'who' the accused was, "the character of the prisoner (in the sense of both his disposition and reputation) was especially important information and was often crucial to the outcome of the trial."[2] It is not surprising then that character continues to play such a significant, if disputed role in the modern criminal trial. Perhaps, the most significant difference between the role of character evidence now and its role in the early seventeenth and eighteenth centuries is the way

[1] Beattie, J.M. (1986) *Crime and the Courts in England 1660–1800.* Princeton University Press, at p. 440.

[2] Beattie (1986) ibid., at p. 440.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_5

it is heard. Modern juries hear only material which has passed through a filter system that is the rules of evidence and character evidence is no exception. In the infancy of character evidence, evidence of good reputation was highly influential. It was essential for the accused to bring character witnesses to speak on his behalf, and this alone would often persuade the jury to either acquit or find partial verdicts.[3] In modern criminal trials, evidence of character continues to play an important role, but the focus of adducing such evidence has changed considerably.[4] Nowadays, an accused with a past record who seeks to introduce evidence of good reputation will find that cross-examination on his record may be permitted to rebut this assertion. Evidence of prior criminal convictions can arise at two stages in the criminal proceedings: as part of the prosecution's case, an area commonly referred to as similar fact evidence, and during cross-examination.

Misconduct Evidence

Similar fact evidence, or more accurately misconduct evidence, refers to evidence of the past bad character of the accused, particularly past offences or convictions which may be tendered at trial to establish the fact in issue (guilt or innocence) or some other fact (such as intention or to disprove an alibi). This evidence, if admissible, forms part of the prosecution's case against the accused. The general rule of evidence is that only relevant evidence is deemed admissible at trial. Evidence of previous misconduct

[3] Judges were so heavily influenced by evidence of good character that men were frequently sentenced to death, not on the basis of sound evidence, but rather because they had no one to speak kindly on their behalf. Having no character references created an automatic assumption of bad reputation and disposition. Beattie observes that "to have no witnesses at all was almost certain to be disastrous," with this being a common factor among many of those sentenced to death. Some judges even commented that they would have granted reprieve to an accused if "persons of worth and reputation had given him a favourable account of his character and former manner of life." Beattie (1986), at pp. 447–448.

[4] Evidence of good character is still admissible at trial, but its admission is likely to only favour the first-time offender. Evidence of good character is confined to general reputation. Cross-examination on the other hand may also extend to specific acts of disposition. The purpose for which evidence of good reputation is permitted tends both to the credibility of the witness and sometimes even to the fact in issue (i.e. innocent or guilty).

may sometimes be considered relevant if it constitutes background evidence or similar fact evidence. The parameters of admissibility of such evidence are narrowly construed and there is a general exclusionary rule applicable. The Court in the case of *R v Bond*[5] acknowledged this general exclusionary rule when it comes to previous misconduct:

> …the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the [accused] unconnected with such charge; therefore it is not allowable to show … that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted…

The seminal case which laid the foundations for the general exclusionary rule is the case of *Makin v Attorney General for New South Wales*,[6] where Lord Herschell considered it improper for the prosecution to tender evidence of prior misconduct in order to establish a propensity for offending behaviour.[7] This sentiment has been reinforced in Irish case law. In the case of *People (DPP) v Murphy*,[8] the Court emphasised that previous convictions should not unjustifiably be taken into consideration at trial and any conviction which follows upon the improper introduction of previous convictions cannot be considered as safe. The rationale for this rule lies in the fear that the jury will accord more weight to this evidence than they should and infer guilt primarily on the basis of the accused's previous misconduct, rather than on the evidence pertaining to the facts of the current case. The unfairness that would arise from this scenario does not, however, justify the imposition of an absolute exclusionary rule. This would be impractical and give rise to further issues of unfairness. Thus, Lord Herschell determined that,

> [t]he mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question

[5] *R v Bond* [1906] 2 KB 389, at p. 397.

[6] *Makin v Attorney General for New South Wales* [1894] AC 57.

[7] At p. 65.

[8] *People (DPP) v Murphy* [2005] 2 IR 125.

> whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[9]

Thus, the evidence can be admitted if relevant to and probative of an issue other than mere propensity to offend,[10] but is excluded if it is proffered for the latter reason alone. The evidence to be introduced does not necessarily have to be of a previous conviction. Prior misconduct that has not resulted in a conviction can also be considered here. Mere bad character, however, is insufficient to justify admissibility, and the evidence must demonstrate something more than this.[11] The Irish courts also followed this reasoning in cases such as *People (A.G.) v Kirwan*[12] and *Attorney General v Fleming*.[13]

In the aftermath of the *Makin* judgement, the courts begin to identify categories of admissibility leading to a somewhat mechanical approach to the treatment of misconduct evidence in reasoning judgements.[14] This was until, in the case of *DPP v Boardman*,[15] the courts reformulated the test of admissibility by premising it upon a balancing exercise. The House of Lords in *Boardman* accepted the traditional exclusionary rule stating that the rationale,

---

[9] *Makin*, op. cit., per Lord Herschell at p. 65.

[10] See Acorn, AE. (1991) Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense. *Oxford Journal of Legal Studies* 11(1): 63–91, at pp. 94–95.

[11] See *R v Fisher* [1910] 1 K.B.; *R v Firth* [1938] 26 C.A.R. 148; *R v Cohen* [1938] 3 All E.R. 380.

[12] *People (AG) v Kirwan* [1943] IR 279. In this case, the accused was charged with murder and dismemberment of the body. Medical evidence was that only someone who had the relevant anatomical skill and knowledge could have dismembered the body in such a way. Evidence of three prison staff was admitted which revealed that the accused had such skill. This revealed to the jury that the accused had a criminal record but this was considered incidental to the purpose of admitting the evidence.

[13] *Attorney General v Fleming* [1934] IR 166, where evidence of a prior attempt to poison was admitted at the trial for murder to show malice.

[14] See, for example, *AG v McCabe* [1926] I.R. 129—where it formed part of the *res gestae*; *People (AG) v Dempsey* [1961] I.R. 288—where it was used to rebut a defence of innocent association. *R v Porter* [1935] 25 C.A.R. 59—where evidence of a conviction received for an offence committed that was similar to the current offence was admitted to demonstrate system or method. In *Harris v DPP* [1952] A.C. 694 the Court clarified that there was no closed list and that the examples provided by Lord Herschell in *Makin* were guidelines only.

[15] *DPP v Boardman* [1975] AC 421.

> …is not that the law regards such evidence as inherently irrelevant, but because it is believed that if it were generally admissible jurors would in many cases think that it was more relevant than it was, and that, as it is put, its prejudicial effect would outweigh its probative value.[16]

Lord Wilberforce then expressed the task for the Court:

> In each case it is necessary to estimate (i) whether and if so how strongly the evidence as to other facts tends to support, i.e. make more credible the evidence given as to the fact in question; and (ii) whether such evidence if given is likely to be prejudicial to the accused. Both these elements involve questions of degree.[17]

Thus, in order to be admitted, the evidence requires a strong degree of probative force. Lord Wilberforce also placed heavy emphasis upon the 'striking similarity' of the previous misconduct but the absolute necessity of this factor was comprehensively rejected in the case of *DPP v P*.[18] The striking similarities in the various charges may indeed be a relevant factor, but confining the probative force of the evidence to such a factor is considered to be inappropriate. Thus, the essential principle remains—in order to justify admitting the evidence, its probative force must be "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime."[19] It appears then that past character is indivisible and, once the issue of past misconduct is raised, any past conviction has the potential to be considered relevant and probative.[20]

In *DPP v Keogh*,[21] the court expressly refused to admit the evidence in question stating that "evidence of character or of previous convictions

---

[16] Ibid., per Lord Cross.

[17] Ibid., at p. 896.

[18] *DPP v P* [1991] 2 AC 447. Lord Mackay determined that it is not appropriate to single out "striking similarity" as an essential element in every case (at p. 460).

[19] Ibid. at p. 460.

[20] This may be true even in respect to an old conviction.

[21] *DPP v Keogh* [1998] 4 IR 416.

shall not be given at a criminal trial except at the instigation of the accused." Kelly J considered the evidence was, on the one hand, probatively 'vague and imprecise' and, on the other hand, highly prejudicial since it was extremely difficult to rebut. In *B v DPP*,[22] Budd J cited *Boardman* with approval saying the "basic principle must be that the admission of similar fact evidence … is exceptional and requires a strong degree of probative force."[23] In the case, the evidence of sexual abuse against his daughters was cross-admissible in the accused's trial as the evidence was strikingly similar and of exceptional probative force. The judge, in referring to the case of *DPP v P*, also affirmed that the element of 'striking similarity' was not essential in every case, although it may be of strong probative force in some, particularly where the accused faces multiple accusations.[24]

In modern trials, misconduct evidence often becomes an issue when applications are made to sever an indictment in circumstances where there is more than one complainant.[25] Thus, rather than determining whether a previous conviction may be brought to bear on the case, the relevant issue is one of determining whether the evidence of each complainant is cross-admissible. Cases such as *People v BK*[26] and *People (DPP) v McCurdy*[27] demonstrate a cautious approach to this issue, especially given the possibility of collusion in such circumstances. To be successful in an application for severance, the defence must show that the concerns for the accused's right to a fair trial outweigh the goals of joinder. The probative value of the evidence of multiple complainants must be deter-

[22] *B v DPP* [1997] 3 IR 140.

[23] Ibid. per Budd J, quoting Lord Wilberforce in *Boardman* (at p. 444).

[24] See further Maher, B. (2007) Development in Bad Character Evidence: Undermining the Accused's Shield. Dublin University Law Journal 14 (1) 57–83, at p. 68.

[25] Criminal Justice (Administration) Act 1924, section 6(3).

[26] *DPP v BK* [2000] 2 IR 199. The Court of Criminal Appeal determined that the test as to whether to sever the counts was whether each count could be admissible on the other, and in doing so, the Court would invoke the balancing test. The Court found that there were material differences in the evidence in relation to the boy in the dormitory and the alleged offences of the other two boys and so trying all the counts together had created an unfair prejudice. However, the alleged offences of the other two boys, in the caravan, were cross-admissible as they were alleged to have been committed in unusual but identical circumstances.

[27] *People (DPP) v McCurdy* [2012] IECCA 76.

mined and the court should be satisfied that collusion or unconscious influence of one witness by another has not occurred.[28]

Despite the fact that previous convictions may be tendered as evidence by the prosecution, including establishing propensity, it is clear that the courts will require a very high standard of probative value before admitting such evidence.[29] This is to ensure a fair balance is maintained between safeguarding the right to a fair trial and at times permitting evidence which is relevant and necessary, albeit prejudicial. The judiciary act as the most important watchdog for protecting this balance, as demonstrated in the case of *People (DPP) v DO's*.[30] Although dealing with cross-examination, the Court of Criminal Appeal determined that the prosecution's questioning was used deliberately and exclusively to establish the appellant's disposition and amounted to a clear breach of the rules pertaining to misconduct evidence. The evidence did not have any probative value and was on the other hand distinctly prejudicial.

Despite changes in the rules of admissibility of character evidence in other jurisdictions,[31] the opportunity to increase the significance of misconduct evidence at trial in Ireland has been firmly rejected in recent times. Bad character evidence has rarely received sufficient attention to justify an expansion of the rules of evidence in this area. One of the reasons is undoubtedly because cases involving this kind of evidence are low in number.[32] In a report by the Criminal Law Review Group in 2007, it was noted that "any too radical change in the law in this area might affect the prospects for a fair trial in the case of an accused with a previous record."[33]

---

[28] See comments of Budd J in *B v DPP*, op. cit., at 157–158. In the case of *DPP v McNeill* [2011] IESC 11, the Supreme Court held that background evidence of ongoing abuse had been correctly disclosed and that such evidence could be admitted if it was relevant and necessary. This is arguably a lower standard than the high probative value required under the *Boardman* principle. Nonetheless, it seems that if misconduct evidence is relevant in order to ensure the jury's comprehension of the counts in issue, this is also a valid reason for permitting the evidence.

[29] See *O'Brien v Chief Constable of Wales Police* [2005] U.K.H.L. 26, in particular comments by Lord Philips at p. 52.

[30] *People (DPP) v DO's*, unreported, Court of Criminal Appeal, 28 July 2004.

[31] See, for example, the Criminal Justice Act 2003 (England).

[32] *Balance in the Criminal Law Review Group, Final Report* 15th March 2007, at p. 119.

[33] Ibid. at p. 141. It was also noted that there was an increased risk of miscarriages of justice in cases where the probative value of the evidence was low.

Cross-Examination on Bad Character

Cross-Examination of the Accused

The rules and principles governing cross-examination are different to similar fact evidence largely due to the fact that the former is a creature of statute. It has been observed that "[f]or an accused, the strategic importance of the decision whether or not to take the stand cannot be overstated."[34] This is because testifying consequently invokes the right to cross-examine under s.1 of the Criminal Justice (Evidence) Act 1924 as amended.[35] The prosecution is restrained in the process of cross-examination, however, and may only ask questions which are 'relevant and admissible.'[36] Similar to the principles governing misconduct evidence, a general exclusionary rule also persists in relation to cross-examination. Section 1(f) of the Act limits the scope of the general right to cross-examine by prohibiting the prosecution from asking questions that would tend to reveal previous bad character (charged or convicted), thus acting as a shield for the accused. The risk of unduly prejudicing the accused through revelation of previous wrongdoing is generally to be avoided in the interests of a fair trial.[37]

The Irish courts have continuously demonstrated their commitment to rendering the accused with a clean slate at trial to avoid unnecessary prejudice ensuing. In *People (DPP) v Kelly*,[38] the accused appealed his conviction for various offences relating to drug possession on the grounds that the prosecution had contravened s.1(f) by cross-examining him in a way that suggested he had committed previous offences. The Court of Criminal Appeal found that the prosecution had used questioning on a specific amount of money to launch into a prolonged investigation of the character of the applicant. It was held that the overall purpose and tenor of the cross-examination was to establish a suspicion that the accused was

[34] Heffernan, L. (2005) *Evidence: Cases and Materials*. Dublin: Thomson Round Hall, at p. 62.

[35] Section 1(e) permits cross-examination "notwithstanding that it would tend to incriminate him as to the offence charged."

[36] *Maxwell v Director of Public Prosecutions* [1935] AC 309, per Viscount Sankey.

[37] See comments of McWilliam J in *King v Attorney General* [1981] IR 233.

[38] *People (DPP) v Kelly*, unreported, Court of Criminal Appeal, 21 March 2002.

dealing illegal drugs, and that in doing so the questioning infringed the provisions of s.1(f).[39]

Losing the Shield

A blanket rejection of this evidence would, however, be impractical, and judges and policymakers recognise that in some circumstances, revelation of previous criminal conduct under cross-examination is necessary. In accordance with s.1(f)(i), (ii), and (iii), an accused may be cross-examined on previous convictions where misconduct evidence has already been admitted as evidence in chief[40] (i), the defence seeks to establish his good character or the conduct of the defence is to cast imputations on the character of a witness (ii), or he gives evidence against a co-accused (iii). The section is amended by s.33 of the Criminal Procedure Act 2010, which allows loss of the shield where the questioning of a witness involves imputations on the character of a victim who is deceased or is so incapacitated as to be unable to give evidence.[41] Section 33(b) of the 2010 Act also inserts a new provision, s.1A, which provides that the accused may be called as a witness and be asked, and the prosecution may ask any other witness, questions that reveal the accused's past convictions or bad character[42] or questions that show he is of good character.[43] This represents a significant change to the traditional approach of only allowing cross-examination as to character when the accused chooses to take the stand himself. The accused may also reveal his past convictions through an accidental slip.[44] In these circumstances, it is for the trial judge to determine the relevance of the slip and whether cross-examination on previous

[39] See also *People (AG) v Doyle*, unreported CCA, 6 March 2002.

[40] In these circumstances, the questioning may be used to establish propensity rather than being confined to issues of credibility. The subsection is, however, limited to prior convictions and does not include prior charges or bad reputation generally.

[41] Section 33(b) of the 2010 Act also requires at least seven days notice to be given to the prosecution of the intent to make imputations. Alternatively, an application must be made to the Court citing the reasons why it is not possible to give the notice, and he must be granted leave to do so.

[42] Section 1(b)(i).

[43] Section 1(b)(ii).

[44] Ross, D. (2003) Accused Introduces His Own Bad Character. *Deakin Law Review* 8 (2), 291–303.

record should be permitted. In some limited circumstances, the judge may decide to discharge the jury and call for a new trial.

The rationale behind the inclusion of bad character evidence lies in rebutting a favourable impression adduced by the defence. On the one hand, introducing evidence of the individual's past record may create irreparable prejudice against him. On the other hand, an unyielding rule of exclusion might unwittingly permit the accused to abuse the shield, by giving the jury an unrealistically favourable image of himself. The statute is silent on the scope of questioning in these circumstances, but it seems in practice the courts will limit questioning to the bare details of the offence. Permitting a full-scale attack into the detail of priors would go beyond the purpose of the statute.

Under s.1(f)(i), an accused may be examined with regard to past offences where misconduct evidence has already been deemed admissible as evidence in chief. Cross-examination thus enables the prosecution to clarify issues raised earlier in the trial by eliciting information directly from the accused.[45] Evidence adduced under this proviso may be admissible as proof of the accused's guilt, which distinguishes it from evidence adduced under the other provisos of s.1(f).

Under ss.1(f)(ii), an accused who seeks to admit evidence of his good character or seeks to cast imputations on the character of witnesses for the prosecution will lose the shield. The evidence must be elicited for the express purpose of demonstrating the accused's credibility and may not be adduced for the purpose of being probative of any other issue at trial. If the accused seeks to assert his good character or discredit the character of witnesses, then the prosecution should be entitled to tender counter-evidence. The evidence cannot, however, be used to infer that the accused is guilty of the crime with which he is charged.[46] It is difficult to see how a jury will separate the two types of reasoning in their minds (propensity and credibility). In reality, there is little difference between saying that the accused is a bad man and is not to be believed and saying he is a bad man and thus is more likely to have committed the offence with which he is charged. In circumstances where the defence seeks to establish his good

[45] If an accused chooses to testify, then he automatically becomes open to cross-examination under s.1(f)(i) as this section is not dependent upon a loss of the shield arising from the conduct of the defence.

[46] In *Maxwell v DPP* [1935] AC 309.

character, this applies to asking questions of 'any witness,' not just witnesses for the prosecution. Traditionally, evidence of good character which emerged during cross-examination of a defence witness by the prosecution or which was volunteered by the witness would not lead to loss of the shield. It seems this will remain the case unless s.1A applies.

With regard to the second limb of s.1(f)(ii), imputations on the character of a witness, the Irish courts have opted for a 'purposive' approach in that the accused will not lose the shield if imputations made on the character of a witness are necessary for the proper conduct of a defence. The right to cross-examine prosecution witnesses is deeply engrained in the Irish Constitution and falls within the parameters of the right to a fair trial. Counsel for the defence must be able to challenge the veracity of the State's case against the accused and cross-examination plays a vital role in this. Vigorous cross-examination, aimed at exposing weaknesses, inaccuracies, or even improper conduct, may often involve an imputation against a prosecution witness. If s.1(f)(ii) were to be invoked in all such circumstances, this could severely inhibit the accused's ability to mount a defence and would thus impinge upon his right to a fair trial. In *DPP v McGrail*,[47] the Court of Criminal Appeal considered that the principles of fair procedure must apply. In the case, defence counsel for the applicant had cross-examined the arresting Gardaí who denied that they had invented the incriminating statements allegedly made by the accused as well as other incriminating evidence. The trial judge held that this questioning had cast imputations on the character of the prosecution witnesses and permitted cross-examination of the accused as to his previous convictions. The Court of Criminal Appeal, in quashing the conviction and ordering a retrial, determined that:

> A distinction must be drawn between questions and suggestions which are reasonably necessary to establish either the prosecution case or the defence case…. A procedure which inhibits an accused from challenging the veracity of the evidence against him at the risk of having his own previous character put in evidence is not a fair procedure.[48]

Thus, in a criminal trial, an accused is entitled to strenuously deny the charge against him and this even extends to imputations on the character

[47] *DPP v McGrail* [1990] 2 IR 38.

[48] *DPP v McGrail* [1990] 2 I 38, at pp. 48–51.

of prosecution witnesses so long as such is considered reasonably necessary for the defence to put in issue the truth of the evidence of a prosecution witness. When imputations reach beyond the facts of the particular case, the shield is lost, unless judicial discretion prohibits cross-examination in the interests of justice.[49]

The final circumstances under which the shield afforded by s.1(f)(iii) can be lost is where the accused testifies against a co-accused. The rationale behind this exception provision is centred on the gravity of the situation a person finds himself in when his co-accused testifies against him.[50] Cross-examination is permitted for the purpose of attesting to the accused's credibility. The provision only operates where the accused and co-accused are charged with the same offence. It does not apply where the accused and co-accused are charged in the same proceedings, but not jointly for the same offence. In the case of *Murdoch v Taylor*,[51] the House of Lords made it clear that the exception will only apply where an accused gives evidence which is adverse to his co-accused's defence and not where the evidence merely inconveniences or contradicts the other's defence.[52] Thus, the incriminating evidence must be evidence probative of a fact in issue, leading the jury to use the information as proof of guilt. The subsection works in favour of the accused with no criminal record and against the accused who has, since the co-accused without a record may testify against the other with impunity.

The Criminal Record of a Witness

When it comes to cross-examining an ordinary witness, there is no applicable exclusionary rule.[53] This is, one might assume, because the risk of

[49] It is for the trial judge to decide the circumstances which cause the accused to lose the shield under s.1(f), and even if the shield has technically been lost, the trial judge retains discretion as to whether to permit cross-examination of the accused on bad character. In exercising this discretion, the judge must ultimately decide whether the evidence is of greater probative or prejudicial value.

[50] The trial judge consequentially retains no discretion to prevent cross-examination under this provision.

[51] *Murdoch v Taylor* [1965] AC 574.

[52] See, for example, *R v Kirkpatrick* [1998] Crim LR 63, where the court held that the testimony did not have the effect of supporting the prosecution's case and thus cross-examination was not permitted of the accused.

[53] Section 6 of the Criminal Procedure Act 1865.

prejudicing the witness is not the same (as for an accused). Evidence of the past convictions of a witness may be admitted as relevant to the issue of credibility. There is also a duty on the prosecution to disclose the criminal record of any witness they intend to call,[54] and the defence must be given ample opportunity to cross-examine such a witness.[55] Thus, a witness who testifies is in a vulnerable position of having their criminal record revealed under cross-examination and as such this may discourage them from testifying for fear of being humiliated as a result.[56] The strict operation of the provision implies an assumption of unreliability if the witness has a record, regardless of whether that record has any connection or relevance to the issues at trial, or relates to a prior offence involving dishonesty.[57] In such circumstances, only judicial discretion stands between irrelevant evidence and admissibility thereof.

The Rationale Behind Exclusion and Jury Prejudice

One of the perceived dangers of introducing evidence of previous bad character is that the jury may place undue weight upon the importance of such evidence.[58] Black J expressed the sentiment in the case of *The People v. Kirwan* that,

> bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class … the greatest care ought to

[54] *R v Paraskeva* (1983) 79 Crim. App. Rep. 162 (CA).

[55] To this end, the defence's cross-examination of a prosecution witness does not necessarily expose the accused to cross-examination of his past record unless imputations are made. See discussion on making imputations below.

[56] This falls contrary to the objectives of the adversarial process to encourage witnesses to testify where they have relevant evidence to proffer.

[57] The existence of a past conviction does not automatically mean that a person is more prone to lie than other witnesses, and certainly there is little by way of evidence to definitively demonstrate this to be true. The same may be said of the accused with a record. There is also no statutory limit upon the scope of cross-examination of witnesses here, the assumption being that this will fall to the discretion of the trial judge.

[58] Jury prejudice is not always the issue however, as demonstrated in the case of *People (DPP) v Murphy* [2005] 2 IR 125.

> be taken to reject such evidence unless it is plainly necessary to prove something which is really in issue.[59]

It is considered important that the accused "starts his life afresh when he stands before a jury."[60] Prejudice in the eyes of the jury can occur in two ways. First assumptions about the accused as a 'typical criminal' and ideas that he is unlikely to have reformed himself are likely to lead the jury into the propensity reasoning which the law objectively seeks to omit in many situations. The jury members may decide that on the basis of past misconduct the accused is more likely to have committed the offence with which he is currently charged. Alternatively, they may not be satisfied of guilt beyond reasonable doubt but may convict the accused anyway on the basis of 'moral prejudice.'[61] They may use the evidence to decide that the accused deserves to be punished because of his character.[62]

Studies have demonstrated that knowledge of the bad character of an accused can increase the likelihood of a conviction for the offence tried. Sally Lloyd-Bostock's study of mock juries in 2000 concluded that "evidence of previous convictions can have a prejudicial effect, especially where there is a recent previous conviction for a similar offence."[63] The study revealed a decrease in conviction where the previous offence was dissimilar in all instances except where the previous conviction was for indecent assault on a child. In the latter circumstances, Lloyd-Bostock observed that "a previous conviction for indecently assaulting a child … produces a consistent and for some offences statistically significant increase in ratings of likelihood that he would commit dissimilar offences."[64] Other studies have also resulted in similar findings. A study

---

[59] *The People v. Kirwan* [1943] IR 279 at 307, quoting in part the judgement of Kennedy J. in *R. v. Bond* [1906] 2 K.B. 389 at p. 398.

[60] *People v Zackowitz* (1930) 172 NE 466, per Cardozo CJ, at p. 466.

[61] Palmer, A. (1994) The Scope of the Similar Fact Rule. *Adelaide Law Review* 16, 161–189, at pp. 169–172.

[62] This also raises concerns about standard of proof required in criminal trials and the lowering of such with the introduction of character evidence.

[63] Lloyd-Bostock, S. (2000) The Effects in Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study. Crim. L.R. 734–755, at p. 753.

[64] Lloyd-Bostock (2000) op. cit. at pp. 748–749.

conducted at Oxford[65] revealed that participants rated the accused more likely to have committed the crime where they were given evidence of a past similar offence. However, they regarded the accused as less likely to have committed the current offence where the past offence was not the same. While the usefulness of such mock jury studies is obviously limited, they nonetheless provide an important insight into the impact of bad character evidence. They also go some way towards reinforcing the important role of the trial judge in directing the jury as to the purpose of the evidence and possibly excluding the evidence even where the shield has technically been lost.[66]

The threat of jury prejudice falls flat in the context of the summary trial, where the judge is the arbitrator of law and fact. In these circumstances, the rules do not address how the evidence of prior convictions may impact upon a judge or a decision in the case.[67] While bias may exist, it would be impractical to prevent a judge who knows the criminal record of an accused from deliberating upon the case.

Observations and Conclusion

What is clear from the preceding discussion of the law is that an accused does not stand his life afresh when he faces subsequent prosecution. If he has offended in the past, then previous convictions may be brought to bear upon decision-making processes at trial. The evidentiary rules under common law and statute serve as a reminder of the lifelong nature of a criminal conviction, and in many ways, they unintentionally perpetuate the stigmatic label of 'offender' (rather than of 'accused'). The legal system in such circumstances can make it extremely difficult for one to divest themselves of this label, with the fallibility of human prejudice

[65] Law Commission (1996) Consultation Paper No. 141, *Criminal Law- Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*. Home Office, London.

[66] Although the purpose of the evidence is to assess credibility rather than establish the accused's guilt for the offence charged, it may be difficult for the jury to separate out these two rationales in their deliberations. Lane LCJ in the case of *R v Watts* [1983] 3 All ER 101, acknowledged this difficulty and referred to it as "intellectual acrobatics" (at 104).

[67] District court judges are likely to be familiar with the criminal records of accused appearing before them (O'Malley 2013).

likely to arise once such evidence is admitted, regardless of the legal purpose for which it is adduced.

Despite the potential for prejudice, however, it would be wrong to assume that previous convictions are never relevant at trial, and to operate a blanket rule of exclusion against their admissibility would be impractical and potentially unfair. Revelation of a criminal past may sometimes be warranted and the Irish judiciary have demonstrated a considered approach, ensuring as far as practicable, that a fair balance is struck in such occasions.

Nonetheless, adducing previous criminal record can evoke stereotypes of 'typical criminality' and may alter the perception of the other evidence at trial. The prospect of being cross-examined on prior convictions offers a strong disincentive to testify or participate in one's own defence. There is also the potential to create an undesired rippling effect should this type of evidence be more readily admitted at trial generally. Not only would the prosecution be more likely to resort to such evidence as part of their case, but it may encourage the Gardaí investigating a crime to search not objectively for a perpetrator but for someone with possible opportunity and a record. Even with a plausible defence to a charge, an accused may decide that there is too great a risk of conviction and more severe punishment given his record, and that plea bargaining is a more attractive option.

The evidence of previous convictions at trial is rarely regarded as noteworthy when it comes to appreciating the lifelong nature of a criminal record. Yet criminal biographies are a valuable commodity at trial, and tendering this type of evidence can have significant consequences. Although its use is limited in Ireland, it remains a part of evidentiary decision-making processes, in effect targeting those with a criminal past because it is considered natural and sensible to do so.

Bibliography

Acorn, AE. (1991). Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense. *Oxford Journal of Legal Studies, 11*(1), 63–91.

Beattie, J. M. (1986). *Crime and the Courts in England 1660–1800*. Princeton, NJ: Princeton University Press.

Heffernan, L. (2005). *Evidence: Cases and Materials*. Dublin: Thomson Round Hall.

Law Commission. (1996). *Consultation Paper No 141, Criminal Law—Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*. London: Home Office.

Lloyd-Bostock, S. (2000). The Effects in Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study. *Criminal Law Review*, 734–755.

Maher, B. (2007). Development in Bad Character Evidence: Undermining the Accused's Shield. *Dublin University Law Journal, 14*(1), 57–83.

O'Malley, T. (2013). *Sexual Offences* (2nd ed.). Dublin: Round Hall.

Palmer, A. (1994) The Scope of the Similar Fact Rule. *Adelaide Law Review, 16*, 161–189.

Ross, D. (2003). Accused Introduces His Own Bad Character. *Deakin Law Review, 8*(2), 291–303.

6

Sentencing on Criminal Record

Introducing Past Convictions into the Sentencing Framework

As in most other jurisdictions, an offender's criminal record plays an important role in the sentencing procedure of the Irish Courts. The existence of past criminal convictions weighs heavily against an offender and, after the seriousness of the offence, is often the most significant determinant of sentence severity. Sentencing practices and case law decisions confirm this, not only through the harsh sentences handed down to repeat offenders but through the disparity in sentencing of, on the one hand, first-time offenders and, on the other, 'habitual' or repeat offenders. Although criminal record influences the treatment of offenders throughout and beyond the criminal justice system, it is its impact upon sentencing which is most publicised. That more severe punishment be given to repeat offenders is commonly accepted and even demanded not simply from a legal perspective but, perhaps more importantly, from a social or public perspective. But why should this

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_6

factor be considered at all, yet alone be so highly influential? One might attempt to find an explanation, even justification, through the concept of proportionality. One of the most fundamental principles of sentencing is that punishment must be proportionate to both the seriousness of the offence committed and the personal circumstances of the offender who committed it. While in its earlier days of inception the proportionality principle may have been interpreted to address solely the element of 'offence,' it is widely accepted today that the element of 'offender' is so integral a part of its application that the one element could not be considered without the other. The fact that personal circumstances of the offender are deemed so important in sentencing may be used as justification for considering criminal record biographies. If personal factors that mitigate can be considered, why should the negative personal factor of criminal history not also be taken into account? After all, the "sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused" (*People (DPP) v McCormack* (2000), p. 359).[1] Beyond this, there is a myriad of complexities in considering the use of criminal record in sentencing. For one, the precise impact of the record is unclear. This is due in part to the fact that under current Irish sentencing law there is an unstructured sentencing system, which is complicated further by the employment of various and diverse rationales to justify sentences handed down in a particular case. Hence, it is difficult to definitively predict exactly when past convictions will be relied upon by the sentencing judge and to what effect. In more recent times, statute has sought to remedy this through the introduction of mandatory and presumptive sentencing schemes, designed to restrict the unpredictability of judicial discretion. The role of criminal records is intensified through the application of legislative provisions which aim to levy up punishment for the repeat offender. The finger of executive intent is firmly pressed upon the ex-offender mark. In introducing recent legislation to target multiple burglary offences, the Minister for Justice stated: "I am prioritising efforts to tackle Ireland's hardened cohort of repeat offenders. Tackling repeat offending will reduce crime

[1] *People (DPP) v McCormack* [2000] 4 I.R. 356, per Barron J.

levels…." No such inextricable link between recidivist premiums and a reduction in crime levels has been established to date, however. What is established is that decision-making processes within the criminal justice system rely heavily upon criminal record biographies. The consequences of the prior record are far-reaching and sentencing is a classic illustration of this.

Statutory Enhancements for Repeat Offenders

There is little doubt that penal policies have become much harsher in recent decades, with control and risk aversion or management ideology gaining a greater footer in criminal justice policy than ever before. The targeting of repeat offenders is palpably evident throughout the system and the area of sentencing has not escaped unscathed. Mandatory and presumptive sentencing schemes are becoming more prevalent in Irish law in recent decades. Mandatory minimum sentences require the imposition of a specified minimum penalty (usually custodial) once certain conditions are satisfied. Presumptive sentences, on the other hand, require the imposition of a mandatory or minimum sentence, but permit downward departures in exceptional circumstances in order to satisfy the needs of justice. The enhancement of sentences premised upon repeat offending is a prevalent feature in sentencing systems across the globe. The US is probably the most notable example here with laws dating back to the nineteenth century. Recidivist premiums were renewed with vigour in the US in 1993 with the initiation of three strikes laws, beginning in Washington and swiftly followed in California, eventually seeping into other states and federal laws[2] (see Roberts and Yalincak 2014). The essence of the rule is that on the conviction for a third serious felony, the punishment of life imprisonment must be imposed without the possibility of parole for at least 25 years. The judge has absolutely no discretion to consider if there are exceptional circumstances justifying a lesser sentence. While statutes vary from state to state, federal law provides for three strikes in respect of those convicted of a serious violent

[2] Persistent Offender Accountability Act 1994.

felony, where the priors are also for a serious violent felony and/or a serious drug offence. When enacted in California,[3] the third offence did not even need to be violent or serious, although this has now been altered by reforms in 2012.[4] The existence of a criminal record can have a devastating effect upon those coming before the American courts, with sentences double or triple the original penalty for the offence capable of being imposed. No two cases demonstrate the consequences quite like *Ewing v California* (2003)[5] and *Lockyer v Andrade* (2003),[6] where the offenders were sentenced to life imprisonment for the theft of golf clubs worth $1200 and 50 years imprisonment for stealing $150 worth of goods, respectively. Rationales of incapacitation and deterrence form the cornerstones of such recidivist policies, although there is little empirical evidence to suggest that the magnitude of recidivist enhancements is supported by deterrent outcomes. Rather than reduce recidivism, they may even prove counterproductive (Zimring et al. 2001; Spohn and Holleran 2002; Russell 2010). The power of such statutes instead affirms a deference to the type of expressive justice such polices embody. Allaying public disquiet and anguish regarding persistent offenders acquires symbolic meaning through the aligning of the 'them' and 'us' paradigms. We must protect ourselves by severely (and often disproportionately) punishing those who fail to conform to societal norms (Jones and Newburn 2006). Permitting previous record to aggravate sentences so dramatically distorts the focus of the criminal law away from criminal conduct (through the offence) towards criminal careers. Other countries have also endorsed recidivist premiums, although perhaps not to such extreme effect. In the UK, the Criminal Justice Act 2003 requires criminal record to be considered an aggravating factor in sentencing, and deterrence and

[3] California Penal Code West 1999.

[4] California Proposition 36 now requires the third offence to be a serious or violent felony, although this clause does not apply to defendants previously convicted of rape, murder, or child molestation. California Proposition 36 also facilitates a review process to commute lesser sentences for those currently serving life sentences as a result of non-violent or non-serious third strike offences.

[5] *Ewing v California* (2003) 538 U.S. 11.

[6] *Lockyer v Andrade* (2003) 538 U.S. 63.

incapacitation are positively encouraged as the means of adjusting sentence severity for persistent offenders.[7]

In Ireland, mandatory and presumptive minimum sentences for repeat offenders have been introduced into the sentencing framework largely through the provisions of the Criminal Justice Act 2006 and the Criminal Justice Act 2007. Prior to the 2006 and 2007 Acts, the Criminal Justice Act 1999 altered the Misuse of Drugs Act 1977 with a view towards mandatory sentencing. Now, rather than criminal record remaining a factor to be considered as part of judicial discretion, the provisions of these Acts provides for presumptive and mandatory minimum sentences as part of the so-called battle on organised crime. In this sense, the Acts are more limited in terms of their effect than their counterparts in the UK and US (Fitzgerald 2008). Section 5 of the 1999 Act amends s.27 of the Misuse of Drugs Act 1977 by the insertion after subsection 3 of a presumptive mandatory minimum sentence of ten years where an adult is convicted of an offence under s.15A (ss.3(b)) and for a departure of this mandatory sentence where there are exceptional circumstances (ss.3(c)). The purpose of the Act was to enforce harsher sentences upon drug traffickers, but the parameters of mandatory sentencing have reached beyond this limited netting as evidenced in the provisions of the Criminal Justice Act 2006 and the Criminal Justice Act 2007 Acts. The 2006 Act provides for mandatory minimum sentences for firearm offences[8] and amends the law in relation to mandatory sentences under the Misuse of Drugs Act 1977. The recidivist premium for firearm offences, encased within s.42 (8) of the 2006 Act, provides for absolutely no judicial discretion and a sentencing judge may not circumvent the prescribed sentence in any circumstance. This is also true in respect of the provisions that amend the Misuse of Drugs Act 1977.[9]

[7] In line with such rationales, the 2003 Act also introduced Indeterminate Public Protection sentences for dangerous offenders, which have now been abolished under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[8] Part 5 of the 2006 Act introduces the new mandatory provisions for firearm offences, which include a mandatory sentence of 5 years for possession of a firearm while stealing a vehicle (s.57(8) inserted into s.26(8) of the Firearms Act 1964) and a 10-year mandatory minimum for the use of firearms to assist an escape (s.58(8) inserted into s.27(8) of the Firearms Act 1964).

[9] Section 82 of the 2006 Act inserts a new offence of importing controlled drugs in excess of €13,000 (s.15(b) of 1977 Act) and s.84 of the 2006 Act inserts mandatory minimum sentences for a second offence under s.27 of the 1977 Act (as amended by s.5 of the Criminal Justice Act 1999).

Previous convictions are particularly important in the context of drug offences, as the provisions of the 2006 Act make clear. Section 84 of the 2006 Act amends section 27 of the Misuse of Drugs Act 1977 by requiring a mandatory minimum sentence of ten years to be imposed for a *second offence* of drug trafficking. The word 'shall' in the provision stamps out any element of discretion, where the offender already has a conviction under s.15A or s.15B (of the 1977 Act). In his speech to the Dáil in relation to the purpose of these amendments, the then Minister for Justice stated: "…as against mitigating factors such as cooperation and a guilty plea the Court will also be required to take account of previous drug trafficking convictions … [which] will be counter balance to any reduction that may have been felt to be appropriate."[10] This statement reflects something important in the context of the use of past convictions. While the provisions do intrude restrictively upon judicial discretion and in this way mirror similar provisions in the US and UK, the proportionality principle is still intended to be the determining factor and the upper limit upon deserved punishment is still the offence of conviction (Murphy 2007).

The focus upon habitual offenders is continued within the parameters of the Criminal Justice Act 2007. Provision is made for a mandatory minimum sentence of at least three-quarters the maximum sentence available for the offence or a ten-year sentence if the maximum term is life imprisonment under section 25. Although the category of offences, ranging from murder to blackmail,[11] to which this rule applies is much broader than the 2006 provisions, there are a number of qualifying criteria which must apply before the rule can be invoked. First, the adult[12]

[10] Speech given to the Dail, 28 March 2006, available at http://www.justice.ie.

[11] The offences to which the rule applies are listed in Schedule 2 in the 2007 Act and include offences under the Non-Fatal Offences Against the Person Act 1997 (causing serious harm (s.4), threatening to kill (s.5), and false imprisonment [s.15]), offences under the Explosive Substances Act 1883 (ss.2–4), firearm offences under the 1925 (s.15) and 1964 Acts (s.26–27), aggravated burglary under the Criminal Justice (Theft and Fraud Offences) Act 2001 (s.13), drug trafficking offences and organised crime under the Criminal Justice Acts of 1994 (s.3(1)) and 2006 (s.71–73), respectively, and blackmail and extortion under the Criminal Justice (Public Order) Act 1994 (s.17).

[12] Adult as opposed to juvenile; provisions in the US and UK do not require the triggering offence to be committed by an adult. The Irish provisions on the other hand require both the initial and subsequent offence to be committed by an individual over 18 years of age.

offender must have been convicted of an initial offence (listed), the penalty for which must have been at least five years. If the offender commits a subsequent listed offence within a seven-year period the mandatory provision is invoked. It is intended that these conditions will limit the number of offences that actually trigger the mandatory minimum sentence under the Act. Furthermore, s.25(3) retains the element of discretion for the sentencing judge, so that the mandatory minimum need not be imposed where it would be 'disproportionate in all the circumstances of the case.'

Executive mandate has also demonstrated a desire in recent years to focus legislation upon a specific cohort of repeat offenders. The Criminal Justice (Burglary of Dwellings) Act 2015, for example, specifically targets repeat offending by burglars, by requiring judges to impose consecutive sentences for burglary of dwelling offences where the offender has prior convictions for burglary offences (amending the Criminal Justice [Theft and Fraud Offences] Act 2001). The provisions only apply to offences committed after the offender has attained the age of 18 years and in the context of sentencing in the District Court the aggregate term of imprisonment for the consecutive sentences should not exceed 2 years.

While in Ireland recidivist provisions are significantly less severe than in other jurisdictions such as the US and UK, contending with the effectiveness of such provisions places the criminal system in somewhat of a quandary. Critics and interest groups have called for the abolition of mandatory and presumptive sentencing in Ireland, arguing that the initiatives have proved a costly and ineffective mistake.[13] If the effect has been to increase the prison population, then in this regard the objective may have been achieved (there has been an increase of over one third since the mid-1990s). But there is no proven correlation between increasing the prison population and reducing crime. Nor does any convincing evidence exist that harsh punishments will in fact deter (Von Hirsch et al. 1999b; Tonry 1996, 2004).[14] Furthermore, to incapacitate in order

[13] 'Mandatory sentencing of criminals "an expensive mistake" *Irish Independent*, 16 June 2016.

[14] A Justice Policy Institute Report published in 2004 revealed the effects of the three strikes law in the US and the most significant finding was that in California where the rule most aggressively applied, there had not been any reduction in crime, and in fact, states without the rule seemed to fair better in terms of falling crime rates than states that invoked the rule (Ehlers et al. 2004).

to prevent recidivism (a key feature of recidivist premiums) is problematic. For one it is often applied selectively to certain categories and not necessarily always for serious offences (O'Malley 2011, p. 79). It is also difficult to predict with exact accuracy future criminality, and statistical forecasting is highly prone to exaggeration (Jacobs 2015; Von Hirsch 2009, in Ashworth et al.; Floud and Young 1981). The symbolic value of mandatory sentencing erroneously displaces the need for an evidence-based approach to dealing with repeat offenders in sentencing. The often disillusioned preoccupation with categories of offenders, rather than assessing risk according to the individual, further undermines the effectiveness of such provisions. The increased reliance upon imprisonment for dealing with categories of 'risky' offenders places additional pressures upon the penal system and perhaps at the expense of the development of other alternatives.

Sentencing on Prior Record

Sentencing Policies and the Principle of Proportionality

Sentencing policy delineates the penal objectives, which the criminal justice system as a whole seeks to achieve. It thus influences not only the type and severity of punishment but also the standards and principles to which sentencing judges must adhere. Every sentence meted out to an offender reflects some policy that, either on a broad scale or on a narrower subjective level, is believed to be towards the end to be achieved in punishing offenders. Sentencing policies and principles dictate how criminal record is to be used and in determining the limits on its value. Previous criminal convictions may be relevant to both establishing the appropriate sentence based on the seriousness of the offence (in terms of culpability) and as a factor relevant to the personal circumstances of the offender.[15] Its use may also be relevant to the imposition of any number of sentencing rationales (which will be discussed further on).

[15] The Irish judiciary have expressly acknowledged this: *DPP v P. O'C* [2009] IECCA 116, the Court of Criminal Appeal commented that "[t]he previous convictions and sentences are relevant to the appropriate sentence to be imposed on the [offender]."

For Irish sentencing law, there is one dominating policy that runs concurrent to all the other aims of punishment. This policy states that "punishment should be appropriate not only to the offence committed but also to the particular offender" (*State (Stanbridge) v McMahon* [1978], p. 318).[16] This is an extremely important policy which permits sentencing to be individualised on the basis of aggravating and mitigating factors, and which incorporates judicial discretion into the sentencing framework. The rationale underlying this policy is that of proportionate punishment. The doctrine of proportionality which stems back to the writings of Cesare Beccaria (Beccaria 1963; Young 1986) has become a fundamental principle in terms of sentencing policy and is a guiding principle not only in terms of sentencing standards and criteria but also in terms of the objectives of the justice system entirely. It is a principle premised upon common sense notions of fairness. Punishments are undeserved if minor offences are punished with severe sanctions and vice versa. This principle has become a fundamental and integral part of the law and constitutions of many countries as well as being highly valued in International law. Both the European Court of Justice and the European Court of Human Rights continuously apply proportionality standards in their case assessments. Many countries have statutory requirements that sentences be proportionate to the gravity of the offence. The Canadian Criminal Code, for example, provides for punishment proportionate to the gravity of the offence and the degree of responsibility of the offender.[17] In the Eighth Amendment to the United States Constitution, there is prohibition on the imposition of cruel and unusual punishments.[18] The impact of this provision has charted an uncertain path in the US. In 1980, the Supreme Court in the case of *Rummel v Estelle*[19] rejected the argument that a life sentence, for a low-level property offence, under Texas three strikes law amounted to cruel

[16] *The State (Stanbridge) v McMahon* [1978] I.R. 314, per Gannon J.

[17] Canadian Criminal Code section 718 (1).

[18] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[19] *Rummel v Estelle* (1980) 100 U.S. 113.

and unusual punishment. In the case of *Solem v Helm* (1983),[20] a majority of the Supreme Court held section 8 to have been violated by the imposition of life imprisonment for an offence of uttering a 'no account' cheque for $100, where the offender had six previous convictions though only for minor property offences. Respect for the principle of proportionality reflected in the judgement of *Solem v Helm*[21] seems like a distant echo, amidst the conservative ideology dominating the US today, under which the Eighth Amendment is now largely ineffective in securing proportionate punishments.[22] Although not an express provision of the Irish Constitution, the Irish Courts have affirmed the principle of proportionality as having constitutional imperative as well as continuously stating its centrality to Irish sentencing policy.[23] In the case of *People (DPP) v C (W)* (1994),[24] the Court of Criminal Appeal, per Flood J, found that "the selection of the particular punishment to be imposed on an individual offender is subject to the constitutional principle of proportionality."[25] This involved imposing a sentence that would strike a balance between the particular circumstances of the offence and the relevant personal circumstances of the offender. Subsequently, the Supreme Court in the case of *People (DPP) v M* (1994)[26] in reducing the 12 years imposed at trial for sexual offences to 12 years, referred to a 'constitutional protection' in determining that punishment must first be proportionate to the offence but also proportionate to the personal circumstances of the offender, this being an element of judicial discretion (p. 317). The question then is: is it proportionate to punish more severely because of prior criminal record? The individual has already been punished for his

[20] *Solem v Helm* (1983) 463 U.S. 277.

[21] Justice Powell, delivering the opinion of the court expressed the view that "the principle that punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence" *Solem v Helm* (1983) 463 U.S. 277, pp. 284–285.

[22] Both cases of *Ewing v California* (2003) 538 U.S. 11 and *Lockyer v Andrade* (2003) 538 U.S. 63 distinguished the case of *Solem v Helm* on the ground that in that case the sentence was one of life without the possibility of parole. Thus a life sentence *with* the possibility of release, regardless of how far into the future, did not constitute cruel and unusual punishment.

[23] *The People (AG) v O'Driscoll* (1972) 1 Frewen 351; *State (Healy) v Donoghue* [1976] I.R. 325.

[24] *People (DPP) v C (W)* [1994] 1 I.L.R.M. 321.

[25] *People (DPP) v C (W)*, per Flood J.

[26] *People (DPP) v M* [1994] 3 I.R. 306.

previous offence, so is it fair to impose a more severe penalty than might otherwise be deserved in the current circumstances? This author believes that offenders should be sentenced for their crime of conviction and not previous convictions. One cannot deny, however, that in some circumstances it is entirely reasonable and sensible for a sentencing judge to take account of past convictions.

Impact of a Criminal Record in the Sentencing Process

So how does a criminal record fall into the sentencing equation? The answer first looks to the issue of aggravating and mitigating factors. These are judicially developed principles which a judge, at their discretion, will take account of in establishing how to fit the punishment to the particular offender. Aggravating factors, such as the use of gratuitous violence, a breach of trust, an offence committed on bail,[27] tend to levy up punishment. Mitigating factors on the other hand can be considered to apply a more lenient penalty. Typical factors that have been considered to mitigate sentence include a guilty plea,[28] early admission, prospects of rehabilitation,[29] first-time offender, and the age of the offender.[30] While the consideration of aggravating and mitigating factors (at judicial discretion) can lead to inconsistency in the distribution of legal punishments for the same offence, they form an important part of the principle of proportionality. These are relevant factors in establishing a fair sentence. It is within the parameters of these factors that a criminal record will acquire meaning. Naturally, imposing punishments that are fair means taking into account both the seriousness of the offence as well as offender characteristics and there are arguments to be made that criminal history can be relevant to both.

---

[27] This is a legislative requirement under s.11(3) of the Criminal Justice Act 1984, as amended by s.10 of the Bail Act 1997.

[28] *People (AG) v O'Driscoll* (1972) 1 Frewen 351; *People (DPP) v Tiernan* [1988] I.R. 250; *People (DPP) v M* [1994] 2 I.L.R.M. 541.

[29] *People (AG) v O'Driscoll* (1972) 1 Frewen 351.

[30] In Ireland, the Children Act 2001 reflects the desire to apply non-custodial sanctions to offences committed by juveniles. Age can also be relevant on the other end of the scale: *People (DPP) v JM*, unreported, Court of Criminal Appeal, 22 February 2002, where ailing health and old age were deemed mitigating factors.

The harm done and the culpability of the offender are integral concerns in assessing the seriousness of the offence, which will determine the sentence for punishing proportionate to the offence. It has been argued that the 'seriousness' of the offence of conviction can be influenced by the existence of past offences, mainly as being relevant to the issue of culpability (Von Hirsch 2005; Law Reform Commission 1993). The Law Reform Commission in their Consultation Paper on Sentencing took the view that criminal record can aggravate culpability. The seriousness and indeed frequency of past convictions may be argued to weigh down on the offender's culpability as he has demonstrated his inclination towards criminal behaviour, particularly if of a certain type, and an inability to refrain from such conduct. An offender predisposed to acts of theft or crimes of a sexual nature will undoubtedly be sentenced harsher than if the offence of conviction was taken on its own. Not that similarity is the defining dynamic. But it demonstrates how, by this reasoning, past crimes can also be relevant to the personal circumstances of the offender. An offender who frequently commits violent offences is regarded as a violent character and thus is not considered to merit mitigation of sentence. It has also been argued, however, that past record is completely irrelevant to the question of culpability for the offence of conviction. It is argued that once the inquiry (into offence gravity) extends to considering prior convictions "the parameters of *the offence* have been clearly exhausted" (Edney and Bagaric 2007, p. 234). In arguing the relevance of past convictions to be remote, the principle of proportionality is to be considered redundant in any sentencing process that takes them into account.

The first limb of the proportionality principle looks to the seriousness of the offence, the second to the personal circumstances of the offender. The Supreme Court in *People (DPP) v M* (1994) opined: "Having assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered" (p. 317).[31] Proportionality operates as a limiting principle, permitting greater flexibility in sentencing and allowing downward departures from otherwise proportionate sentences. The principle operates so that the

[31] Per Denham J in *People (DPP) v M* [1994] 3 I.R. 306.

offence of conviction is considered to be the upper limit of permissible punishment.[32] The absence of prior convictions is frequently considered to merit a mitigation of sentence. Consequently, the impact that a criminal record has upon sentencing is to influence the imposition of a harsher penalty than might otherwise have been imposed. Differentiating between the first-time and repeat offender is not a new idea. In the *People (AG) v McClure* (1945),[33] an 18-month sentence for gross indecency was reduced to a 6-month suspended sentence once the Court of Criminal Appeal noted the offender's prior good character. Courts in Ireland and worldwide recognise the serious implications for first-time offenders. The Australian Victoria Court of Criminal Appeal in *R v McCormack* (1981)[34] held that "it is a grave step to decide to impose upon young [people] previously of good character, the potentially devastating and corrupting experience of imprisonment" (p. 110). Inevitably, however, there will be crimes so serious that imprisonment cannot be avoided even if it is a first offence. There are practical reasons behind the imposition of more lenient penalties for first-time offenders. The absence of a record can demonstrate that this offence was out of character and the offender is unlikely to reoffend.[35] By the same limb, the leniency reflects a desire for rehabilitation. This was the approach taken in *The People (AG) v Farrell*,[36] where the last 4 years of a 15-year sentence were suspended, the offender being 21 years old. In the case of *People (DPP) v NdeP and VZ* (2008),[37] the DPP appealed the leniency of a sentence of five-year imprisonment for two counts of robbery and one count of false imprisonment. The Court of Criminal Appeal upheld the sentence, however, and did not find it to be unduly lenient having regard to the fact that the offender was young, had no prior convictions, and had cooperated with the Gardaí. In another case, a man was convicted of multiple rape of his ex-girlfriend while she slept, and sentenced originally to a suspended seven-year sentence. On appeal, the Court of Criminal Appeal acknowledged

[32] *People (DPP) v Kelly* [2005] 1 I.L.R.M. 19 (Hardiman J).

[33] *People (AG) v McClure* [1945] I.R. 275.

[34] *R v McCormack* [1981] V.R. 104.

[35] See O'Malley (2006) op. cit., at p. 141.

[36] The *People (AG) v Farrell*, unreported, Court of Criminal Appeal, 21 July 1990.

[37] *People (DPP) v NdeP and VZ* (Unreported, Court of Criminal Appeal, 19 December 2008).

the offender's cooperation, his voluntary surrender, and his previous good character as factors justifying a sentence that was appreciably less than would ordinarily be imposed in cases of multiple rape. They determined, nonetheless, that these factors did not justify the imposition of a non-custodial sentence for the serious crime and therefore affirmed the 7-year sentence but imposed a 15-month sentence of imprisonment.[38]

Accepting mitigation in sentencing for first-time offenders, is it fair and just that sentence severity is enhanced where there are prior convictions? The offender has already been punished for his past crime, so is it justifiable to punish him again for that offence? Permitting such constitutes a form of double punishment, which brings the effectiveness of proportionality into question. Punishment must be for the offence committed, not for prior offences. The judiciary undoubtedly have a difficult task. Should they be required to ignore the fact that an offender, convicted of a violent offence, has previous convictions for violent offences? Or what of the minor offender, who has a succession of previous minor offence convictions. While the quality of the offending behaviour may not be serious, the repetitive nature of the offence may indicate an unwillingness to desist. While the mere fact of repeat offending may require the courts to sentence more severely than otherwise necessitated by the offence, it is unclear that this will have the desired effect of deterring future criminal behaviour. Often, it is the character and attitude of the offender which is more significant to consider (Hough et al. 2003).

There is also some debate as to the exact approach taken to the prior record. It may be considered an aggravating factor, capable of augmenting the sentence beyond what is otherwise appropriate for the offence of conviction. Alternatively, it may follow the progressive loss of mitigation approach, whereby mitigation is given for the absence of convictions, but the more convictions there are the less mitigation the offender is entitled to (Ashworth 1983; Von Hirsch 2014, in Roberts and Von Hirsch). Some confusion emanates from case law as to which is the defining approach endorsed in this jurisdiction, but there is support for the assertion that the progressive loss of mitigation approach may best serve the consideration of this factor by the sentencing judge (O'Malley 2011).

[38] Reported in the *Irish Times*, 15 March 2016.

If previous record is considered to be an aggravating factor in sentencing, there is no denying that retrospective punishment is being imposed for past offences. A non-custodial sentence may become a custodial one; a short prison sentence may become a long one. The aggravation of the sentence directly links to the punishment of the prior record, as in the absence of this the appropriate sentence would be less. The manner in which previous convictions aggravate the sentence is somewhat more exaggerated in other jurisdictions. In the US, for example, there is practice of cumulative sentencing, whereby there is no upper ceiling to limit the punishment. Punishment can be made more severe with each subsequent conviction without there being a 'closed criminal history score' (Von Hirsch 1981, p. 616). A classic example of this is three strikes laws. Previous convictions aggravate the sentence to the extent that it entirely exceeds the maximum penalty for the offence of conviction. In the case of *Lockyer v Andrade* (2003),[39] a 50-year sentence was upheld for an offence of shoplifting, which rather than being tried as a misdemeanour was considered a felony (petty theft with a prior), as the offender had prior convictions for burglary. English law also regards prior record as an aggravating factor pursuant to the provisions of the Criminal Justice Act 2003, where it is reasonable to do so. The key objectives of allowing prior record to be an aggravating factor are deterrence and incapacitation. The public interest in preventing an offender from harming again, particularly in light of violent crimes, is considered to outweigh the rights of the offender. In some instances, it seems to outweigh the concept of proportionate punishment entirely. That the public interest is an important determinant of punishment cannot be denied. Such influence can be stronger in sentencing persistently violent or dangerous offenders, for example. It could be argued that there is stronger justification for taking record as an aggravating factor for such offenders in light of the overwhelming need to protect the public and sometimes in light of the improbability of rehabilitation. But this should not mean sentencing disproportionate to the offence of conviction. There is a balance to be maintained between protecting society from a dangerous offender and giving effect to the offender's rights. The principle of proportionality, when

[39] *Lockyer v Andrade* (2003) 538 U.S. 63.

applied, aims to provide such a balance by ensuring that the upper limit on punishment is the appropriate sentence for the gravity of the offence. There are problems with incapacitation based upon risk. Studies suggest that it is not possible to predict with an acceptable standard of accuracy, even in the context of serious offenders, who is likely to reoffend (Ashworth 1983). Any predictions of future risk are likely to be exaggerated and thus enhancing a sentence in light of such predictions is questionable (Jacobs 2015). Empirical research also casts doubt upon the deterrent effect of aggravated sentences and there is little conclusive proof that the desired effect will be achieved through the implementation of recidivist premiums (Von Hirsch and Roberts 2004; O'Malley 2006, 2016; Roberts and Yalincak 2014). True aggravated sentences have one clear effect, which is the imposition of disproportionate punishments for the crime committed. Such double punishment violates the standards of proportionality. While the repeat offender might be regarded as more blameworthy and increased punishment deserved, the parameters of justifiable punishment become skewed as the number of previous convictions increases. How much extra punishment should the law impose for a third, fourth, fifteenth conviction, where there is no 'ceiling' placed upon punishment? At present, in this jurisdiction the criminal record does not, strictly speaking, operate as an aggravating factor in the sense of permitting cumulative sentencing, and punishment is not increased with each subsequent conviction without limit. There is a 'ceiling' placed on the impact criminal record can have, which is the maximum penalty for the offence of conviction. Still, arguments remain that criminal record may have an aggravating effect and may increase punishment beyond what would otherwise be appropriate for the offence. Sentencing enhancements of this kind render the focus of law not upon the seriousness of the offence and the offender's immediate culpability but rather upon the extent of his criminal past. The effect is to make the criminal law's public valuation of criminal conduct much more diffuse and the severity of sentence no longer reflects recognition of the degree of wrongfulness of criminal acts (Von Hirsch and Roberts 2004). There may have been a time when the criminal law was structured to deal with *crimes* and not criminal *careers*, but this is certainly not the case anymore (Von Hirsch 2002, in Rex and Tonry).

The alternative approach is that with each subsequent conviction, the offender gradually loses the mitigation that the court may otherwise have applied. Importantly, this approach imposes a 'ceiling' beyond which it is no longer justifiable to punish the offender.

While the presence of past convictions may not merit mitigation of sentence, their existence cannot be used to impose a sentence that is in excess of the penalty deserved by the offence of conviction. Thus, the judge determines the appropriate sentence for the offence and then, using his discretion, considers whether there are factors meriting reduction of the sentence. If there are past convictions, such reduction will probably not take place. How many past offences must exist before mitigation is 'used up' is uncertain. It is probably safe to say that this will depend on the number of past convictions, the type and seriousness of the past offence(s), as well as judicial discretion. What is clear, however, is that the punishment cannot go beyond what is the appropriate sentence for the offence of conviction (O'Malley 2006, 2016). This approach still inevitably produces sentencing disparity between first-time offenders and recidivists (Ashworth 1983; Edney and Bagaric 2007). While there may be persuasive reasons for imposing lighter penalties on first-time offenders, it does not naturally follow that this should mean treating all types of recidivist offenders with progressive severity. The idea that the offender becomes more blameworthy or culpable with each offence can ignore the various elements of past crimes (e.g. if persistently minor offences) as well as the motivation for the offender's criminal behaviour (e.g. poverty and marginalisation). In addition, the argument for more lenient punishment of first-time offenders is founded upon a desire to avoid the detrimental effects of imprisonment, consequently suggesting that the negative effects are less upon a hardened or repeat offender.[40] While there may be some merit in this argument, it cannot be justified to say that a repeat offender deserves to suffer more (than what is appropriate for the offence) because he has experienced the harshness of prison life before and is used to it. Such reasoning could not be supported by a sentencing system anchored upon proportionality. The somewhat unsatisfactory solution to this problem would be the imposition of a 'flat-rate' of penalties for offences,

[40] *R v McDonald* (1994) 120 A.L.R. 629.

which could not be varied on the basis of record and would not take account of legitimate mitigating factors.[41] Such a solution would certainly be out of sync with the Irish sentencing policy of sentencing an offender as well the offence, in accordance with proportionality standards. The need to avoid double punishment for past offences is not necessarily satisfied by this approach, although it is by far more palatable than the aggravated sentencing approach. It may be viewed that it is not so much about punishing the recidivist more but punishing the first-time offender (or one with few past convictions) less. Arguably, the progressive loss theory offers the fairest way of dealing with past convictions because what it essentially prescribes is for the offender to be punished according to the severity of the offence and no more.

The following cases demonstrate the lack of certainty as to the definitive approach endorsed by the Irish Judiciary. In *People (DPP) v S (P)* (2009),[42] the applicant who had multiple convictions for similar sexual offences had been sentenced to multiple life sentences and some determinate sentences for sexual offences committed against two boys. The trial judge had indicated that in the absence of the previous convictions, ten years would have been an appropriate sentence. The Court of Criminal Appeal, in reducing the sentence to 15-year imprisonment and a 10-year post-release supervision order, felt that "…in relation to the previous offence the applicant has already been punished and should not on the occasion of sentencing for the present offences be punished again for those former offences" and that "previous offending will normally be regarded as an absence of a mitigating factor." In accepting this, however, the Court also determined that in the case "the nature of the previous offending indicates that the offender represents a continuing danger to the public" and that "[t]his is a relevant factor in sentencing." Thus, the court in *S(P)* viewed past record in accordance with the progressive loss of mitigation theory. However, in the case of *People (DPP) v K (G)* (2009),[43] the Court of Criminal Appeal considered that

[41] Some commentators have argued for such a solution not simply on the basis that it is inherently unjust to take past record into account but also on the basis that it would lead to greater consistency in sentencing (Edney and Bagaric 2007, p. 236).

[42] *People (DPP) v S (P)* [2009] I.E.C.C.A. 1.

[43] People (DPP) v K (G) [2008] I.E.C.C.A. 110.

"previous convictions are relevant not in relation to mitigation of sentence but in aggravation of the offence." The Court proceeded to say that the circumstances of the offence, including the past convictions, "are relevant not just in terms of their absence of mitigation of sentence but also in terms of assessing an appropriate sentence in terms of the seriousness of the offence, which sentence will be proportionately more severe than would be the case were these circumstances absent." The Court, while recognising that the absence of previous convictions is generally regarded as a matter relevant to mitigation of sentence, preferred to view the presence of convictions as relevant in assessing the gravity of the offence. There is no mention of the *G (K)* judgement in the *S (P)* case above. Critics argue that the relevance of previous convictions to offence gravity is obscure because the effect (of the offence) is the same regardless of whether the offender had previous convictions or not (Edney and Bagaric 2007, p. 234; see also Tonry 2014). The law assumes a disregard for its rules or an unwillingness to desist, without acknowledging the complexities of the 'character.' There are many reasons why a person offends. The alternative view is that enhanced punishment is not a second punishment for the past offence but rather a more severe penalty for the current offence because it is a repetitive one. If an offender has persistently committed violent or sexual crimes (these being the most serious) then the current sentence is an aggravated one. In *People (DPP) v K (G)*, the accused pleaded guilty to aggravated sexual assault. Having two prior convictions for rape, he was sentenced to life imprisonment. The Court of Criminal Appeal reduced the sentence to 16 years with the last 3 years suspended, along with a post-release supervision order of 10 years, which it considered to be a more proportionate sentence in line with the gravity of the offence (to which prior record was considered relevant). As a repeat violent offender, the Court was obligated to impose a sentence which reflected the need to protect the public, but which was not so disproportionately severe that the past offences became the defining determiner of the sentence. The punishment cannot exceed what is appropriate for the gravity of the offence or the maximum penalty available for the particular offence. The Court was also careful to emphasise that it was not including an element of preventative detention in the sentence and remained adherent to the

proportionality principle. This affirms the judiciary's long standing reluctance to use criminal record to incapacitate. In the case of *People (DPP) v Carmody (1988)*,[44] the trial judge had, in professing a duty to protect the public, determined a sentence that the Court of Criminal Appeal considered to be an attempt to procure reform by prevention. Both the appellants had extensive criminal records mostly for minor offences, but nonetheless the Court rejected the idea that it is permissible to increase a sentence beyond what is appropriate considering the gravity of the offence, for persistent or repeat offenders. Such sentiment has been challenged in recent years by the influx of legislative provisions targeting repeat offenders. More recently, the Court of Appeal determined that "a previous record, even if not aggravating, and depending on how bad it is will result in the progressive loss of the substantial mitigation that would otherwise be available to an accused who was of previous good character."[45]

Relevance of Prior Convictions

In the case of *People (D.P.P.) v. B.D.* (Unreported, Court of Criminal Appeal, 2nd February 2007), a two-year suspended sentence for assault and robbery was appealed as being unduly lenient. The Court of Criminal Appeal, in substituting a two-year prison sentence, determined that the trial judge had failed to take into account the previous convictions of the accused and the vicious and unprovoked nature of the assault and robbery. Clearly prior record is influential, but why is this factor relevant (Tonry 2014, in Roberts and Von Hirsch) and what of the issue of indivisibility? Some have argued that prior convictions are simply not relevant and logically and morally should not be used in sentencing (Edney and Bagaric 2007, pp. 224–240). While most might be inclined to argue vehemently against such a position, it does have some moral and logistic merit particularly in the context of social inequalities. A disproportionally large number of offenders from poor socioeconomic backgrounds

[44] *The People (DPP) v Carmody* [1988] I.L.R.M. 370.
[45] *DPP v O.R.* [2017] IECA 61, para. 25, per Edwards J.

have prior criminal records and the probability of exacerbating that record increases when coming before a court (Farrell and Swigert 1978). Sentencing policy can operate to perpetuate the social and legal inequities faced by these individuals. Disregarding evidence of past record would go some way towards ironing out the discrepancies between sentences for poor and well-off offenders, which in some jurisdictions could mean the difference between life imprisonment and a significantly lesser term. The alternative of a flat-rate sentencing system, while erasing such inequality, would not be favoured by many on the basis that it would take away the element of mitigation for first-time offenders. Given that this policy, spirited in rehabilitative qualities, is so strong an aspect of Irish sentencing law, it is unlikely to be easily uprooted.

The similarity of the prior record also aligns with the issue of relevance. If one accepts the viability of considering the criminal record in sentencing, then previous convictions that are similar in nature to the current offence may be more relevant in appreciating a pattern of offending behaviour which demonstrates an unwillingness to desist from that behaviour. This to some extent affirms the populist understanding of a habitual criminal. Similarity of offending behaviour is enshrined within social and political perceptions of the repeat offender. But what if the current offence is for minor theft and the prior offence is a sexual assault, or the current offence is manslaughter and the previous offences are for minor public disorder? Does or should the dissimilarity of the previous offence affect its relevance in sentencing? Behaviour which is out of character for the offender often justifies a lesser penalty. This is the approach taken for first-time offenders. By the same reasoning, previous offences of a similar nature suggest that this behaviour *is* characteristic and a more severe penalty justified. While similarity of offences certainly holds greater weight in sentencing in the Irish Courts, this does not mean that past offences will automatically be disregarded if they are dissimilar. Any and all past convictions may be considered and this presents a challenge to any appreciation of the relevance of the criminal record. Case law in this jurisdiction, however, reflects some adherence to a practical common sense approach to the issue. In *DPP v M.M*,[46] the Court of Appeal

[46] *DPP v M.M.* [2016] IECA 282.

observed that the appellant did have previous convictions but they were of a very different nature to the offences of sexual assault and buggery in the current case and as such were not considered relevant. Similarly, in People *(DPP v Walsh)*,[47] the appellant had previous convictions, mostly relating to traffic offices. Given that the offence in the case concerned was one of sexual assault, the Court of Appeal took the view that the previous convictions "were neither so numerous nor so serious as to have justified the total loss of [mitigation]." It may be then that quality and quantity become the defining issues of ascertaining the relevance of previous convictions. Dissimilar offences may carry greater weight if they are particularly serious, however, to attach a penalty more severe than merited by the gravity of the offence of conviction would violate the principle of proportionality.[48] The court may also be guided by the sentence handed down for the prior offence, although this is more likely to be relevant to the overall seriousness of the prior offence.[49]

With regard to quantity, the more convictions an offender has, the greater weight they will be accorded, inevitably resulting in a more severe punishment. A vast number of priors again suggests to the court a pattern of offending behaviour and a likelihood of reoffending. The Court may determine that there is a continued threat to the safety of the public based upon the offender's criminal record. Adhering to the progressive loss of mitigation approach the court may conclude that the offender has exhausted the entitlement to mitigation. The time frame within which the prior offending occurred will also dictate the approach. For example, a number of offences committed within a 5-year period are likely to carry more weight than the same number committed over a 30-year period. By the same measure, old convictions may not be considered relevant at all by the court, although this will depend upon the case as well as the character of the accused. The understanding is that the older the conviction and the longer the 'rehabilitation' period, the less likely it is characteristic of the individual to behave in this way. The courts also afford recognition

[47] *DPP v Walsh* [2017] IECA 187.

[48] The *People (DPP) v Renald*, unreported, Court of Criminal Appeal, 23 November 2001.

[49] One can argue that prior sentence is certainly relevant and that in particular those who have been sentenced to imprisonment in the past are more likely to receive a custodial sentence in the future. This bears down most heavily upon offenders from the lower socioeconomic classes.

for the fact that the offender has made attempts to mend his ways and should be accorded some leniency in accordance with rehabilitative aims.[50] Expungement laws, utilised in many countries, provide for such a 'decay' policy in terms of disclosure of record, within the concrete realms of statute. Such provisions provide that once a certain 'conviction-free' period has expired the past conviction will no longer be taken into consideration. This is usually subject to limitations and normally does not apply in the context of court proceedings. The age of the individual when he received the prior conviction may be of some relevance also (as is the age they committed the current offence). Convictions received as a juvenile offender might not be considered relevant to a conviction as an adult, in accordance with juvenile justice standards. Section 258 of the Children Act 2001 provides for a type of expungement of record for juvenile offenders, subject to certain conditions, so that these convictions may not have any real bearing upon the sentence for an offence committed as an adult.

A cynical view of the criminal record at sentencing might suggest that the overarching relevance is simply that of character. The offender is a bad man, who has offended before and will offend again. The view of the unreformable habitual criminal justifies sentencing them more severely than may be proportionate in all the circumstances. To take this view, however, might be to deny the full range of factors influencing the sentencing decision, including the rationale.

Rationales of Punishment and Applicability to Sentencing Enhancements for Recidivists

There are thought to be five main aims of punishment: deterrence, both individual and general, incapacitation, rehabilitation, and desert or retribution (Hart and Gardner 2008). While deterrence has often

[50] Rehabilitative aims are important for a number of reasons, including risk probability and incentivising. It may be argued that there is little difference in the recidivism risk between a first-time offender and one who has not offended for a significant period of time. Reducing the penalty in such circumstances can also be an incentive for the offender to refrain from further offending. Roberts, 1997, p. 335; Ashworth 1983, p. 225.

been claimed as the main aim of punishment, both this rationale and rehabilitation have been considered perhaps too idealistic, given that neither goal has been entirely successful on any broad scale analysis. Instead, the focus of punishment in many countries has been set upon the desert or retributive model.[51] In Ireland, the Law Reform Commission in 1993 favoured the 'just deserts' approach to sentencing, although this is not the single gravitational rationale adopted (Law Reform Commission 1993; Kilcommins et al. 2004, p 187). Any of the rationales can be incorporated in to the sentencing process to justify a decision in an individual case. Furthermore, although various rationales can be invoked in one particular instance, it is not proposed that they compete at the same time to provide justification for the same questions. Rather they are employed individually to provide answers to different questions (Hart and Gardner 2008) such as "why punish?" "how much punishment?" "who do we punish?" The just deserts approach is used to determine the question of the severity of punishment. This is done on the basis of ensuring punishment is proportionate to the particular offence. Once this has been determined, the sentencing judge should adjust the sentence as appropriate for the particular offender. It is then that other aims such as deterrence and rehabilitation are to be considered (Law Reform Commission 1993; Ni Raifeartaigh 1993). The rationales or goals of legal punishment are also important to consider in the context of past criminal convictions.

Deterrence

Deterrence as a rationale regards the prevention of crime as the main goal of punishment. Developed by criminologists like Beccaria and Betham, its essence was to refocus punishment away from violent and harsh sanctions, expressed coherently as follows: "We rest our hopes on the hangman; and in this vain and deceitful confidence in the ultimate punishment of crime, forget the very first of our duties—its prevention" (Sir Thomas

[51] The United States Committee for the Study of Incarceration favoured the adoption of this policy (Von Hirsch 1976). The UK is another country where the desert policy has been the preferred sentencing policy (Ashworth 2017, HMSO 1990).

Fowell Buxton 1821).[52] Paradoxically, the rationale is now invoked as the purpose behind harsher sentencing, particularly for recidivists (Von Hirsch and Roberts 2004; *Lockyer v Andrade* (2003)). While a first-time offender may be given a mitigated sentence, a recidivist offender may require greater punishment in order to provide a greater deterrent to reoffending. This is the idea behind individual deterrence. Greater attention is given to general deterrence, especially in terms of political policy. Not only should penalty be calculated so as to prevent the individual offender from offending again but it is also required to deter others from committing a similar offence. Writers such as Posner and Bentham have compounded the argument that "the greatest good of the greatest number represents the supreme value and that the individual only counts for one: it may therefore be justifiable to punish one person severely in order to deter others effectively, thereby overriding the claims of proportionality" (Ashworth 2007 in Maguire et al. p. 993). Such an assertion could only be accepted in the presence of convincing evidence, of which there is a significant lack (Von Hirsch et al. 1999b; Doob and Webster 2003). In so far as the criminal record is concerned, deterrence has been relied upon as justification, but in the absence of convincing evidence to suggest that the intended effect is being realised, it is not a convincing justification for imposing severe sentences that are completely disproportionate to the offence (Ashworth 1983). Offenders, even persistent offenders, do not relinquish all their rights simply on the basis that they have offended, and they have an important right to proportionate punishment to which effect must be given.

Incapacitation

The theory of incapacitation involves identifying offenders who are of particular danger to society and in view of the likelihood that they will harm again, invoke special protective measures. Prime examples include the Californian Penal Code and the Criminal Justice Act 2003 in Britain. Ashworth notes that the incapacitative approach has no behavioural

[52] Sir Thomas Fowell Buxton, MP, Parliamentary Debates: official reports, Vol. 5, 1821.

premise and is neither linked with any particular causes of offending or with behavioural changes of the offender (Ashworth 2007 in Maguire et al., p. 995). Instead, the primary focus is risk assessment and public protection. The strong conflict in incapacitative sentencing is that between the public interest and the offender's rights. The incapacitative theory has been used to justify the imposition of disproportionately severe sentences for repeat offenders and has often completely superseded the principle of proportionality. The continuously confirmed fallibility of predictive judgements does challenge the justification for imposing seriously harsh sentences in the public interest (Floud and Young 1981; Bottoms and Brownsword 1982; Monahan 2004 in Tonry). The incapacitative approach has also been claimed to provide justification for the use of the past criminal convictions, particularly in the context of 'three strikes' laws. The principle of proportionality is sidelined in favour of protecting the public from repeat offenders. Apart from the fact that increased imprisonment has little positive effects in terms of preventing reoffending (unless of course the sentence is life), the approach also has the undesirable effect of sentencing persistent minor offenders to punishments as severe as that for an offender who has committed a very serious offence. An unrestrained incapacitation approach would not be in keeping with the important principle of proportionality and as such is not currently the defining rationale in Irish law.

Rehabilitation

Rehabilitation is a compelling goal to consider in the context of sentencing policy. Sentences that aim to rehabilitate or incorporate rehabilitation as a goal of sentencing (e.g. sentences for first-time offenders) operate to benefit not only the offender but also society. There is a strong public interest in rehabilitating offenders as it can have a far greater effect on reducing the risk of reoffending that imprisonment.[53] Community-based sanctions are particularly advocated by rehabilitative theories whenever possible. Considering the stigmatic effects that a prison record (as opposed

[53] *People (DPP) v OD (R)* [2000] 4 I.R. 361. See also *Renshaw v DPP* (1996) 67 S.A.S.R. 139 and *People (DPP) v Eccles*, ex tempore, Court of Criminal Appeal, 8 October 2005.

to conviction record) has, maintaining social ties with the community is important. The aim should be to reintegrate, not exclude. This is not to suggest, however, that the rehabilitative approach is without its problems. To begin with, there is a concern surrounding whether rehabilitative interventions, such as counselling, drug treatment, and intervention in the home, actually work. No definitive answer can be given towards this end (McGuire 2002). The other concern is that given the often intrusive nature of rehabilitative treatments and the length of time they can be imposed for, as much control can be exerted as is the case for restrictive punitive sanctions. Both call into question the concept of proportionate punishment. The Courts, however, continue to have regard to the theory of rehabilitation in sentencing, and this should be viewed as a highly desirable and positive articulation in sentencing. It is in light of the rehabilitative theory that any argument against the use of criminal record in sentencing would suffer. Allowing mitigating factors to be considered particularly for first-time offenders, and accordingly a reduction of sentence to permit rehabilitation, is an important aspect of Irish sentencing law. To disregard past convictions and sentence all offenders to the appropriate sentence for the offence, regardless of whether a first-time or repeat offender, would eliminate the possibility of mitigating in the presence of entirely legitimate factors. The rehabilitative approach would become almost entirely redundant.

Retribution or Desert

The final theory of punishment is the just deserts approach. The theory behind just deserts is that offenders are moral agents who deserve censure in the form of punishment for their wrongdoing. The punishment is the morally appropriate response to the crime. Proportionality is the key principle underlying the deserts approach. The offender deserves to be punished but has a right not to be punished disproportionately to the offence committed. Proportionality must be a key consideration both in terms of the legislative construction of offences and sentences for those offences, as well as being essential in the operation of sentencing principles through discretion. Resisting the use of criminal record within the

desert theory of punishment may be futile, considering that the proportionality principle defines the upper limit of permissible punishment in terms of the appropriate sentence for the offence of conviction. The sentence is not continuously increased without a 'ceiling' when the offender has a criminal record. While past convictions may increase the punishment, there is little evidence of grossly disproportionate sentences being applied by the courts on the basis of this. Indeed, in comparison with other jurisdictions, the Irish judiciary remain uniquely mindful of the proportionality principle and the need to avoid incapacitative sentences. The parameters of 'deserved' punishment continue to be applied with the gravity of the current offence as the defining upper limit on the sentence imposed.

Conclusion

There is a growing consensus in the public and political spheres that the justice system favours the accused and that sentences are not applied as aggressively as is considered necessary for public protection. This is especially evident in the context of repeat offenders. Political rhetoric favours statutory enhancements for repeat offenders, applied unceremoniously across categories of offenders without acknowledging individual risk or the need for an evidence-based approach. Despite populist belief, offenders rights are not at the polar opposite of the public interest, and consideration to one should not equal complete disregard of the rights of the other. Decisions made in the public interest should not serve the imposition of disproportionate penalties upon offenders, and neither should giving due regard to offender's rights leave the public wanting in terms of justice. While it might be argued that the public interest would be served by simply imposing a sentence proportionate to the offence and eliminating consideration of the criminal record altogether, this would also eliminate consideration of legitimate personal circumstances that would mitigate sentence. Mitigation of sentence in the presence of compelling factors is an essential element of the law and is unlikely to be removed in favour of a flat-rate sentencing system. Punishment must be proportionate to the offence and the particular offender and as such criminal records

will continue to play a role in sentencing. What should be guarded against is enhancing penalties for previous convictions to the point where proportionality becomes meaningless rhetoric. Penal policies in Ireland are not contemplated in isolation from the influences of penal policies in other jurisdictions as evidenced by the implementation of statutory enhancement provisions in recent years. Irish sentencing policy must be careful to avoid the pitfalls of more draconian policies, wherein balance and proportionality are completely overshadowed by a prioritisation of risk control in the context of repeat offenders.

Bibliography

Ashworth, A. (1983). *Sentencing and Penal Policy*. London: Weidenfield & Nicolson.

Ashworth, A. (2017). *Deserved Criminal Sentences*. London: Hart Publishing.

Beccaria, C. (1963). *On Crimes and Punishments* (H. Paolucci, Trans.). Indianapolis, IN: Bobbs-Merrill Company.

Bottoms, A. E., & Brownsword, R. (1982). The Dangerousness Debate After the Floud Report. *British Journal of Criminology, 22*, 229.

Doob, A., & Webster, C. (2003). Sentence Severity and Crime: Accepting the Null Hypothesis. *Crime and Justice, 30*, 143.

Edney, R., & Bagaric, M. (2007). *Australian Sentencing; Principles and Practice*. Melbourne: Cambridge University Press.

Ehlers, S., Schiraldi, V., & Ziedenberg, J. (2004). *Still Striking Out: Ten Years of California's Three Strikes Law*. Washington, DC: Justice Policy Institute.

Farrell, R. A., & Swigert, V. L. (1978). Prior Offence Record as a Self-Fulfilling Prophecy. *Law & Society Review, 12*(3), 437–453.

Fitzgerald, C. (2008). Californication of Irish Sentencing Law. *Irish Criminal Law Journal, 18*(2), 42.

Floud, J., & Young, W. (1981). *Dangerousness and Criminal Justice*. London: Heinemann.

Hart, H. L. A., & Gardner, J. (2008). *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed.). Oxford: Oxford University Press.

HMSO, White Paper. (1990). *Crime, Justice and Protecting the Public: The Governments Proposals for Legislation*. Cm965. London: HMSO.

Hough, M., Jacobson, J., & Millie, A. (2003). *The Decision to Imprison: Sentencing and the Prison Population*. London: Prison Reform Trust.

Jacobs, J. B. (2015). *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.

Jones, T., & Newburn, T. (2006). Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Politics. *British Journal of Criminology, 46*, 781.

Kilcommins, S., O'Donnell, I., O'Sullivan, E., & Vaughan, B. (2004). *Crime, Punishment and the Search for Order in Ireland*. Dublin: Institute of Public Administration.

McGuire, J. (Ed.). (2002). *Offender Rehabilitation and Treatment: Effective Programmes and Policies to Reduce Re-offending*. Chichester: Wiley.

Monahan, J. (2004). The Future of Violence Risk Management. In M. Tonry (Ed.), *The Future of Imprisonment*. New York: Oxford University Press.

Murphy, G. (2007). An Analysis of Sentencing Provisions in the Criminal Justice Act 2006. *Judicial Studies Institute Journal, 1*, 60–100.

Ni Raifeartaigh, U. (1993). The Law Reform Commission *Consultation Paper on Sentencing*. *Irish Law Times, 11*, 101.

O'Malley, T. (2011). *Sentencing: Towards a Coherent System*. Dublin: Round Hall.

O'Malley, T. (2006). *Sentencing Law and Practice* (2nd ed.). Dublin: Round Hall.

O'Malley, T. (2016). *Sentencing Law and Practice* (3rd ed.). Dublin: Round Hall.

Roberts, J. V. (1997). The Role of Criminal Record in the Sentencing Process. *Crime and Justice, 22*, 303–362.

Roberts, J. V., & Yalincak, O. K. (2014). Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines. *Federal Sentencing Reporter, 26*(3), 177–190.

Russell, S. (2010). Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing. *U.C. Davis Law Review, 43*, 1135–1182.

Spohn, C., & Holleran, D. (2002). The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders. *Criminology, 40*, 329.

The Law Reform Commission. (LRC CP 6-1993). *Consultation Paper on Sentencing*. Dublin: Law Reform Commission.

Tonry, M. (1996). *Sentencing Matters*. New York: Oxford University Press.

Tonry, M. (2004). *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy*. Cullompton: Willan.

Tonry, M. (2014). The Questionable Relevance of Previous Convictions to Punishments for Later Crimes. In J. V. Roberts & J. V. Von Hirsch (Eds.), *Previous Convictions at Sentencing*. Oxford: Hart.

Travis, J. (2002). Invisible Punishment: An Instrument of Social Exclusion. In M. Mauer & M. Chesney-Lind (Eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: The New Press.

Von Hirsch, A. (1976). *Doing Justice: The Choice of Punishments*. New York: Hill and Wang.

Von Hirsch, A. (1981). Desert and Previous Convictions in Sentencing. *Minnesota Law Review, 65*, 591.

Von Hirsch, A. (2002). Record-Enhanced Sentencing in England and Wales. In S. Rex & M. Tonry (Eds.), *Reform and Punishment: The Future of Sentencing*. Cullompton: Willan Publishing.

Von Hirsch, A. (2005). Proportionate Punishments. In A. Von Hirsch & A. Ashworth (Eds.), *Principled Sentencing*. Oxford: Oxford University Press.

Von Hirsch, A. (2009). Incapacitation. In A. Ashworth, A. Von Hirsch, & J. Roberts (Eds.), *Principled Sentencing: Readings on Theory and Policy* (3rd ed.). Oxford: Hart Publishing.

Von Hirsch, A. (2014). Proportionality and the progressive Loss of Mitigation: Some Further Reflections. In J. V. Roberts & J. V. Von Hirsch (Eds.), *Previous Convictions at Sentencing*. Oxford: Hart.

Von Hirsch, A., Bottoms, A. E., Burney, E., & Wikstrom, P. O. (1999b). *Criminal Deterrence and Sentencing Severity*. Oxford: Hart Publishing.

Von Hirsch, A., & Roberts, J. V. (2004). Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions. *Criminal Law Review*, 639

Young, D. (1986). *Introduction, On Crimes and Punishments*. Indianapolis: Hackett.

Zimring, F. E., Hawkins, G., & Kamin, S. (2001). *Punishment and Democracy: Three Strikes and You're Out in California*. Oxford: Oxford University Press.

Part III

The Aftermath of Punishment and Release

7

Post-Release Monitoring of Ex-offenders in the Community

Foucault observed that "the carceral texture of society assures both the real capture of the body and its perpetual observation."[1] Inherent in this statement is the idea that the panoptic functioning of the prison system became transferred to the social body outside the prison walls. The 'carceral circles'[2] widened and the prison form permeated into society, unseen but very much present. Discipline and surveillance became the new way of honing punishment on the soul of the offender. In recent decades, criminal policy has revived the preoccupation with discipline and surveillance, becoming increasingly more strategically focused upon reducing the risks posed by offenders in the aftermath of imprisonment. The transition from prison to the community is a precarious process marred by contradictions in policy approaches. While some approaches emphasise the need to create an inclusive environment for prior offenders, others reinforce the 'excluding' narrative embedded in surveillance and monitoring techniques. Punishment alone is no longer believed to be sufficient, and additional security features are becoming the norm in response to dealing with offenders. Post-release monitoring has become a common

[1] Foucault (1977), at p. 304.

[2] Foucault (1977), at p. 298.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_7

feature in contemporary crime management, stemming from a need to assuage growing insecurity in modern society.[3] While the rationale for such monitoring focuses largely upon the prevention of crime, one of the inevitable consequences for ex-offenders is that their connection with the criminal justice system does not automatically end after imprisonment. For many, the civil effects of a conviction can last for life and for others it can last for a substantial and often indefinite period of time into the future.

The Nature and Development of Post-Release Monitoring

The idea of monitoring offenders after release is not a new one. It has been documented in the early nineteenth century that offenders left prison "with a passport that they must show everywhere they go which mentions the sentence they have served."[4] This passport essentially permitted perpetual surveillance of the individual, usually in the context of seeking employment and surveillance by the police. Prior to this, an offender was disengaged from the penal system after release from prison and was no longer its concern, unless he committed another offence.[5]

In England, as early as 1868, proposals for a national 'Habitual Criminals Register' aimed to effect the supervision of all those convicted of a crime upon release.[6] It was considered that "those who have been guilty of repeated offences should, after the expiration of their sentences,

[3] Note Garland, D. (2000). *Punishment and Modern Society*. Oxford: Clarendon Press; Rose, N. (2000) Government and Control. Brit. J. Criminol. 40, 321–339.

[4] Barbé-Marbois, F. de, *Rapport sur l'état des prisons du Calvados, de l'Eure, la Manche et la Seine Inférieure*, 1823, at p. 17. Referenced in Foucault (1977) op. cit., at p. 267.

[5] It is interesting to note the Ticket of Leave system that operated in Australia, which to some extent amounted to a form of post-release control over the individual in colonial times. A Ticket of Leave could be granted to an eligible convict, like a parole or probation, and entitled him to live and work within a given police district (in the penal colony) The Ticket of Leave lasted for a year at a time and could be revoked if an offence was committed or the individual travelled outside the prescribed police district.

[6] See Hebenton, B. and Thomas, T. (1993). *Criminal Records: State, Citizen and the Politics of Protection*. Avebury: Aldershot.

for the better security of society be placed under constant supervision."[7] The tenor and flavour of these proposals was thus premised upon a desire to provide greater security for the public, an aspiration that later policies also focus upon. Although these early 'tracking' systems were limited and eventually abandoned, they are evidence of an earlier effort to establish a network of communication regarding released offenders.

The idea of supervising ex-offenders in the community has now been entirely reinvented by policies emerging since the early 1990s. These polices have been aimed at reducing the risks posed by certain dangerous offenders and include requiring ex-offenders to register with the police and implementing supervision and other types of community-monitoring orders. These post-release measures are imposed as civil provisions ancillary to a criminal conviction and are not normally considered to be part of the criminal penalty or punishment for the offence.[8] In this sense, they are an entirely unique approach to crime management in late modern society. The influence of popular perception of crime, in the creation and endorsement of post-release policies, cannot be understated. Media portrayals of brutal and high-profile crimes have forged an image of large masses of dangerous high-risk offenders at large in communities. The intersection of media, social, and political opinion often generates a belief that intolerable risk exists, which must be addressed through harsh and unyielding criminal policies. Certain categories of offenders are more susceptible to intolerance than others. Sex offenders and organised crime offenders are particularly demonised. Penal policy has progressively become more directed towards managing the threat that these released offenders might go on to reoffend in the future. The securitisation of identity also features here.[9] Obtaining information on offenders in order to be able to identify and monitor them is part of the new crime control approach to offending behaviour,

[7] Earl Shaftesbury, speaking at the debate of the 1869 Habitual Criminals Bill: 194 House of Lords Debates, col. 697, 5 March 1869 (*Hansard*, Vol. CXCIV).

[8] In the UK, the Home Office emphasised that the sex offender register was a civil measure aimed at protecting the public and was not an additional penalty for the offender. Home Office/Scottish Executive (2001). *Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997*. London: Home Office, at p. 11.

[9] Rose (2000).

and such knowledge has become an important way of restoring to society a sense of security and equanimity. The legislative measures under discussion in this chapter can be seen as vital facilitators of this innovative 'knowledge-for-security'[10] system.

Dealing with Sex Offenders

Protecting the Public: An International Concern and the Approach in Ireland

Prior to the enactment of laws in Ireland, countries like the US and the UK had established post-prison release arrangements in order to tackle the re-entry into society of convicted sex offenders. In the US, the language of precaution has catalysed policies of indefinite incarceration periods for sex offenders, notification requirements, risk assessment in the guise of treatment,[11] and disclosure to the community, which has arguably left the question of personal rights of sex offenders in a somewhat precarious and ambiguous position.[12] In the US, notification requirements, though once passive, have evolved into a requirement to actively 'sign on' with the local law enforcement, in addition to informing the

[10] Hebenton and Thomas (1996), at p. 431.

[11] See Lacombe, D. (2008) Consumed with Sex: The Treatment of Sex Offenders in Risk Society. Brit. J. Criminol. 48, 55–74.

[12] In the US, electronic monitoring has also been used as a method of improving the management and supervision of released offenders. The requirements vary from State to State but a lifetime obligation may be imposed in some States for certain offenders. See Jacobs, J. (2015) *The Eternal Criminal Record*. Cambridge MA: Harvard University Press at p. 269; Delson, N. (2006) Using Global Positioning Systems (GPS) for Sex Offender Management. *Association for the Treatment of Sexual Abusers Forum* 18, 24–30. Moreover, electronic monitoring orders can apply retrospectively, so as Hebenton and Seddon observe "an offender convicted years ago and long since disentangled from the criminal justice system must submit to supervision via an electronic device." Hebenton, B. and Seddon, T. (2009) From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age. Brit. J. of Criminol. 1–20, at p. 8. In the UK, although this kind of monitoring has not found clear footing in post-release supervision arrangements, a Home Office report recommended optimising the use of technology in the management of offenders and in particular the development and use of satellite tagging and tracking: Home Office (2007) *Review of the Protection of Children from Sex Offenders.* London: Home Office.

registry if the person relocates, uses a vehicle not registered to them or if they change their appearance in any way.[13] The UK has also turned to restrictive civil orders as a means of monitoring sex offenders post release.[14] Policies enacted in the UK originally included a variety of orders, namely, the Sexual Offences Prevention Order, the Foreign Travel Order, the Risk of Sexual Harm Order, and the Notification Order (under the Sexual Offences Act 2003). These orders have now been consolidated into two—the Sexual Risk Order and the Sexual Harm Prevention Order (as of 2015).[15] The 'register' is perhaps the most notable measure introduced as a tool to assist police to track offenders and apprehend suspects. It operates as an active register with the obligation to notify the police, annually, of relevant information including providing photographs and fingerprints.[16] Such provisions in relation to sex offenders have catalysed a new phenomenon into the criminal justice sphere, propelling changes to the Irish approach also. The special concern over sexual offending and offenders has motivated policymakers in Ireland to follow their international counterparts in developing similar approaches to dealing with sex offenders after conviction. Thus, the changing nature of penal techniques has thrust upon the police in this jurisdiction, the additional responsibility of managing sex offenders in the community.[17]

[13] The information that may be required and held includes name, address, fingerprints, photographs, social security number, vehicle registration details and DNA profile, and the obligation to register can last anywhere from 10 years to a lifetime obligation. See Jacobs (2015) op. cit.; Terry, K. (2015) Sex offender laws in the United States: smart policy or disproportionate sanctions? *International Journal of Comparative and Applied Criminal Justice*, *39*(2), 113–127; Zgoba, K., Miner, M., Levenson, J., Knight, R., Letourneau, E. and Thornton, D. (2015) The Adam Walsh Act: an examination of sex offender risk classification systems. *Sexual Abuse: A Journal of Research and Treatment*, *28*(8), 722–740.

[14] Note that the civil post-release measures in the UK flow from a criminal conviction. See also Thomas, T. (2011) *The Registration and Monitoring of Sex Offenders: A Comparative Study*, New York: Routledge.

[15] See further Thomas T. (2016) *Policing Sexual Offences and Sex Offenders.* Palgrave Macmillan; Thomas, T. (2005) *Sex Crime: Sex Offending and Society*, 2nd ed. Devon: Willan Publishing.

[16] See also Zgoba, K. (2017) Memorialization laws in the United Kingdom: a response to fear or an increased occurrence? *American Journal of Criminal Justice*, *42*(3), 628–43.

[17] A nominated Inspector in each Garda Division has responsibility for liaising with the central Garda Domestic Violence and Sexual Assault Unit (who keep the 'register') for the purpose of monitoring the application of and compliance with the Sex Offenders Act 2001.

The Irish 'Register'

The establishment of a register in the UK initiated the idea of having a sex offender register in this jurisdiction,[18] which was surprising because there was no evidence of any urgent need to establish such post-release arrangements at the time. The idea was not motivated by any high-profile crime committed within the jurisdiction like that of Megan Kanka in the US or Sarah Payne in the UK, or by the release of any notorious sex offenders like that of Sidney Cooke in the UK. A considerable amount of emphasis was put upon the idea of the foreign sex offender, who might be using Ireland as a safe haven to escape restrictive orders in the UK and elsewhere. In more recent times, sex offender policies have been less haunted by this anonymous foreign spectre. Despite lingering scepticism that a register would be an effective safety measure, the government initiated proposals in 1998 under *The Law on Sexual Offences—A Discussion Paper*, followed swiftly by a Bill to give effect to recommendations featured in the Discussion Paper.[19] According to the then Minister for Justice Mr John O'Donoghue, the rationale for the register under the 2000 Bill mirrored that of introducing the UK register; that it could prevent crimes and might act as a deterrent.[20] In Dáil debates, the view was expressed that the provisions in the Bill would target those who 'prey on the vulnerable' and would send the message that such individuals would be dealt with swiftly and uncompromisingly. This emphasis upon the predatory sex offender is perhaps why the decision was made not to apply the provisions to offenders who are not more than three years older than the victim/other party to the offence who is aged between 15 and 17 at the time of the offence (thereby distinguishing consensual sexual activity taking place between young people of broadly similar age).[21] The decision was also made that the register would not apply retrospectively as to permit such would be unfair and impracticable.

---

[18] Thomas, T. (2000) Protecting the Public: Some Observations on the Sex Offenders Bill 2000. Irish Criminal Law Journal 10 (2), 12 at p. 12.

[19] Department of Justice and Equality (1998). *The Law on Sexual Offences-A Discussion Paper.* Dublin: Department of Justice and Equality.

[20] Department of Justice and Equality, Press Conference Speech by John O'Donoghue to announce the publication of the Sex Offenders Bill 2000, Dublin, January 2000.

[21] Section 3 of the Act and the Schedule to the Act provide for such exemptions.

Although the term 'register' is not actually used in the 2001 Act, Part 2 of the Act makes provision for notification requirements for released sex offenders. Once a conviction is recorded in the courts, a Certificate of Conviction is issued to the Sex Offender Management and Intelligence Unit within An Garda Síochána and the information is recorded on the PULSE (Police Using Leading Systems Effectively) computer system. The unit has responsibility for maintaining records of all persons in the State with obligations under the provisions of the 2001 Act and a Garda Inspector is nominated in each Division to oversee the implementation of these provisions.[22] The obligation to notify the Gardaí of information including name, date of birth, and address, arises once the offender is convicted of an offence under the Act[23] (legislation enacted since the 2001 Act has created additional offences to which the provisions also now apply)[24] and must occur within seven days of release (although there are currently recommendations circulating which propose to change this to three days).[25] Once the individual has done this, then they will have discharged their obligation under the provision, unless they change their name and/or address or intend to stay outside the given address for seven days or more. The individual must notify the Gardaí (in person or in writing) of such circumstances within seven days. Notification requirements are provided for an ascending scale based upon the length of the

[22] The Sex Offender Management and Intelligence Unit is part of the Garda National Protective Services Bureau (GNPSB) which was established in March 2015 as part of a victim-centred approach in carrying out the functions of the organisations responsible for dealing with sexual offences and sex offender management. The Bureau, which replaces the Domestic Violence Sexual Assault Investigation Unit, comprises the following Units: Sexual Crime Management Unit; Paedophile Investigation Unit; Sex Offender Management & Intelligence Unit; SORAM Multi-Agency Office (including personnel from the Probation Service, Child & Family Agency and Local Authority Housing); Human Trafficking Investigation & Coordination Unit; Missing Persons Unit; Domestic Violence Unit; Child Protection Unit; ViClas (Violent Crime Linkage Analysis System); Victim Services Offices. See Annual Report of An Garda Síochána 2015.

[23] The sexual offences which trigger the notification requirements are defined in s.3 and the Schedule to the Act and include rape, sexual assault, and incest.

[24] This includes offences under the Criminal Law (Human Trafficking) Act 2008. See also various provisions of the Criminal Law (Sexual Offences) Act 2017 (e.g. s.10).

[25] Such recommendations come in the form of the Sex Offenders (Amendment) Bill 2018. Those convicted of a sex offence outside the State are also subject to the requirements as long as the offence is one which would be deemed a sex offence under the 2001 Act. Provision is made however for a defence of honestly believing that one was not subject to the requirements because the offence was not one that would have merited the obligations if committed within the State.

original sentence imposed (under s.8), with obligation periods ranging from five years to a lifetime obligation. Notification periods are halved where the offender is under the age of 18 at the time of sentencing. Failure to comply with these registration requirements is a summary offence under the Act incurring a fine and/or a term of imprisonment.[26] Where a person is subject to a lifetime obligation, they may petition the Circuit Court after ten years have passed to remove the obligation which the Court may do if the 'interests of the common good would no longer be served' by the requirement continuing.[27] This provision was presumably introduced in order to avoid any potential issues of incompatibility with Article 8 of the European Convention on Human Rights.[28] The Act renders it an offence to fail to comply with the notification requirements with the possibility of being punished summarily or on indictment.[29] Since the implementation of the Sex Offenders Act 2001, hundreds of convicted offenders have been subject to monitoring pursuant to Part 2 of the Act. The most recently available figures in October 2017 set the number at 1575.

The Sex Offender Order

Despite the intention not to apply the provisions of the Act retrospectively, concerns that some dangerous offenders might slip through the net resulted in the inclusion of the Sex Offender Order in the 2001 legislation. Under Part 3 of the Act, a member of An Garda Síochána not below the rank of Chief Superintendent can apply to the Circuit Court for a sex offender order where an individual has been acting in a manner that gives

[26] The power of arrest was introduced under the Criminal Law (Human Trafficking) Act 2008 in relation to offenders who do not comply with their obligations under the Sex Offenders Act 2001.

[27] The first application for deregistration came in 2015 from a man registered in 2001 following his conviction for sexual abuse. The judge agreed to remove him from the register as he was at low risk of reoffending and the interests of justice were no longer served by keeping him on the register. Reported in The Irish Times, 11 November 2015: http://www.irishtimes.com/news/crime-and-law/courts/criminal-court/judge-agrees-to-remove-man-from-sex-offenders-register-1.2425874.

[28] *R (F (A Child)) v Secretary of State for the Home Department* [2010] UKSC 17.

[29] On indictment, the person is punishable with a fine of €10,000, up to five years imprisonment, or both: Sex Offenders Act 2001, s.12(3), as substituted by s.13(b) of the Criminal Law (Human Trafficking) Act 2008.

reasonable grounds for believing an order is necessary to protect the public. The order is considered as an additional protective measure, allowing the Gardaí to flag the behaviour of someone convicted of sex offences in the past. A judge will grant the order if it is considered necessary to protect the public from serious harm, which is defined as death or serious personal injury whether physical or psychological.[30] The intent is to target dangerous offenders as emphasised by the five-year minimum period for the order, deemed to be a proportionate minimum, considering the offenders to whom this order would be applied.[31] The Court is given a very wide discretion regarding the terms of the order, but usually imposes a prohibition on the individual from acting in a suspicious manner or requires the offender to stay away from certain areas or individuals in addition to the obligation to notify the Gardaí pursuant to Part 2 of the Act.[32] There are some constitutional restraints, particularly in the context of the right to privacy and liberty, which will limit the scope of judicial discretion if the terms are too vague or disproportionate.[33] To some extent, the effect of the provision is that it applies the registration requirements retrospectively in some limited circumstances. However, as such orders would (assumingly) only be sought and granted where the past sex offender poses a substantial or high risk, their scope is more limited than the register. Of significance also is the fact that any order made can be subsequently discharged on application if the court is satisfied that the protection of the public no longer warrants continuing the order or if the effect of continuing the order would be to cause an injustice. To date, this provision of the Act has rarely been invoked, in keeping with the intent

[30] Section 16(5). The identity of the individual is not usually revealed when such an order is made, meaning the Gardaí have full responsibility in enforcing the order. The order can be imposed on any individual who has been convicted before or after the commencement of the Act either within the State or outside the State (so long as the act would also constitute a sexual offence under the 2001 Act).

[31] This justification does not tally with the experience in other jurisdictions which has revealed that once precautionary measures are introduced they tend to trickle down to lower risk offenders.

[32] Section 16(7). As the order made is considered civil in nature, the standard of proof required is that applicable to civil proceedings, that is, on the balance of probabilities: s.21(1). Despite this civil standard, criminal penalties are incurred in the event of non-compliance: s.22.

[33] These orders can have significant implications for the rights of an ex-offender and have been subject to legal challenge elsewhere: Power, H. (1999) The Crime and Disorder Act 1998 (1)' 'Sex offenders, privacy and the police Crim. L. R. 3–16.

to target only offenders who pose a continuing high risk.[34] In 2015, a Circuit Court judge granted an order against a released sex offender living in the community, where there were reasonable grounds for believing the order to be necessary to protect a named female and her baby, as well as the public from serious harm. The man was also ordered not to have any profile on Facebook or any other social media site, not to delete his internet history and to make his mobile phone accessible to the Gardaí.[35]

Supervision by the Probation Service

In Ireland, prior to the 2001 Act, there was no means by which released offenders could be mandatorily supervised in the community after completion of their prison term, unless the original sentence imposed was one of life imprisonment.[36] As a way of addressing this perceived shortfall in the transitional process between imprisonment and life in the community, the 2001 Act empowers a sentencing court to impose a period of supervision on sex offenders in the aftermath of their prison sentence. The duel function of the provision under Part 5 was determined to be assisting the offender in maintaining internal control over his behaviour, in addition to allowing for external monitoring of his behaviour and activities.[37] To a large extent, the purpose of the order is to protect the public from serious risk of harm, but the provision also expresses a commitment to rehabilitation. Before a supervision order can be made, the Court must consider the need for a period of post-release supervision of the offender, the need to protect the public from serious harm, the need to prevent the commission of further sexual offences by the offender and the need for further rehabilitation of the offender.[38] The Court has considerable discretion with regards to the terms of the order and conditions

[34] Reportedly, only three orders have been made to date.

[35] Deegan, G. (2015, February 13) Sex offender ordered not to have Tinder, Facebook profiles. *Irish Times*.

[36] Department of Justice and Equality (1998) at para. 10.8.3.

[37] Department of Justice and Equality (1998) at para 10.8.1 and para 10.8.6.

[38] Section 28. The court may hear any relevant evidence in this regard. In considering the appropriate custodial sentence, the court may not be influenced by the element of supervision (so as to award a lesser custodial sentence), but the aggregate period of the custodial sentence and the period

included within the supervision period may include requiring the individual to stay away from certain areas and/or requiring him to receive treatment or counselling.[39] Since the Probation Service is responsible for enforcing compliance with the order, the Court may be influenced by their advice with regard to the form or terms of the order. By virtue of s.51 of the Criminal Law (Sexual Offences) Act 2017, probation officers may now also apply to the court to amend any condition of supervision imposed, or to seek additional conditions imposed. As with the other provisions of the 2001 Act, it is an offence to fail to comply with the conditions of an order made (s.33).[40] The most recent figures available indicate that 376 sex offenders are currently supervised in the community by the Probation Service.[41]

Seeking Employment with a Sex Offence Conviction

Part 4 of the 2001 Act makes it an offence to apply for or accept employment which would give the sex offender unsupervised access to children or mentally impaired persons, without first so informing the employer.[42] The individual must make such a disclosure at the time of applying for the position, or, if later, as soon as he becomes aware that the position involves unsupervised access to children. A severe penalty applies for breach of this provision, with a hefty fine and/or up to five years imprisonment available on indictment. Once the individual informs the employer, then it seems he has met his obligations under the Act. The assumption then is that the application would fall. The employer in such

of supervision may not exceed the maximum term of imprisonment available for the particular sexual offence (s.29(2)).

[39] Section 30. Any order made be discharged upon application, in the interests of justice.

[40] Proceedings for this offence may be brought and prosecuted by a probation officer: Sex Offenders Act 2001, s.33(4) as inserted by s.13 of the Criminal Law (Human Trafficking) Act 2008.

[41] See the Probation Service (2017) *Annual Report 2017*. Dublin, The Probation Service.

[42] Section 26. The Act does not provide for such obligations if the employment involves unsupervised access to vulnerable adults (apart from the mentally impaired). In the UK, it is an offence to apply for employment where the person is on the Department of Education's list of persons excluded from employment in schools, or on the Department of Health's Consultancy Service Index, or where the individual is subject to a 'disqualification order.'

situations is in a somewhat precarious position. First, in the absence of disclosure they have no way of determining if an applicant has past convictions for sexual offences unless the position is one covered by existing vetting procedures.[43] Secondly, neither the Act nor any current policy anticipates the prospect of an employer hiring an offender despite being aware of his past sexual convictions. In the UK, it is a criminal offence under the Criminal Justice and Court Services Act 2000 to knowingly employ an applicant who is disqualified from working with children.[44] There is no such specification under Irish legislation, although there remains the possibility of the employer being liable in the event of any offending against children committed in the course of employment. The provision imposes a lifetime obligation and applies retrospectively. Interestingly, it applies to those convicted of any sex offence under the Act and is not confined to those who pose a substantial risk or have been convicted of a sex offence against a child. There is also little direction given as to what 'access to children' encompasses. Announcing the provision, the government opined that whether or not disclosure would exclude the person from employment would be "a matter for the prospective employer … on being informed of the conviction, to decide if it is relevant to the work or position concerned."[45] However, 16 and 17 years olds might be children in law but could also be work colleagues of the offender. It is unclear how this type of situation is affected by the disclosure obligations. Furthermore, it is uncertain how effective the measure is in providing protection for children given that the obligation is depen-

[43] Current vetting procedures (by the Gardaí) relate to recruitment of staff for children's residential centres or positions with health boards that will allow individuals' access to children or vulnerable adults. Private employers or voluntary organisations do not have access to these vetting procedures.

[44] Criminal Justice and Court Services Act 2000, s.35(2). In the UK, any work with children merits pre-employment screening under the criminal record check system (Home Office (1986) *Protection of Children: Disclosure of Criminal Background of those with Access to Children* London: Home Office). The Probation Service will also pass information to the Employment Service on anyone they are supervising who has convictions for sexual offences and should not be offered certain work. The actual nature of the offence is not revealed and the offender is usually informed. Home Office (1999) *Disclosure to the Employment Service of Restrictions that should be placed on the Employment of Potentially Dangerous Offenders.* London: Home Office, Probation Unit.

[45] Mr O'Donoghue, 538 Dáil Debates, 22 June 2001.

dent upon compliance by the individual.[46] Creating a disclosure requirement may be considered a necessary measure, but there is no guarantee that past sex offenders who pose a serious risk will not end up in employment with children. Moreover, it should be noted that the provisions of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, which may allow a criminal conviction to be considered spent in certain circumstances, do not apply to a conviction for a sex offence. All such convictions must be disclosed where requested regardless of the nature of the employment.

Disclosure of Information to the Public

Apart from the disclosure requirement under Part 4 of the Act, and those pursuant to the National Vetting Bureau (Children and Vulnerable Persons) Act 2012,[47] as amended, there is no general access to information on sex offenders or other types of offenders for that matter. In Ireland, personal information including details of one's criminal convictions is protected information under law.[48] Whether or not the public should have access to information about those convicted of sexual offences has been discussed however, and has become increasingly topical in this jurisdiction. It is an issue fraught with controversy. On the one hand, access to information could arm communities with knowledge on the identity and whereabouts of released sex offenders, enabling them to better protect themselves against potential threats posed by dangerous offenders. On the other hand, it could create fear and panic over an

[46] In the UK, the more elaborate system of disclosure, employers access to the Department of Health's Consultancy Service Index, and 'disqualification orders' are integrated with existing vetting procedures thus allowing employing organisations whose work involves access to children to monitor whether convicted sex offenders are committing the offence of applying for that type of work. No such monitoring is provided for in the Irish provisions.

[47] This Act requires mandatory vetting of those who may work with children and vulnerable adults in the public sector, and the information that may be shared with prospective employers includes 'soft information' if it is considered necessary. 'Soft information' extends beyond a criminal record and is not confined to such.

[48] This is typical of the approach taken in Europe: Larrauri, E. (2014a) Criminal record disclosure and the right to privacy. *Criminal Law Review*, *10*, 723–737; Larrauri, E. (2014b) Legal protections against criminal background checks. *Punishment & Society*, *16*(1), 50–73.

unsubstantiated risk, heighten the risk of vigilantism, and cause low-risk individuals to experience marginalisation and exclusion.[49] Jacobs has noted that for offenders, the release of or knowledge about their criminal past can in effect be more injurious than other collateral consequences of a conviction.[50]

In the US, although the form varies from state to state, there is a public right of access under Megan's Law.[51] The enactment of this law followed the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act 1994, which established a national sex offender registry in the US. Most statutes permit public posting of name, conviction, photograph, and often a home and work address.[52] Some states notify the public only about high-risk sex offenders, while other states employ broad notification practices and disseminate information about all registered sex offenders (Levenson et al. 2007). In the UK, there has traditionally been no widespread public access to information about sex offenders, but rather "limited disclosure to third parties" allowable under the Multi-Agency Public Protection Arrangements (MAPPA) procedures (Kemshall et al. 2011). Cases following this approach emphasised the careful balance to be drawn with regard to fundamental rights issues. In the case of *R v Chief Constable of North Wales ex p. A.B.*,[53] the Court of Appeal stressed that disclosure should only be in exceptional cases and that blanket disclosure is highly unde-

[49] This could produce the opposite effect than that intended—instead of reducing risk, it increases it by pushing individuals underground or into the margins of society where they are less easily monitored. It is also worth noting that there is an issue with disclosure of convictions insofar as there is exclusion of those who may pose a real risk but have never been convicted in a court of a sexual crime.

[50] See Jacobs (2015).

[51] Named after seven-year-old Megan Kanka, who was sexually abused and murdered by a paedophile living on her street in New Jersey. Such community disclosure has been challenged and upheld: *Connecticut Department of Public Safety v Doe* (2003) 538 US 84.

[52] The approach is not universal uncontrolled disclosure. Many states restrict which offender records can be browsed online and can differ in the types of information which are included on the sex offender registry website. See Zgoba, K.M. and Ragbir, D. (2016). Sex Offender Registration and Notification Act (SORNA). *Sexual Violence* 33–49; Fitch, K. (2006) *Megan's Law: Does it protect children? (2)* London: NSPCC.

[53] R *v Chief Constable of North Wales ex p. A.B.* [1998] 3 All ER 310.

sirable and unlawful, having regard to the right to privacy under Art. 8 ECHR.[54] As a result of increased pressure to strengthen the use of controlled disclosure under the MAPPA procedures, Sarah's law,[55] as piloted in the UK in 2009, has since been rolled out nationwide. This law, though much more limited than Megan's law in the US, allows a parent, carer, guardian, or concerned adult to apply to the local police for information about specified persons who have unsupervised access in relation to specified children (O'Sullivan et al. 2016; Kemshall & Wood 2010). The police retain discretion as to whether it is necessary and reasonable to release the information sought.

In Ireland at present, the public do not generally have access to information pertaining to convicted sex offenders. The idea of introducing a Megan's law-type scheme permitting such disclosure has repeatedly been rejected in this jurisdiction.[56] An Garda Síochána's policy on the investigation of sexual crime expressly provides that they are not at liberty to disclose any such information as to do so would affect ability of the Gardaí to effectively provide for public safety. This does not mean, however, that information about sex offenders can never be shared. The Sex Offenders Act 2001 does not expressly address disclosure, but it is currently an administrative issue in this jurisdiction. The Gardaí, who are responsible for maintaining the information and monitoring sex offenders subject to the 2001 Act, may release appropriate information to the public, including parents, in excep-

[54] In the case of *R v Devon County Council, ex p. L* [1991] 2 FLR social workers, suspecting L of paedophile offences, went to the homes of his female partners who had children to warn them of their suspicions. The disclosure was legitimate, because it was limited to specific individuals where there was a reasonably apprehended specific risk to specific children. Hence it was a 'legitimate aim' under Art. 8(2) ECHR.

[55] The scheme is named after eight-year-old Sarah Payne who was abducted and murdered by a sex offender in 2000.

[56] Department of Justice and Equality (2009) *The Management of Sex Offenders: A Discussion Document*: Available at www.justice.ie. A proposed disclosure scheme circulated in 2012 (Child Sex Offenders [Information and Monitoring] Bill) was sidelined as raising too many concerns both of a constitutional nature and under the European Convention on Human Rights.

tional circumstances.[57] If the Gardaí have reason to believe a particular high-risk sex offender poses a real and immediate danger, they are free to tell individuals who need to know. Disclosure in such circumstances is considered to be reasonable and necessary.

There are proposals to amend the law governing sex offender monitoring in Ireland, which include placing this administrative issue of disclosure upon a statutory footing. The Sex Offenders (Amendment) Bill 2018 proposes to introduce some key changes to the Sex Offenders Act 2001, including the commencement period for notification orders (from seven days to three), the provision of fingerprints, palm prints, and photographs where requested by the Gardaí,[58] and disclosure of information to the public where necessary.[59] There are two levels to this proposed disclosure. Where a registered sex offender fails to 'sign on' and their whereabouts are unknown to the Gardaí, a member not below the rank of Inspector may publish the name, address, description, age, and photograph of the individual in order to protect the public or in order to locate the individual. Only information which is necessary may be disclosed. Additionally, disclosure may be made where an individual subject to the requirements of the 2001 Act poses a threat to a person. Disclosure in such circumstances may only be made where it is unlikely to result in public disorder, physical harm, damage to property, or intimidation of or threats to any person, and then only to the minimum number of persons necessary to avoid the threat. Importantly, the proposed provision provides that before such disclosure is made, the Gardaí should inform the person in respect of whom the disclosure is intended

[57] A press release from the Department of Justice at the time stated that disclosure of information on registered sex offenders would only be made "in the most exceptional circumstances in order to prevent an immediate risk of crime or to alert members of the public to an apprehended danger and then only on a strict need to know basis." Department of Justice and Equality, "O'Donoghue publishes Bill to protect the public from sex offenders and to provide for separate legal representation for victims of rape" *Press Release*, 12 January 2000.

[58] The Bill provides for destruction of these samples within 3 months of the person no longer being subject to the provisions.

[59] The Act also proposes to permit electronic tagging of released sex offenders, an issue not without controversy itself: Fitzgerald O'Reilly, M (2017, July 3) Seeking to track sex offenders poses human rights questions. Irish Examiner.

to be made. Disclosure will not be made if the person agrees to act so that the threat no longer exists.[60] These proposals certainly bring Ireland a step closer in terms of endorsing the kind of disclosure policies popular elsewhere, in particular the provision permitting publication of information to the community at large. Nonetheless, the tenor of the provisions and of those in government is that disclosure should remain controlled and only be made where clearly necessary, rather than permitting widespread access. As such, it seems that the Irish approach remains considerably tempered and proportionate, in comparison with disclosure laws elsewhere. It is perhaps unhelpful however that the Bill remains silent on the how the information disclosed is to be used or whether it should be considered confidential (apart from the information widely publicised). It has been observed elsewhere that the lack of assistance in this regard can be profoundly negative and stressful for those to whom disclosure is made (Caputo & Brodsky 2003; Kemshall & Wood 2010). Given the potential implications surrounding disclosure and the current data protection laws in place in Ireland, it is imperative that consideration is given to this issue prior to the enactment of any new laws.[61]

Risk Assessment and Management of Sex Offenders

Ireland, like many jurisdictions,[62] has adopted a multi-agency approach in dealing with offenders after conviction and release, and as such, information is communicated between agencies such as the Gardaí, the probation service, and the prison service, in addition to other stakeholders, and

[60] Note the UK case of *X (South Yorkshire) v Secretary of State for the Home Department and Chief Constable of Yorkshire* [2012] EWHC 2954 in relation to this very issue.

[61] See also Fitzgerald O'Reilly, M. (2018). Information Pertaining to Released Sex Offenders: To Disclose or Not to Disclose, that is the Question. *The Howard Journal of Crime and Justice* 57(2), 204–230.

[62] See Harris, A., Levenson, J., Lobanov-Rostovsky, C., and Walfield, S. (2016) Law enforcement perspectives on sex offender registration and notification: effectiveness, challenges, and policy priorities. *Criminal Justice Policy Review*, https://doi.org/10.1177/0887403416651671. Available at: http://journals.sagepub.com/doi/abs/10.1177/0887403416651671 (accessed 25 August 2017); Thomas, T. (2016) *Policing Sexual Offences and Sex Offenders*. Basingstoke: Palgrave Macmillan.

also extends to foreign agencies. In November 2006, a Memorandum of Understanding was signed into force, which placed the informal information sharing between the Gardaí and the British Police forces on formal footing. Thus, when convicted sex offenders, who are subject to notification requirements, travel between these two states, information may be passed in the interests of public safety, regarding any risks posed, to the destination state.[63] The Probation Service also have a 'Protocol' for the sharing of information on the management of sex offenders with the Probation Board for Northern Ireland. This mutual information sharing arrangement facilitates the effective case management of sex offenders between jurisdictions by enabling exchange of relevant information on a structured basis.[64] Risk is the key narrative that emerges in the context of sex offenders. Identifying and managing such risk has become an integral aspect of post-release management of such offenders. It is acknowledged that the aim is to target the high-risk repeat sexual offenders, who remain in the minority of the overall category of sex offenders. Given the broad-ranging nature of notification orders, however, low-risk offenders are often enmeshed within a system increasingly reluctant to forgive them the sins of their past.

Despite offender registration and notification laws being strongly endorsed by the public, who believe that knowing where sex offenders live can enhance their ability to protect themselves and their children from sexual victimisation,[65] there is little by way of evidence to suggest that these laws are actually effective in terms of reducing recidivism.[66] It must also be acknowledged that despite the fear of recidivism regarding

[63] Department of Justice, *The Management of Sex Offenders* (2009).

[64] See also Thomas, T. (2011). *The Registration and Monitoring of Sex offenders: A comparative study.* Routledge; Fitzgerald O'Reilly, M. (2013) Post Release Supervision of Sex Offenders' *Irish Criminal Law Journal* 23 (4), 108.

[65] Connor, D. and Tewksbury, R. (2017) Public and professional views of sex offender registration and notification *Criminology, Criminal Justice, Law & Society*, *18*(1), 1–27.

[66] Jennings, W. and Zgoba, K. (2015) An application of an innovative cost-benefit analysis tool for determining the implementation costs and public safety benefits of SORNA with educational implications for criminology and criminal justice. *Journal of Criminal Justice Education*, *26*(2), 147–162; Tewksbury, R., Jennings, W., and Zgoba, K. (2012) A longitudinal examination of sex offender recidivism prior to and following the implementation of SORN. *Behavioral Sciences & the Law*, *30*, 308–328.

sex offenders, of a kind not generated by other types of offending behaviour, empirical evidence demonstrates that sexual offending falls among the lowest categories of recidivist behaviour.[67] Furthermore, it has been found that most sexual crime is committed by individuals known to the victim and so the stranger danger stereotype perpetuated by such laws is unhelpful at best, and at worst, they do little to protect children or adults who may be living with, or otherwise have a relationship with, or are in close proximity to, the offender.[68]

Post-Release Provisions Under the Criminal Justice Act 2007

Soon after the introduction of the Sex Offenders Act 2001, political endeavour began to swing in the direction of controlling other categories of offenders in the aftermath of imprisonment. The pressure to define risk and manage it accordingly has led to the development of measures that target a much broader category of offenders than sex offenders. The emergence of the post-release provisions under the Criminal Justice Act 2007[69] came somewhat obscurely, without much discussion or debate as to the purpose or intended effect of the measures introduced. It seems that similar measures in the UK had some influence upon their introduction in Ireland.[70]

Originally, the Criminal Justice Bill 2007 proposed a similar type of order to that available in the UK called a crime prevention order. Such an

[67] Irish Prison Service (2013) *Recidivism Study*, Dublin, Ireland: Irish Prison Service; O'Donnell, I., Baumer, E.P., and Hughes, N. (2008) Recidivism in the Republic of Ireland. *Criminology & Criminal Justice*, *8*(2), 123–146.

[68] Those who have a relationship with their assailant are less likely to be sufficiently protected and often entirely overlooked by the justice system (Jenkins 1998). Modern initiatives in the UK and Ireland seek to tackle the 'demonisation' of the sex offender, and projects like Circles of Support and Stop it Now, that recognised that most sexual abuse is by people known to their victim, aim to combine surveillance with reintegration strategies.

[69] As amended by the Criminal Justice (Victims of Crime) Act 2017.

[70] Anti-social behaviour order under the Police Reform Act 2002 and serious crime prevention order under the Serious Crime Act 2007. Similar provisions have also been introduced elsewhere—see Methven, E. and Carter, D. (2016) Serious Crime Prevention Orders. *Current Issues in Criminal Justice* 28 (2), 227–238.

order could be imposed on an individual over the age of 18 who had been convicted of an offence under the Schedule to the Act and who received a custodial sentence less than the maximum available for the particular offence. The aim, according to section 25(2)(a) and (b) of the Bill was to ensure persons likely to be adversely affected by the presence of the offender are protected and so that the individual would not commit any further offences. The maximum period for which an order could be made was ten years. Conditions would be attached to the order and could be attached for whatever periods the sentencing court considered appropriate. Some examples were given in the Bill of conditions that could be imposed. These included the following: a requirement to keep the peace, a prohibition or restriction on accessing specific places at specific times, or making contact with specific individuals, and a requirement to notify the Gardaí of information including address, changes in address, and changes in employment.[71]

The Act itself provoked much criticism including on the content of its provisions and the manner of its enactment.[72] Although the Act proposed to effect significant changes in the law, there was little by way of debate or consultation on the various provisions and it was sought to be introduced at a very fast rate. Many like the Irish Council for Civil Liberties (ICCL) and the Law Society of Ireland urged the government to postpone the Bill in order "to allow for proper democratic debate of the merits of its provisions."[73] Part of the criticism of the 'crime prevention order' under section 25 of the Bill was that it would criminalise conduct that is not in itself a crime (i.e. breaching an order would be a criminal offence). The ICCL actually recommended the deletion of the section from the Act arguing that there was no reasonable justification for their introduction.[74]

---

[71] The Criminal Justice Bill 2007 s. 25(2) (7).

[72] See, for example, ICCL (2007) *What's Wrong with the Criminal Justice Bill?* Dublin: Irish Council for Civil Liberties; Rogers, J. (2007, April 4) Elements of the Criminal Justice Bill do not stand up to scrutiny. *The Irish Times*; Editorial (2007, April 26) Criminal Justice Bill increases erosion of civil rights. *The Irish Times*.

[73] ICCL (2007) op. cit. See also, Law Society of Ireland (2007, February 27) Law Society's deep concern at Government's intention to rush through far-reaching changes in criminal law. *Press Release*.

[74] ICCL (2007) op. cit., at p. 5.

The then Minister for Justice Mr McDowell stated that the aim of the provision was to protect the public, keep the offender on the 'straight and narrow' and give the Gardaí 'some handle' over the person.[75] In Dáil debates, the provision was considered to be an 'extremely valuable development' in the law that would advocate and protect victims' rights, with some stating that even more draconian provisions were needed in the future.[76] Some concern was expressed in relation to the maximum ten year period for which the order could be applied and urged clarification regarding the conditions that could be imposed.[77] Others expressed dissatisfaction with the lack of time or debate on the provision and its potential implications.[78]

Attitudes had changed however by the Report Stage of the Bill with more parties expressing concern over the proposed provision. The criticism of legal professionals and other groups seemed to have influenced a more cautious approach. It was stated that the proposed orders were very vague and further debate was called for on the practical effect of the measure.[79] By the time the Bill was finalised, the 'crime prevention order' had been scrapped and was replaced by two separate orders under section 26 of the Act. These orders were called a 'monitoring order' and a 'protection of persons order.'[80] The reasons given for the change was that the earlier debates and concerns were considered[81] and the Minister for Justice acknowledged that the original order might have been 'unconstitutionally broad.'[82] The Minister further stated that the new provision was more focused and would not in a broad-encompassing manner "allow courts to make orders interfering with people's lives to a very substantial extent

[75] 634 Dáil Debates 619, 23 March 2007.

[76] See Mr Brendan Howlin, 643 Dáil Debates 407, 22 March 2007. See also Mr Jim O'Keeffe, who described the provision as a 'good idea.' 643 Dáil Debates 407, 22 March 2007.

[77] See, for example, Mr Damien English, 634 Dáil Debates 691, 23 March 2007.

[78] See speech of Ms Roisin Shorthall, ibid., at 699.

[79] Mr Howlin and Mr O'Keeffe, 634 Dáil Debates 617, 22 March 2007.

[80] Criticism at the proposed provision was made both in the Dáil and outside. See, for example, Mr Howlin, 634 Dáil Debates 617, 22 March 2007; Rogers (2007).

[81] 634 Dáil Debates, col 636, col 137, 24 April 2009.

[82] Ibid., at p. 138.

after release."[83] One further important element stated in relation to the orders was that they were made on foot of a criminal conviction and appealable, and as such were not civil orders, nor did they require a standard of proof. Thus, they were intended to be post-release elements of a sentence. Apart from emphasis upon giving the public a sense of security, very little else is said about the purpose of introducing these measures into Irish law.[84]

The Monitoring Order

Section 26 of the Criminal Justice Act 2007 empowers a court to impose two different orders as part of a sentence. The first of these is called a 'monitoring order.' Under section 26 (2) of the Act a monitoring order can be imposed upon an adult offender convicted on indictment of an offence under schedule two of the Act. The serious offences that can invoke an order include offences under the Non-Fatal Offences Against the Person Act 1997 such as assault causing serious harm (section 4) and false imprisonment (section 15), aggravated burglary under the Criminal Justice (Theft and Fraud Offences) Act 2001 (section 13), and blackmail and extortion under the Criminal Justice and Public Order Act 1994 (section 17). [85]

The order can be imposed in addition to a custodial sentence, where the maximum penalty available for that offence has not been given. It comes into effect after the offender is released from prison. The maximum period for which the order can have effect is seven years, and the court has a wide discretion in this regard.[86] The order requires the individual to notify an Inspector of the Gardaí, in the district in which he is resident, of certain information as soon as practicable after the order

[83] Ibid., at p. 139.

[84] See, for example, Mr Damien English, 634 Dáil Debates 691, 23 March 2007.

[85] The other offences include murder, threats to kill, or cause serious harm (Non-Fatal Offences Against the Person Act 1997– s.5), explosives offences under the Explosive Substances Act 1883, firearm offences under the Firearms Acts, drug trafficking offences (Criminal Justice Act 1994-s.3), and organised crime offences under the Criminal Justice Act 2006.

[86] Section 26(3). Such discretion would assumingly be limited by constitutional principles so that the orders are not disproportionate or vague.

comes into effect. The information that must be given includes name and address, as well as notifying in writing any proposed change of address or intention to be absent from that address for more than seven days. Such notification must take place *before* the move occurs. Significantly, any person made subject to such an order may apply to the court to have to order dissolved or varied.[87] Under section 26(8), a court may grant the application if satisfied that there are circumstances that have occurred since the time of making the order that merit variation or revocation.

The Protection of Persons Order

The second order that can be imposed pursuant to the provision in the 2007 Act is called a 'protection of persons order.' Under section 26(5) of the Act, a protection of persons order can be imposed upon an adult offender convicted on indictment of an offence under the Schedule two of the Act. Like the monitoring order, the protection of persons order can be imposed on foot of a conviction in addition to an ordinary custodial sentence. The order comes into effect when the individual is released from prison and can last for a maximum period of seven years. The court again has discretion in this regard. The order is to prohibit an individual from engaging in "any behaviour that in the courts opinion, would be likely to cause the victim of the offence concerned, or any other person named in the order fear, distress or alarm or would be likely to amount to intimidation of any such person." The provision is not narrowed down beyond this statement and no further information is stated in the provision as to what this means specifically. The declared purpose for the order is to protect the victim or any other named person from harassment by the offender.[88] As with monitoring orders, protection of persons orders can be discharged or varied on application to the court by the individual

[87] This shifting of the burden of proof (the obligation is on him to prove the order is no longer necessary) to the offender is notable in the provisions that pertain to sex offenders and drug trafficking offenders also and is further evidence of the onus placed upon the ex-offender. Note that it is not clear what standard of proof is required in making the order. For discussion see Rogan, M. (2008). Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and "Post-Release" Orders Dublin University Law Journal 15 (1), 298–323.

[88] Section 26(4).

against whom the order has been made (section 26(8)). Notice that such an application is being made to an Inspector of the Gardaí in the area where the individual is resident. A court may grant the application if satisfied that there are circumstances that have occurred since the time of making the order that merit variation or revocation.

Implementation and Effectiveness

With regards to implementation, little information is yet available as to how many orders have been made or what conditions have been imposed as part of the protection of persons orders. On a more general level, the section will inevitably place additional duties upon the Gardaí, who are responsible for processing and checking the information given and ensuring compliance with the provision.[89] One practical problem observed by Rogan with regard to the implementation of the monitoring order is in regard to the fact that notification must be before any change address. Essentially it may not be realistic to expect a person to be aware of changes in address in advance. Many offenders may have chaotic lifestyles and changes in address are not planned or desired. The requirement may disproportionately affect such individuals. The actual effect is that it may be easier to breach a monitoring order under this section.[90] A noteworthy element of the provision is in regards to access to legal aid. Under section 27 of the Act, an individual against whom a monitoring order or protection of persons order is made may receive legal aid under the Criminal Justice (Legal Aid) Act 1962, when applying to have the order varied or revoked. This is an important proviso for doing justice where the offender is of little means and otherwise might not be able to make an application under section 26(8).

The purpose of introducing the orders under the Act was to protect the public. In this regards there is little information available as to the effect of the provisions and minimal discussion or debate prior to or post their introduction. The monitoring order under the provision mirrors the obligations imposed under Part 2 of the Sex Offenders Act 2001 discussed

[89] There is no mention (as of yet) of these orders in Gardaí Reports.

[90] Rogan (2008) op. cit., at p. 220.

above. Similar to the current sex offender register, the obligations under section 26(2) involve passive rather than active monitoring (but with the exception that notification regarding change of address must be *before* the move occurs). This to some extent limits the scope of the obligation placed upon the individual. Considering the nature of the offences listed in schedule 2, the provision was clearly intended to some extent to target offenders involved in 'gangland' offences. In a public consultation of the Bill prior to its enactment (organised by the ICCL), national and international experts had argued that the measure would do nothing to tackle gangland crime.[91] One criminological expert commented that he was "puzzled by the suggestion that the rights of victims can in some way be enhanced by diminishing the rights of people accused of crimes. Quite simply, this flies in the face of the facts."[92] Furthermore, it is not made clear how the provision is to mesh with the notification provision under the Criminal Justice Act 2006 (below). Overall, the effectiveness of the measures introduced has yet to be assessed.

Drug Trafficking Offenders

As is the case in many other jurisdictions, the question of how to deal with drug trafficking offenders has emerged with increasing intensity in Ireland in recent decades. Many countries, most notably the US, have waged a so-called war on drugs that has promoted a hard-line, no-nonsense policy for drug offenders. The echo of such zero tolerance policies has found analogous rhetoric in Ireland, where recent years have witnessed a multitude of legal policies directed at drug trafficking offenders, including the Criminal Justice (Drug Trafficking) Act 1996, which provides for the detention of up to seven days of those suspected of drug trafficking,[93] the Proceeds of Crime Act 1996, which allows the freezing and forfeiture of

[91] 'Re-Balancing Rights? Contemporary Issues in Human Rights and Criminal Justice.' Public Consultation held in the President's Hall of the Law Society of Ireland on 17 February 2007.

[92] Professor Robert Gordon, speaking at the Public Consultation: 'Re-Balancing Rights? Contemporary Issues in Human Rights and Criminal Justice' (2007) op. cit.

[93] In relation to organised crime offences, the Criminal Justice Act 2007, section 50, also permits a maximum period of seven days detention in relation to specified offences under the section. This provision does not affect the operation of section 2 of the Criminal Justice (Drug Trafficking) Act 1996.

the proceeds of crime, and the Housing (Miscellaneous Provisions) Act 1997, which enables local authorities to evict drug dealers.[94]

The Irish Register

When the Government published the Criminal Justice Bill 2004, provision was made for a drug offenders register. Apart from being in keeping with the hard-line approach for drug offenders, it is unclear what the rationale for a drug offenders register was. There was no explanation provided in the explanatory notes as to the rationale or necessity of such a measure. Little discussion or emphasis was placed upon this provision at all prior to the enactment of the Bill. Greater emphasis was placed on other provisions of the Bill that was considered to be "one of the most significant and reforming pieces of criminal legislation in a long time."[95] The purpose of the Act as a whole was stated to be to contribute to the "the fight against criminal gangs."[96] In addition to the increase in resources provided to the Gardaí, prosecution services, and the courts, it was stated that the Act demonstrated "the Government's unwavering commitment to defeating organised gangs."[97] Moreover, the provisions were stated to be reasonable and justified by the level of threat posed by organised crime.[98] In addressing the issue of the register specifically, the then Minister for Justice Mr McDowell, referring to it as 'the management of offenders after their release,' believed the register would be beneficial to the Gardaí in monitoring organised criminals.[99] It is clear that the register was modelled to a large extent upon the register for sex offenders under the 2001 Act.

[94] The initiation of 'hard' policies for drug offences was the Misuse of Drugs Act 1984 which provided for higher fines and harsher sentences for those convicted of drug offences.

[95] Address by the Tánaiste at the Criminal Law Conference 2006, Royal College of Surgeons. Changes made under the Act included in the areas of investigating offences, sentencing, firearms, and organised crime.

[96] 'Criminal Justice Bill Published' available at www.justice.ie/en/JELR/Pages/Criminal_justice_bill_published.

[97] Address by the Tánaiste at the Criminal Law Conference 2006, Royal College of Surgeons. Available at http://www.justice.ie/en/JELR/Pages/Speech_Criminal_Law_Conference_2006.

[98] The Minister and Tánaiste announcing the publication of the Bill, (2006) ibid.

[99] The Minister and Tánaiste announcing the publication of the Bill, (2006) op. cit.

It was proposed under a draft of the Bill that all those convicted of a drug trafficking offence would be required to notify the Gardaí of particular information. The offender must have been sentenced to more than one year imprisonment and the provision could apply retrospectively. The bill set out the periods of notification that could apply on an ascending (or descending) scale, with a maximum of 12 years at the upper end of the scale, and furthermore provided that registration could apply to juvenile offenders, but with the time periods halved. The Bill did include the prospect of the requirement being discharged on application by the individual. The provisions would also apply to persons convicted of a drug trafficking offence in another jurisdiction.

The Irish Human Rights Commission (IHRC) observed that the provision was presumably designed to ensure the Gardaí have current information on the names, addresses, and whereabouts of persons previously convicted of drug trafficking offences, but apart from this could see no reason for the register.[100] They could not see how the register would be an effective, necessary, or proportionate response to the prevention of drug trafficking. Moreover, the IHRC considered that the requirements amounted to an interference with private life in contradistinction to Art 8 of the ECHR and that in this context was not in pursuit of a legitimate aim and necessary in a democratic society.

Part 9 of the Criminal Justice Act 2006[101] came into force on 2 October 2006 and introduces what is essentially a drug offenders register. Under the 2006 Act, any person who has been convicted of a drug trafficking offence, within the meaning of section 3(1) of the Criminal Justice Act 1994, and sentenced to more than 12 months in prison, will be made subject to the register.[102] The obligation applies to all offenders convicted on indictment after the commencement of the Act (section 89(1)), and although the provision is not fully retrospective, the notification orders can also be imposed if the offender was convicted before the commencement of the Act if he/she is still awaiting sentence, or if the offender is

[100] Irish Human Rights Commission (2006). *Observations on Additional Proposals for Amendments to the Criminal Justice Bill 2004.* Dublin: IHRC.

[101] As amended by the Criminal Justice (Victims of Crime) Act 2017.

[102] Criminal Justice Act sections 88 and 89.

serving the sentence in prison, is on temporary release, or the sentence is otherwise still in force (section 89(3)).[103] Persons convicted after the commencement of the Act and those awaiting sentence are automatically subject to the provisions, whereas an application must be made to the Circuit Court by a superintendent Garda in the case of persons under section 89(3). A court may impose the obligations where it considers it in the interests of the common good and appropriate in all the circumstances. The obligation to notify also applies to those convicted of a drug trafficking offence outside the jurisdiction if that offence would constitute a drug trafficking offence in Ireland.[104]

When such an order is imposed, a certificate to that effect is issued to the offender by the court that sentenced him, and also to the Gardaí and the Governor of the prison where the offender is serving his sentence. The Governor of the prison is obliged to notify the offender prior to his release that he is subject to the provision and must also inform the Gardaí at least ten days before the offender's release.[105] Pursuant to the provision, the individual has seven days from the 'relevant date'[106] to notify the Gardaí of specific information including name, date of birth, and home address.[107] The individual is also required to notify the Gardaí within seven days of a change in name, address, residence away from the given address for a 'qualifying period'[108] or an intention to leave the State for a period of seven or more days. Such obligations can be fulfilled either by the individual attending in person at a Garda station, sending by post a written notification, or by such other means as may be prescribed.[109] The length of time for which the notification requirements can last depends

[103] Section 89(2) and section (3)(a)(b)(c).

[104] Criminal Justice Act 2006, section 95.

[105] Section 91.

[106] This date is defined in section 87 as the date of conviction (and not the date of sentence) for the drug trafficking offence. Murphy notes that this is an anomaly, given that in theory an individual is subject to the requirements from the moment of conviction and if a sentence of less than 12 months is subsequently imposed the offender will cease to be obligated by the provisions. Murphy, G. (2007) An Analysis of Sentencing Provisions in the Criminal Justice Act 2006. *Judicial Studies Institute Journal,* 60, at pp. 92–93.

[107] Section 92(6).

[108] This period is any period of seven days or two or more periods which, taken together, add up to seven days (s.92(11)).

[109] Section 92(8).

upon the length of the sentence of imprisonment originally imposed.[110] The maximum period for notification that can be imposed is 12 years, if the original sentence is one of life imprisonment. If the original sentence is more than ten years but not life the period of notification is seven years, if the sentence is more than five years but less than ten years the notification is for five years, if the sentence is more than one year but not more than five years the notification is for three years, and if the sentence is a suspended one then the notification period is one year.[111]

Significantly, pursuant to section 98, the requirements may be discharged in certain circumstances.[112] Where an adult is subject to registration for a period of 12 years and a juvenile to a period of 6 years, this individual may apply to the Circuit Court after a period of 8 years and 4 years, respectively, have passed to have the order discharged. The court may discharge the order if the interests of the common good are no longer served by his continuing to be subject to them.

Post-Release Orders Under the Criminal Justice (Amendment) Act 2009

Calls for further changes in the law to tackle drug offenders emerged in the wake of the brutal murders of Shane Geoghegan in 2008 and Roy Collins in 2009. These tragic murders seemed to be the catalyst for further stringent measures to be levied against organised criminals, with the Minister for Justice, Mr Dermot Ahern, stating that "the government will rule nothing out which is reasonable and consistent with the rule of law in tackling these gangs head on."[113] As part of the legislation package

[110] Section 90. If part of the sentence is suspended, the part that is not suspended is regarded as the term of imprisonment for the purposes of the section (s.90(5)), and if two or more sentences are imposed consecutively or are partly concurrent, the aggregate sentence is the period of imprisonment (s.90(6)).

[111] These periods are halved if the offender is under 18 years old (section 90 (4)).

[112] See generally Murphy (2007) op. cit.

[113] Dáil Statement by the Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, on the killing of Shane Geoghegan,13 November 2008, available at http://www.justice.ie. Many opposed aspects of the Bill believing that although the measures were tough they were not necessary and would be of little effect in fighting organised crime. See, for example, Senator Ivana Bacik, 196 Seanad Debates, Second Stage of the Bill, no. 15, 14 July 2009.

introduced in 2009, particularly the Criminal Justice (Surveillance) Bill 2009, the Criminal Justice (Amendment) Act 2009 was enacted. Section 14 of this Act amends the 2007 Act by inserting the following after section 26: s.26(a)(1), where a person is convicted of an offence under Part 7 of the 2006 Act or an offence specified in Schedule 2 (in furtherance of activities of a criminal organisation), the court in sentencing the offender shall consider whether it is appropriate to make an order under this section (known as a 'post release (restrictions on certain activities) order'). The provision provides that the order shall not be made unless the court considers that it is in the public interest to do so, and the court shall take into consideration matters such as past criminal record and other circumstances relating to the offender (section 26(a)(2)). The order according to section 26(a)(3) may restrict or impose conditions on the persons movements, activities, and/or association with others and can be imposed for any period up to seven years as the court considers appropriate (ss.4). Furthermore, an order made may be revoked or varied on application by the offender if the court considers it proper to do so (ss.6).

Widening the 'Carceral Archipelago'

Speaking about organised crime legislation generally, it was stated that "there is no more fundamental human right to which all our citizens are in equality entitled than the protection of their lives and property from those who break the law."[114] With regards to the drug offenders register, it was never stated directly that the purpose for this measure was public protection, and one cannot readily imply that the register targets any one specific risk aimed at securing public protection. There is little evidence to support the proposition that notification requirements for other types of offenders have a protective effect and their effectiveness in this regard remains untested in the Irish context.[115] It is questionable that the pur-

[114] Dáil Statement by then Minister for Justice and Equality, Mr. Dermot Ahern, on the killing of Shane Geoghegan,13 November 2008. Available at http://www.justice.ie.

[115] Prior to the introduction of these provisions, there was little discussion as to what the actual intent of the measures were to be (deterrent, protective, or otherwise), other than enabling the Gardaí to monitor such individuals. A public protection element may be more readily inferred from the post-release orders under the 2009 Act.

pose of notification for drug trafficking offenders had anything to do directly with public protection. Instead, it may simply be another element of the 'securitisation of identity' envisioned by Rose.[116] Classification and identification of perceived dangerous categories evidence the widening of the carceral net envisioned by Foucault. It has been argued that the so-called war on drugs is effectively a war on citizens. At a conference sponsored by the Irish Penal Reform Trust, Merchants Quay Ireland, and UISCE, entitled 'Rethinking the War on Drugs,' it was argued that "the effects of this are the further marginalisation and stigmatisation of people who use drugs, driving many of them underground and away from the health and social services which help them. We need to begin rethinking whether this approach is helpful or hindering efforts to reduce the harms of drug use on an individual and societal level."[117] It is difficult to ascertain exactly how the drug offenders register is being currently implemented as little information on this is available from the relevant sources.[118] The courts have been ordering drug trafficking offenders to be registered since shortly after its inception, but no statistics are available as to the exact number.

Punitive Effect

It is clear that post-release requirements are intended to be regulatory in nature and are not to be considered punishment per se. This has not however displaced concern that their effect upon offenders is punitive to some degree. If the measures are to be regarded as civil, then it does not mean that the consequences arising from the imposition of such measures are not still punitive. Moreover, irrespective of whether the measures are classed as regulatory or as punishment, they still impose a significant restriction upon the individual in the aftermath of imprisonment.

---

[116] Rose (2000) op. cit.

[117] Ruardhri McAuliffe of UISCE, speaking at the conference. Available at http://www.iprt.ie/print/127.

[118] There was a delay in setting up the system initially, likely due to a deficit in Garda resources. So far there is minimal information as to how the Gardaí are coping with the additional duties imposed upon them by virtue of these provisions.

In examining the nature of post-release provisions, the various orders can be broken down into two subcategories: those that are imposed in addition to ordinary punishment and those that derive automatically from the conviction itself. Notification requirements fall into the latter category. The constitutionality of the notification requirements under the Sex Offenders Act 2001 has been challenged and upheld in the case of *Enright v Ireland*.[119] The High Court found that the requirements could not be considered punitive or part of the punishment. In deciding the matter, Finlay-Geoghegan J in the High Court determined that in order for the requirements to be considered part of the punishment, they must be punitive in intent and effect. The learned judge found the provision of the 2001 Act to be for the benefit of the public and that there was no punitive intention on the part of the Oireachtas. The element of risk was a big factor in the case, with the court relying heavily on and ultimately siding with expert evidence that the risk posed by sex offenders demanded measures to manage this risk.[120] Furthermore, these measures were not found to constitute disproportionate interference with the constitutional rights of offenders under Articles 38.1 and 40.3 of the Constitution, given that the Act was there to protect the constitutional rights of other citizens.[121] The decision was supported by the Central Criminal Court in the case of *People (DPP) v Cawley*, where it was said that "notification requirements … are undoubtedly a consequence of the offences but could hardly be properly said to be a penalty."[122] Thus, the Courts in these cases not only denied that notification could be a punishment but went further in suggesting that the public safety intent behind the provisions eliminated any punitive element. This conclusion is difficult to comprehend, given that measures can be classed as civil but still have punitive consequences.[123]

[119] *Enright v Ireland* [2003] 2 I.R. 321.

[120] Rogan argues that one cannot assume that the decision in *Enright* could not be assumed to apply automatically to a challenge of section 26 of the Criminal Justice Act 2007 due to the focus upon the particular risk posed by sex offenders in the case. See Rogan (2008) op. cit., at p. 226.

[121] The court applied the tests developed in *Tuohy v Courtney* [1994] 3 I.R. 1 and *Heaney v Ireland* [1994] 3 I.R. 593 and found that the test of proportionality was passed.

[122] *People (DPP) v Cawley* [2003] 4 I.R. 321, at p. 335.

[123] Ashworth, A., Gardner, J., Morgan, R., Smith, A.T.H., Von Hirsch, A., and Wasik, M. (1998) Neighbouring on the Oppressive: The Government's Anti-Social Behaviour Order Proposals *Criminal Justice* 16, 7–14.

There is somewhat of a confliction between these cases and subsequent decisions on the Sex Offenders Act 2001. Subsequent cases do not rule out the prospect of the requirements being punitive despite having a protective aim. In the case of *DPP v NY*, Fennelly J held that if an individual poses low risk, the application of the Act 'constitutes a real and substantial punishment' and therefore the court could have regard to this when sentencing.[124] This view was endorsed by the Supreme Court in the case of *CC v Ireland* who felt that the register could be regarded as being punitive in nature.[125] Hardiman J in this case considered that enrolment on the register was a very 'formalised stigma' and had no hesitation in regarding the compulsory enrolment as a punitive consequence of conviction.[126]

The case of *GD v Ireland* also held that enrolment on the register was 'in itself a punishment.'[127] It has also been considered that the requirements, though they may not be a primary punishment, could be considered as a 'secondary' punishment following from ordinary conviction and sentence and thus may be considered for the 'totality' of the sentence. Thus, in the case of *P.H. v Ireland*, Clarke J, in attempting to analyse the conflicting judgments, said that "the provisions of the 2001 Act were amongst the 'relevant circumstances' which should be taken into account when imposing sentence."[128] Rather than being part of the punishment the requirements were an additional burden which 'must be weighed in the balance.'

In 2015, the High Court dealt with another challenge to the provisions of the 2001 Act in the case of *J.F. v Ireland*.[129] The plaintiff challenged the constitutionality of various provisions of the Act, specifically s.8(3)(a), s.11(2), and s.12, in relation to his obligation to comply with the orders under Part 2 of the Act (in respect of which he was obligated

[124] *DPP v NY* [2002] 4 I.R. 309.

[125] *CC v Ireland* [2006] 4 I.R. 1.

[126] The case concerned the constitutional compatibility of offences of strict liability, the issue of notification requirements being considered in this context.

[127] *GD v Ireland,* unreported, Court of Criminal Appeal, 13 July 2004.

[128] *P.H. v Ireland*, unreported, High Court, 16 February 2006, at para. 7.7.

[129] *J.F. v Ireland & anor* [2015] IEHC 468.

for an indefinite period of duration). In dismissing the legal challenge, the Court affirmed the reasoning in the *Enright* case, that "the requirements are not penal in nature but rather constitute an additional burden placed upon a convicted person in the interests of the common good and for the purpose of protecting society at large."[130]

In other jurisdictions, such measures have also been upheld. In England, in the case of *R v Durham Police, ex parte R*, the House of Lords decided that notification requirements were not punitive but rather preventative.[131] The Court relied heavily on the international case of *Ibbotson v United Kingdom*.[132] The European Commission on Human Rights accepted in that case that the purpose of the requirements under the Criminal Justice Act 1997 was prevention, and did not amount to punishment within the meaning of Article 7. This decision was confirmed in the case of *Adamson v United Kingdom* where the European Court of Human Rights felt that the fact that though the individual may feel as though he is being punished, depersonalised, and inhibited in trying to start a new life, this was "not sufficient to establish the registration requirement has a punitive nature or purpose under Art. 7."[133]

So far, only sex offender notification provisions have been contested in the courts and it remains open for other post-release measures to be similarly challenged. The likely question again is: are they civil or are they a punishment? Going upon the judgments discussed above, it is likely that other provisions will likewise be classed as civil rather than as punishment. However, it is desirable that the courts recognise the punitive consequences that derive from these post-release requirements. There has been some discussion of the post-release provisions under the Criminal Justice Act 2007. It is possible that some distinction could be drawn between the requirements under section 26(2) and those under Part 1 of

[130] Ibid., para 53, per Binchy.

[131] *R v Durham Police* [2005] U.K.H.L 21. The House of Lords controversially considered that imposing the requirements pursuant to a caution was not the determination of a criminal charge and thus not incompatible with Article 6 of the ECHR. The American Courts have refused to recognise the punitive nature of registration and community notification (see, e.g. *Smith v Doe* (2003) 538 US 84).

[132] *Ibbotson v UK* (1998) 27 EHRR 332.

[133] *Adamson v UK* (1999) 28 E.H.R.R. 209.

the Sex Offenders Act 2001. When the Court in *Enright* upheld the constitutionality of the sex offenders register, great emphasis was placed upon the particular risk posed by sex offenders. Moreover, it was stressed that the Act as a whole was balanced in that rehabilitation was provided for under Part 5. In comparison, the 2007 Act does not differentiate as to the risk posed by the different offenders to whom the orders apply. There is no assessment as to the future risk of reoffending. Furthermore, while the intention of the provision is public safety, there is no measure of rehabilitation for offenders provided for under section 26. In introducing the provisions of the 2007 Act, the then Minister for Justice Mr McDowell stated that they are not civil orders *per se* in that they are made on foot of a criminal conviction.[134] However, it is likely that the measures are dealt with as civil requirements that hold punitive consequences.[135] As civil measures the purported intention is protection and deterrence, but these rationales are also legitimate grounds for punishment. Punishment does not have to mean vengeance or retribution, and a punitive effect may naturally result from a protective intent.[136]

In the context of the provisions under the Criminal Justice Act 2006 and Criminal Justice (Amendment) Act 2009, it is undesirable that they be perceived as a purely administrative requirement. If the Courts decision in *Enright* is strictly construed and applied, then it could be that the measures for drug trafficking offenders will not simply be classed as civil and regulatory, but this could overshadow any consideration of the punitive implications of their imposition. If decisions like *N.Y.*[137] and *P.H. v Ireland*[138] discussed above are followed, then it is probable that the restrictions imposed will be recognised as a significant burden that can be considered by the sentencing judge when imposing sentence.

If the term 'civil' is narrowly construed, then this could have the effect obscure the negative effect that post-release provisions may have on ex-offenders. Classifying something as civil should not be to deny that it has

[134] 634 Dáil Debates 619, 23 March 2007.

[135] Civil measures can be considered as punishment. See Ashworth et al. (1998) op. cit.; Zedner, L. (2004). *Criminal Justice.* Oxford: Oxford University Press, at pp. 70–76.

[136] See Hudson, B. (2003). *Understanding Justice, 2nd ed.* Buckingham: Open University Press.

[137] *N.Y.* [2002] 4 I.R. 308.

[138] *P.H. v Ireland*, unreported, High Court, 16 February 2006 (Clarke J).

punitive implications. The measures discussed above impose significant restrictions upon those released from prison and in a very real way interfere with the lives of ex-offenders after they have served their sentence. It is important that a fair and balanced approach is taken, and for the principle of proportionality to apply, it is essential that the punitive element inherent in such measures is recognised. In *Enright*, the High Court seemed to regard the notification requirements as primarily administrative, on the basis of protective intent. While there may be a protective purpose, this should not cloud the fact that the obligations are involuntary, coerced, and potentially punitive.[139] Furthermore, the argument that the measures cannot constitute a punishment, being for preventative and deterrent purposes, ignores that these aims are often legitimately drawn on as grounds to imposing punishment.[140] Moreover, as Thomas argues: "what starts life as a preventative, regulatory measure can easily become a more punitive measure in its own right."[141]

Furthermore, as part of the punitive consequences that must be considered, it should be noted that failure to comply leads to criminal sanctions being imposed.[142] In relation to sex offender orders, for example, the behaviour that gives rise to such an order may not be criminal, but default of the obligations imposed leads to a conviction penalty of up to five years. Two offences are created under Part 9 of the Criminal Justice Act 2006, one for non-compliance with the notification requirements and the other for furnishing the Gardaí with information known to be false or misleading. Similarly, breach of a 'monitoring order' or 'protection of person order' is a criminal offence under section 26(10) of the

[139] See Zedner (2004) op. cit.

[140] Hudson (2003) op. cit.

[141] Thomas, T. 'When Public Protection Becomes Punishment? The U.K. Use of Civil Measures to Contain the Sex Offender' (2004) 10 *European Journal on Criminal Policy and Research* 337, at p. 337. See also O'Malley, T. (2009) Sentencing Recidivist Sex Offenders: A Challenge for Proportionality. In Bacik, I. and Heffernan, L. (eds.) *Criminal Law and Procedure: Current Issues and Emerging Trends.* Dublin: First Law.

[142] The fact that breaches will take place unless the individual can prove 'reasonable excuse' invokes as Rogan remarks, "a danger of establishing a 'shadow legal system' where individuals are accused of criminal activity on pain of punishment but without the traditional protections of the criminal law, short circuiting the protections of Article 38.1 in the process." Rogan (2008) op. cit., at p. 233.

CJA 2007. Moreover, because the order may remain in effect for a maximum of seven years (regardless of the maximum custodial sentence available for the offence) the sentence may continue on for longer than what the maximum custodial sentence would have been for the particular offence. As a consequence of the above provisions, behaviour that would not ordinarily constitute an offence is criminalised.[143] This to some extent conflicts with the notion of proportionality and finality in punishment.

A Holistic Approach to Post-Release Monitoring

The measures introduced under the Acts above mesh well with hardline policy emerging as the response to crime. However, one might wonder the extent to which the policies are expressive rather than effective. Their effectiveness in terms of reducing recidivism and protecting the public is unproven, which is surprising given the overwhelming political and public support for community monitoring. Despite this, post-release monitoring can unintentionally interfere with successful integration into the community for those offenders who wish to do so. The need for a balanced approach has been recognised, with governmental agencies commenting upon the need to consider not only public protection but also individual constitutional rights such as privacy and the importance of reintegration of offenders through interventions and support (Department of Justice 2009). Providing treatment and support for sex offenders has dominated much of the strategy here. A new policy for the management of sex offenders in custody was introduced in 2009 which, through therapeutic interventions, aims to

[143] An example of how the Courts are dealing with non-disclosure is in the context of notification orders. It was reported in June 2009 that a District Court imposed an 11 month suspended sentence on a convicted sex offender who had failed to comply with the provisions under Part 2 of the 2001 Act. The 68-year-old sex offender had not notified the Gardaí of his departure, his whereabouts, or his return, after being abroad for more than seven days. The court felt this sentence reflected the seriousness of failing to notify. Editorial (2009, June 26) Convicted sex offender failed to comply with terms of register. *Mullingar Advertiser*.

reduce the risk of reoffending.[144] Initiatives introduced are aimed at increasing the range and availability of therapeutic services in prison and promoting prisoner engagement with the relevant services in an endeavour to support the rehabilitation of a greater number of sex offenders in custody than was possible under preexisting interventions.[145] A coordinated approach has been emphasised in relation to sex offender management in a way that has not been expressly directed towards other categories of offenders subject to post-release orders. This is regrettable considering there is no public policy reason for not taking an equally holistic approach to other categories of offenders, especially considering the hardship of re-entry discussed in the next chapter. Even so, in relation to sex offenders it has been stated that promoting positive change in offenders, encouraging ties with family and society, as well as identifying those who pose a high risk of reoffending is a key objective of collaboration between these agencies.[146] Such an outlook is to be lauded, despite being somewhat overshadowed by the resurgence of control-oriented mandates in relation to sex offender management.[147]

As a surveillance tool, the measures discussed in this chapter have undeniable value. When used appropriately, the expectation is that they will permit monitoring of high-risk offenders and protect the public from deviant predatory behaviour. Public interest considerations in this regard are vital.[148] This should not preclude us from admitting that many low-risk offenders may also find themselves permanently stigmatised and this

[144] Irish Prison Service (2009) *Sex Offender Management Policy: Reducing Re-offending, Enhancing Public Safety*. Dublin, Irish Prison Service.

[145] A key element of this is the recognition that sex offenders comprise a diverse group with a range of needs and levels of risk. Thus, any interventions pursued aim to be informed by individual assessments and based on integrated sentence plans (Irish Prison Service 2009).

[146] Irish Prison Service, *The Integrated Treatment and Management of those Convicted of Sexual Violence*, available at http://www.irishprisons.ie/wp-content/uploads/documents_pdf/sex_offender_management_may2016.pdf.

[147] Sexual Offenders (Amendment) Bill 2018.

[148] Potential victims right to life, freedom from torture, respect for their family life and privacy and to liberty and security (Article 5 ECHR) are important concerns and give powerful justifications for upholding policies that interfere with offenders' rights. However, there are offenders' rights to contend with also. The right to life (Article 2 ECHR), freedom from torture and degrading treatment (Article 3), and respect for privacy (Article 8) are serious rights that merit consideration in this regard. Charleton J comments on the importance of having a balance between such rights in the case of *DPP [At Suit of Detective Garda Barry Walsh] v Cash* [2007] I.E.H.C. 108, at para. 45.

can pose real problems for ex-offenders who wish to lead law abiding lives. The increasing demand for 'punitive segregation'[149] in our society ensures that post-release measures will continue to attract support and intensification in the future. Individual rights (privacy, liberty, the right to earn a livelihood, the right to move freely within the state) are consequentially curtailed and restricted as a result, meaning that the need for balance between such rights and the rights of the public is imperative.[150] There is also arguably a 'right' to rehabilitation to consider. McWilliams and Pease believe this to be "the action of re-establishing a degraded person in a former standing with respect to rank and legal rights, to be maintained over time."[151] Thus, at the very least rehabilitation should mark the end of punishment and the restoration of all civil and legal rights to the individual. What we see instead is the legitimising of control and surveillance which has, as Foucault suggested, lowered the level from which it becomes natural and acceptable to be punished.[152]

The growth in practices of disclosure of criminal record and notification is indicative of a risk information discourse. The reluctance to be viewed as soft on crime has produced policies designed to demonstrate to the public that 'something is being done' and that are distinctively expressive.[153] The problem is that rather than heighten public safety the measures may instead stigmatise, marginalise, and hinder the integration of offenders, causing rather than inhibiting criminal behaviour in the future. The criminogenic effect of penal laws is a prospect that cannot be ignored.[154] Moreover, the provisions deny the reality that offenders tend

[149] Garland believes that "punitive segregation—lengthy sentence terms in no frills prisons, and a marked, monitored existence for those who are eventually released—is increasingly the penal strategy of choice." Garland (2001) op. cit., at p. 142.

[150] The increasingly punitive and restrictive line of the legislature means that responsibility will lie with the courts to achieve and maintain a balance in this sensitive area.

[151] McWilliams, W. and Pease, K. (1990) Probation Practice and an End to Punishment. *The Howard Journal* 29 (1), 14–24.

[152] Foucault (1977) op. cit., at p. 303.

[153] Zimring et al. believe that most penal laws are designed to 'bark louder than they bite' and to provide the necessary symbolic 'get tough' message across without having major resource implications. See generally Zimring, Z., Hawkins, G., and Kamin, S. (2001). *Punishment and Democracy: Three Strikes and You're Out in California.* Oxford: Oxford University Press.

[154] See Farrell R.A. and Swigert, V.L. (1978) Prior Offence Record as a Self-Fulfilling Prophecy. *Law & Society Review* 12(3), 437–453; Becker, H. (1963) *Outsiders: studies in the sociology of deviance.* New York: The Free Press.

to grow out of crime and could inevitably keep individuals within the system for much longer than they originally might have been. This is particularly so in relation to young offenders and one might question their inclusion in the measures enacted (e.g. notification).

Bibliography

An Garda Síochána. (2015). *Annual Report*. Dublin: An Garda Síochána.

Ashworth, A., Gardner, J., Morgan, R., Smith, A. T. H., Von Hirsch, A., & Wasik, M. (1998). Neighbouring on the Oppressive: The Government's Anti-Social Behaviour Order Proposals. *Criminal Justice, 16*, 7–14.

Becker, H. (1963). *Outsiders: Studies in the Sociology of Deviance*. New York: The Free Press.

Caputo, A., & Brodsky, S. (2003). Citizen Coping with Community Notification of Released Sex Offenders. *Behavioral Sciences & the Law, 22*, 239–252.

Connor, D., & Tewksbury, R. (2017). Public and Professional Views of Sex Offender Registration and Notification. *Criminology, Criminal Justice, Law & Society, 18*(1), 1–27.

Deegan, G. (2015, February 13). Sex Offender Ordered Not to Have Tinder, Facebook Profiles. *Irish Times*.

Delson, N. (2006). Using Global Positioning Systems (GPS) for Sex Offender Management. *Association for the Treatment of Sexual Abusers Forum, 18*, 24–30.

Department of Justice and Equality. (1998). *The Law on Sexual Offences—A Discussion Paper*. Dublin: Department of Justice and Equality.

Department of Justice and Equality. (2009). *The Management of Sex Offenders: A Discussion Document*. Dublin: Department of Justice and Equality.

Editorial. (2007, April 26). Criminal Justice Bill Increases Erosion of Civil Rights. *The Irish Time*s.

Editorial. (2009, June 26). Convicted Sex Offender Failed to Comply with Terms of Register. *Mullingar Advertiser*.

Farrell, R. A., & Swigert, V. L. (1978). Prior Offence Record as a Self-Fulfilling Prophecy. *Law & Society Review, 12*(3), 437–453.

Fitch, K. (2006). *Megan's Law: Does It Protect Children? (2)*. London: NSPCC.

Fitzgerald O'Reilly, M. (2013). Post Release Supervision of Sex Offenders. *Irish Criminal Law Journal, 23*(4), 108.

Fitzgerald O'Reilly, M. (2017, July 3). Seeking to Track Sex Offenders Poses Human Rights Questions. *Irish Examiner*.

Fitzgerald O'Reilly, M. (2018). Information Pertaining to Released Sex Offenders: To Disclose or Not to Disclose, That Is the Question. *The Howard Journal of Crime and Justice, 57*(2), 204–230.

Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans.). London: Penguin Books.

Garland, D. (1990). *Punishment and Modern Society: A Study in Social Theory*. Oxford: Clarendon Press.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Harris, A., Levenson, J., Lobanov-Rostovsky, C., & Walfield, S. (2016). Law Enforcement Perspectives on Sex Offender Registration and Notification: Effectiveness, Challenges, and Policy Priorities. *Criminal Justice Policy Review*. https://doi.org/10.1177/0887403416651671.

Hebenton, B., & Seddon, T. (2009). From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age. *The British Journal of Criminology, 49*(3), 343–362.

Hebenton, B., & Thomas, T. (1993). *Criminal Records: State, Citizen and the Politics of Protection*. Avebury: Aldershot.

Hebenton, B., & Thomas, T. (1996). Sexual Offenders in the Community: Reflections on Problems of Law, Community and Risk Management in the U.S.A., England and Wales. *International Journal of the Sociology of Law, 24*, 427–443.

Home Office. (1986). *Protection of Children: Disclosure of Criminal Background of Those with Access to Children*. London: Home Office.

Home Office. (1999). *Disclosure to the Employment Service of Restrictions That Should be Placed on the Employment of Potentially Dangerous Offenders*. London: Home Office.

Home Office. (2001). *Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997*. London: Home Office.

Home Office. (2007). *Review of the Protection of Children from Sex Offenders*. London: Home Office.

Hudson, B. (2003). *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2nd ed.). Buckingham: Open University Press.

Irish Council for Civil Liberties. (2007). *What's Wrong with the Criminal Justice Bill?* Dublin: Irish Council for Civil Liberties.

Irish Human Rights Commission. (2006). *Observations on Additional Proposals for Amendments to the Criminal Justice Bill 2004*. Dublin: IHRC.

Irish Prison Service. (2009). *Sex Offender Management Policy: Reducing Re-offending, Enhancing Public Safety*. Dublin: Irish Prison Service.

Irish Prison Service. (2013). *Recidivism Study*. Dublin: Irish Prison Service.

Jacobs, J. B. (2015). *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.

Jennings, W., & Zgoba, K. (2015). An Application of an Innovative Cost-Benefit Analysis Tool for Determining the Implementation Costs and Public Safety Benefits of SORNA with Educational Implications for Criminology and Criminal Justice. *Journal of Criminal Justice Education, 26*(2), 147–162.

Kemshall, H., & Wood, J. (2010). *Child Sex Offender Review (CSOR): Public Disclosure Pilots, A Process Evaluation*. London: Home Office.

Kemshall, H., Dominey, J., & Hilder, S. (2012). Public Disclosure: Sex Offenders' Perceptions of the Pilot Scheme in England. Compliance, Legitimacy and Living a "Good Life". *Journal of Sexual Aggression, 18*(3), 311–324.

Lacombe, D. (2008). Consumed with Sex: The Treatment of Sex Offenders in Risk Society. *The British Journal of Criminology, 48*, 55–74.

Larrauri, E. (2014a). Criminal Record Disclosure and the Right to Privacy. *Criminal Law Review, 10*, 723–737.

Larrauri, E. (2014b). Legal Protections Against Criminal Background Checks. *Punishment & Society, 16*(1), 50–73.

Law Society of Ireland. (2007, February 27). Law Society's Deep Concern at Government's Intention to Rush Through Far-Reaching Changes in Criminal Law. *Press Release*.

Levenson, J., Brannon, Y., Fortney, T., & Bake, J. (2007). Public Perceptions About Sex Offenders and Community Protection Policies. *Analyses of Social Issues and Public Policy, 7*(1), 1–25.

McWilliams, W., & Pease, K. (1990). Probation Practice and an End to Punishment. *The Howard Journal, 29*(1), 14–24.

Methven, E., & Carter, D. (2016). Serious Crime Prevention Orders. *Current Issues in Criminal Justice, 28*(2), 227–238.

Murphy, G. (2007). An Analysis of Sentencing Provisions in the Criminal Justice Act 2006. *Judicial Studies Institute Journal, 1*, 60–100.

O'Donnell, I., Baumer, E. P., & Hughes, N. (2008). Recidivism in the Republic of Ireland. *Criminology & Criminal Justice, 8*(2), 123–146.

O'Malley, T. (2009). *The Criminal Process*. Dublin: Thomson Reuters, Round Hall.

O'Sullivan, J., Hoggett, J., Kemshall, H., & McCartan, K. (2016). Understandings, Implications and Alternative Approaches to the Use of the Sex Offenders Register in the UK. *Irish Probation Journal, 13*, 84–101.

Power, H. (1999). The Crime and Disorder Act 1998 (1) 'Sex Offenders, Privacy and the Police'. *Criminal Law Review*, 3–16.

Rogan, M. (2008). Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and "Post-Release" Orders. *Dublin University Law Journal, 15*(1), 298–323.

Rogers, J. (2007, April 4). Elements of the Criminal Justice Bill Do Not Stand Up to Scrutiny. *The Irish Times*.

Rose, N. (2000). Government and Control. *British Journal of Criminology, 40*, 321–339.

Terry, K. (2015). Sex Offender Laws in the United States: Smart Policy or Disproportionate Sanctions? *International Journal of Comparative and Applied Criminal Justice, 39*(2), 113–127.

Tewksbury, R., Jennings, W., & Zgoba, K. (2012). A Longitudinal Examination of Sex Offender Recidivism Prior to and Following the Implementation of SORN. *Behavioral Sciences & the Law, 30*, 308–328.

Thomas, T. (2000). Protecting the Public: Some Observations on the Sex Offenders Bill 2000. *Irish Criminal Law Journal, 10*(2), 12.

Thomas, T. (2004). When Public Protection Becomes Punishment? The U.K. Use of Civil Measures to Contain the Sex Offender. *European Journal on Criminal Policy and Research, 10*, 337–351.

Thomas, T. (2005). *Sex Crime: Sex Offending and Society* (2nd ed.). Devon: Willan Publishing.

Thomas, T. (2011). *The Registration and Monitoring of Sex Offenders: A Comparative Study*. New York: Routledge.

Thomas, T. (2016). *Policing Sexual Offences and Sex Offenders*. London: Palgrave Macmillan.

Zedner, L. (2004). *Criminal Justice*. Oxford: Oxford University Press.

Zgoba, K. (2017). Memorialization Laws in the United Kingdom: A Response to Fear or an Increased Occurrence? *American Journal of Criminal Justice, 42*(3), 628–643.

Zgoba, K., & Ragbir, D. (2016). Sex Offender Registration and Notification Act (SORNA). *Sexual Violence*, 33–49.

Zimring, F. E., Hawkins, G., & Kamin, S. (2001). *Punishment and Democracy: Three Strikes and You're Out in California*. Oxford: Oxford University Press.

8

Collateral Consequences of a Conviction and Circuits of Exclusion

It has been expounded that the "reality of re-entry is much different from the 'land of milk and honey' often imagined from behind bars."[1] The difficulty known as re-entry has been well documented both in the Irish context and internationally (Mears & Cochran 2015; McCartan & Kemshall 2015; Martynowicz & Quigley 2010; O'Loingsigh 2004; Visher & Travis 2003; NESF 2002; Petersilia 2001), and while it largely refers to offenders who are released from prison, many of the difficulties faced by ex-prisoners also pertain to the broader category of ex-offenders.[2] Re-entering society, bearing the stigma of a criminal/prison record, is fraught with a myriad of issues, some well-known, others less discernible.[3] Within the criminal justice system the de jure sentence is

[1] LeBel, T., Ritchie, M. and Maruna S. (2017) Can Released Prisoners "Make It?" Examining Formerly Incarcerated Persons' Belief in Upward Mobility and the American Dream. In Stojkovic, S (ed.) *Prisoner Reentry: Critical Issues and Policy Directions*. Palgrave Macmillan, 245–305, at p. 253.

[2] A 2003 Report by the Irish Penal Reform Trust (IPRT) discovered that Ireland has a very high re-entry rate from prison, 299 per 100,000 of the population in comparison with an average of 288 per 100,000 of the population of other European States: Seymour, M. and Costello, L. (2005) *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody.* Dublin: Dublin Institute of Technology.

[3] See also Burton Jr.VS, Fisher, C., Jonson, CL. and Cullen, FT. (2014) Confronting the Collateral Consequences of a Criminal Conviction: A Special Challenge for Social Work With Offenders. *Journal of Forensic Social Work*, 4(2), 80–103.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_8

acknowledged to be the consequence of a guilty verdict. The reach of a conviction, however, extends considerably beyond this de jure sentence. Reconnecting with society, even where the person wishes for this, can be an insurmountable obstacle as a result of the diminished status impressed upon the ex-offender. There are de facto disadvantages that the person may continue to experience as a result of having a criminal conviction. Rights such as privacy, liberty, and earning a livelihood, for example, ordinarily thought to be restored to the individual (upon release), often become 'suspended rights'[4] transcending the formal legal punishments of the justice system. The 'offender' label is one which remains with the individual for life. Many find it impossible to overcome the stigma of this label which affects their opportunity to become fully integrated as law-abiding members of society.[5]

Belonging to the ex-offender or ex-prisoner group has numerous consequences for the individual. It can result in a denial of public housing, welfare benefits, child support, parental rights, and civic engagement.[6] In many jurisdictions, it can mean deportation for immigrants. For the most part, a criminal record can mean that the individual is denied access to some of the most fundamental circuits of social life. Homelessness and unemployment are particularly difficult obstacles to overcome, and in many instances, it is the law, or sometimes the lack of legal protection, that acts as the barrier to ex-offenders attempting to get their lives on the right track. Garland has observed that "the assumption today is that there is no such thing as an 'ex-offender'."[7] This would certainly seem to be true when one considers the way in which a criminal record can be used to mark out and often exclude those with a criminal past.

[4] Michel Foucault suggested that the modern system of imprisonment constitutes an economy of suspended rights. Foucault (1977), at p.10.

[5] See Maruna, S. (2014). Reintegration as a right and the rites of reintegration: A comparative review of de-stigmatization practices. In Humphrey, J.A. and Cordella, P. (eds.), *Effective Interventions in the Lives of Criminal Offenders.* New York: Springer, pp. 121–138.

[6] See Middlemass, K.M. (2017). *Convicted and Condemned: The Politics and Policies of Prisoner Reentry*. New York: NYU Press; Mears, D. and Cochran, J. (2015) *Prisoner Reentry in the Era of Mass Incarceration* (Thousand Oaks, CA; Sage); Hoskins, J. (2014). Ex Offender Restrictions. *Journal of Applied Philosophy* 31(1), 33–48; Travis, J. (2002). *Invisible Punishment: An Instrument of Social Exclusion* in Mauer, M. and Chesney-Lind, M. *Invisible Punishment: The Collateral Consequences of Mass Imprisonment.* New York: The New Press, pp. 15–36.

[7] Garland, D. (2001) *The Culture of Control*. Oxford: Oxford University Press, at p. 180.

Presenting this 'truth' to the public may incur the unsurprising response of 'so what!'. After all, these are people who have offended against society. They have broken the social contract and are deservedly punished for that. Why should they be welcomed back into mainstream society or why should we be concerned about their re-entry or welfare at all? A compelling argument in favour of supporting and facilitating re-entry and rehabilitation lies strongly in the social benefit of such. Participation in normal social activities (having a job, home, ties with family, etc.) is strongly associated with successful reintegration, and assuming a social role is vital in securing an identity towards law-abiding citizen. Restoring to ex-offenders a sense of citizenship and social belonging becomes crucial in the rehabilitation process. Exclusion from such can produce the opposite effect and a criminal record may unintentionally become a criminogenic factor in itself. Despite universal acknowledgement that activities such as employment and housing can be circuits of social inclusion, and despite the evidence that ex-offenders who succeed in becoming socially involved are less likely to reoffend, in the case of returning offenders a criminal record can inhibit access to a multitude of such inclusive roles. Of course, not all offenders have the intention of re-entering society to live a crime-free life and then fail due to external circumstances. Some interviews with ex-prisoners have indicated that a personal decision to change lies at the heart of successful rehabilitation.[8] Other factors that also come into play include education, job skills, as well as the availability of jobs, treatment for substance abuse, housing, and welfare services. Poor abilities and opportunities can contribute to negative post-release circumstances and outcomes for the individual. It may also be that a prior stake in conformity is highly relevant to successful transition from offender to reintegrated citizen. An issue that will be raised in this chapter is that outside of, and/or in addition to, all of these obstacles and difficulties, the individual is further disadvantaged by the label of 'offender' and by the requirement to disclose his/her past convictions in a variety of different social situations. Policy efforts to rehabilitate

[8] See Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives.* Washington, DC: American Psychological Association Books.

offenders are contradicted by the fact that it is often legal barriers[9] that encourage their marginalisation, by preventing individuals from overcoming criminogenic factors such as social deprivation, unemployment, and homelessness. Such legal barriers hinder both the individual's and society's prospects of a crime-free life in the future. They also fail to recognise that the incidence of crime reduces steeply with age and that any appreciable risk of repeat offending may have evaporated.

Conversely, it must be acknowledged that revelation of an individual's past record will often be necessary in the public interest. Considerations such as informed decision-making, the needs of victims, and protection of the public in general are important concerns, and it is essential that a balance is struck between these concerns and the ability of ex-offenders to move on with their lives. The author attempts to navigate some of these issues throughout the chapter, revealing that the assumption of 'freedom' post release is frequently a fallacy in criminal justice theory.

Accessing Employment with a Conviction

Employment is an essential factor in the rehabilitation of offenders and their reintegration into the community. In the aftermath of a conviction and punishment, the stability of employment can promote ties and connections to society and can play an important part in preventing reoffending behaviour in the future. Finding stable employment, however, is one of the biggest difficulties facing ex-offenders, particularly those released from prison (Jacobs & Larrauri 2015; Jones 2015). This is an issue that has been well documented throughout Europe (Pijoan 2014; Larrauri & Jacobs 2013; Larrauri 2011) and in many other jurisdictions. Research in the UK, for example, illustrates that high percentages of ex-

[9] For example, in Ireland, despite the introduction of a Spent Convictions Scheme in 2016 (discussed below), government officials have asked for legislation that would allow employers to access the criminal history of prospective employees: Bardon, S. (2017, July 17) Law would allow employers access to criminal records. *The Irish Times*.

offenders are explicitly refused jobs because of their criminal records.[10] Considering that it is estimated that more than 11 million people in the UK have a criminal record, this represents a substantial group in the labour market and thus a large portion of the general population potentially facing unemployment. The situation is even more dire in the US, with an estimated 70 million people having a prior arrest or conviction—that is, almost one in three adults.[11] Having a conviction is a significant contributor to unemployment rates amongst ex-offenders in the US (Ispa-Landa & Loeffler 2016; Jacobs 2015; Schmitts & Warner 2010). The problem has been duly noted in the Irish context also (McHugh 2013; Martynowicz & Quigley 2010), and while there is no figure available on the number of Irish persons with a criminal record, the fact that the prison population has increased by 400% since 1970 (1970–2011), coupled with the rate of imprisonment as approximately 75 per 100,000 of population (as of August 2017), leads to the reasonable conclusion that a substantial number of the Irish population have a criminal record.[12]

The difficulty in accessing employment is best understood as a process that begins prior to incarceration. Many offenders, particularly those who end up in prison, come from disadvantaged backgrounds characterised by low levels of education, poverty, and other social inadequacies. Many have poor qualifications, poor basic skills, low self-esteem, and often substance abuse problems and find it extremely difficult to acquire meaningful stable employment. On release, poor employment histories and job skills create diminished opportunities for offenders and they remain one of the most marginalised groups in society. The criminal/prison record exacerbates the preexisting problems of poor education and employment. Even with training in prison and supports in the community in the aftermath, employer discrimination poses a real problem to accessing meaningful employment in the long term. The label of offender is one that sticks and many employers may be unable and unwilling to look past this (Uggen & Blahnik 2015).

[10] See NACRO (2010). *Developing proposals for sentencing and achieving a rehabilitation revolution*, Submission to Ministry of Justice. London: NACRO.

[11] Statistic obtained from National Employment Law Project: http://www.nelp.org/campaign/ensuring-fair-chance-to-work/ (last accessed 01/03/2018)

[12] Especially considering that not all those who receive convictions are sent to prison on sentence.

Prisoner Profiles and Support Services

Prisoners are a particularly disadvantaged group, sharing characteristics of poor education, often serious literacy problems, and a general lack of stable employment prior to imprisonment.[13] In 1985, the Whitaker report in Ireland found unemployment to be frequent among prisoners[14] and studies and reports since have revealed the perpetuation of this endemic problem in the Irish Prison system (O'Brien 2018; Seymour & Costello 2005; Morgan & Kett 2003; O'Mahony 1997). It is estimated that prisoners in Ireland are 25 times more likely to come from, and return to, a seriously deprived area characterised by lower income and poor education and employment. The majority have never sat in a State exam, with over half having left school before the age of 15 years.[15] In 2011, the Department of Justice affirmed that at least 52% of Irish prisoners have poor literacy skills, if any (Department of Justice, Equality and Law Reform, Labour Party TD comments, 16 November 2011). Moreover, over 70% of prisoners are unemployed on committal and do not have any particular trade or occupation.

For individuals with such deprived backgrounds, prison can often be seen as a place to enhance skills and employability.[16] Work training and education are provided for within the prison system, as part of prison policy.[17] The Irish Prison Service in association with a range of educational agencies such as Public Libraries, Education and Training Boards,

[13] See Dolan, K. and Carr, J. (2015). The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty. Inst. for Pol'y Stud.; Irish Penal Reform Trust. (2012) *The vicious circle of social exclusion and crime: Ireland's disproportionate punishment of the poor*. Dublin: Irish Penal Reform Trust; Williams, K., Papadopoulou, V., and Booth, N. (2012) *Prisoners' childhood and family backgrounds*. UK: Ministry of Justice Research Series 4/12.

[14] Commission of Inquiry into the Penal System (1985). *Report of the Commission of Inquiry into the Penal System.* Dublin: Stationary Office.

[15] Information acquired from website of the Irish Penal Reform Trust (last accessed 02/03/2018).

[16] On an international level, INTEGRA (a strand of the EU Employment Community Initiative, intended to improve the employability of those excluded or at risk of exclusion from social life) has recognised that a significant part of offender rehabilitation is increasing employability through quality training and education.

[17] The Prison Rules 2007 provide lists of the educational services that prisons should try to provide for prisoners. Note that the European Prison Rules 2006, Basic Principles, Rule 6 provides that detention should be "managed so as to facilitate the re-integration into free society of persons who have been deprived of their liberty."

and institutions such as the National College of Art and Design and the Open University strive to provide a broad range of educational services to help offenders attain from basic skills to Open University degrees. The educational courses offered include physical education, health education, social education, and creative activities such as art, writing, and music.[18] Training and workshops are also provided in areas like welding, joinery, catering, construction, general engineering, and electronics and are aimed at providing useful and structured activities and tools towards future employment.[19]

It has been recognised and recommended that education services and training facilities in prison need to be augmented and improved in order to meet prisoners' subjective needs and in order to follow through with their educational development in the aftermath of imprisonment.[20] Despite the range of services in prison, there remains a lack of through-care services into the community, hindering prospects for effective and coordinated reintegration of offenders. In more recent years, however, efforts have been made to anticipate and respond to the needs of released offenders with greater efficacy. The Irish Prison Service routinely works with the Irish Association for the Social Integration of Offenders (IASIO) to provide the Gate Service[21] and the Resettlement Service.[22] In recent years, the Irish Prison Service has developed an Integrated Sentence Management System (IMS) in order to manage the needs of offenders in custody. The IMS assesses prisoners on entry in relation to their individual needs of accommodation, education, and offending behaviour and a Personal Integration Plan is compiled and reconsidered at intervals

[18] See www.irishprisons.ie (last accessed 02/03/2018).

[19] There are 126 workshops provided across the prison estate, with in excess of 900 prisoners partaking on a daily basis.

[20] See Martynowicz, A. and Quigley, M. (2010). *"It's like stepping on a landmine…" Reintegration of Prisoners in Ireland.* Dublin: IPRT. This report observed that there has been a decrease in the number of prisoners participating in education in prison (IPS Annual Reports 2002–2008). The authors write that "[p]articipation in education is impacted negatively upon by the rising number of prisoners in the system not being accompanied by the development of sufficient additional resources across the prison estate," (at p. 19).

[21] The Gate Service was established in 2007 and aims to support prisoners and ex-prisoners to access training and work in order to reduce reoffending.

[22] The Resettlement Service offers important advice on issues like housing applications, social welfare benefits, and access to services such as mental health and addiction supports.

throughout their imprisonment.[23] In 2016, a centralised information-sharing resource was introduced to allow recording of information with regard to ongoing sentence management for individual prisoners and issues concerning post release, with the aim of improving the transition from custody to the community for offenders.

Despite such positive progress, many offenders return to society and remain insufficiently prepared to access employment. Some have not availed of the services in prison or were unable to do so or were unable to finish the course in custody. They return to society with the additional burden of a prison record and this can cumulatively mean exclusion from the labour market or at least from meaningful engagement with it.[24]

An individual can still suffer from the effects of incarceration regardless of their prior circumstances. Even if offenders come from a relatively stable background and have good employment histories, they may have lost their job on committal, as a sentence of imprisonment can frustrate the contract of employment. While in prison, ties to family can wane, job skills can diminish, and post-release job opportunities can decline, making the transition from prison to life on the outside much harder. The stigma of a conviction makes many ex-offenders unattractive candidates for many types of jobs (e.g. union jobs).[25] In June 2018, former Anglo Irish Bank chief executive David Drumm was sentenced to six years in jail for conspiracy to defraud and false accounting, extending to €7.2 billion. In imposing the sentence, the judge acknowledged the significance of the criminal conviction, commenting "He has lost his reputation which will encroach on any future employment opportunity."[26]

Apart from poor educational skills, other factors experienced by ex-offenders post release include poor self-esteem, mental health problems,

[23] Initially piloted in two prisons (Wheatfield and Arbour Hill prisons in 2008), the system is now fully operational in all prisons in Ireland.

[24] While many ex-prisoners find jobs in unskilled, low-paid, and casual employment, finding long-term stable employment can prove extremely difficult.

[25] Another practical barrier to some types of work is the inability to obtain a driver's licence. Furthermore, many ex-offenders may have difficulties opening a bank account as they may not have an electric or gas bill required to prove identity. This can be a barrier to jobs where the employer pays by credit transfer.

[26] See Carswell, D. (2018, June 20) David Drumm jailed for six years for conspiracy to defraud. *The Irish Times*.

financial burdens, and substance misuse. Low self-esteem, evidence of which may include drug and alcohol use and addiction, can affect individuals prior to offending and the stigma of a conviction can enhance or contribute to this problem. The experience of having been in prison negatively impacts upon coping skills and can demoralise ex-offenders such that they may be less likely to actively seek employment or access support services. Another problem is that time in prison especially if long, means ex-offenders lack recent work experience and employer references—some of course may have no experience at all and this can hinder their success in acquiring meaningful work. Personal skills such as time management, presentation, and team working can be as important for employers as training and educational skills.

It seems that offenders who have a prior 'stake in conformity' fair better in terms of job opportunities and generally adjusting to life after release. Those who maintain connections with past employers, family, and friends will find it easier to rejoin the labour market than those who do not have such ties. In particular, relationships with family and friends in the aftermath of prison can promote and encourage employment, and give to it a sense of value that it may previously have lacked. As Maruna has observed: "other-centred pursuits provide socially excluded offenders with a feeling of connection to or 'embeddedness' in the world around them."[27]

In Ireland, it is acknowledged that many released prisoners are not 'job ready' and lack the necessary skills required to gain and keep employment. There are a variety of factors that contribute to this situation including the following: unwillingness or inability to avail of the service offered in prison, the lack of or insufficient quality of follow-through services in the community, and other factors such as substance abuse, breakdown in family relations, and the requirement to disclose criminal history information. The limited studies conducted with prisoners in this jurisdiction reveal an awareness amongst those interviewed of the importance of work and keeping busy post release. For example a study of prisoners in 2005 revealed that a large portion (42%) thought that

[27] Maruna, S. (2001) op. cit., at p. 119.

employment would be a key concern in the aftermath of imprisonment.[28] Although many prisoners express satisfaction with the services received in prison, many experience difficulties in continuing with training after they are released, whether through a lack of information as to where to go or a lack of money (where the course costs money). Community groups have emphasised the need to make prisoners aware of the courses and training they can avail of in the community after imprisonment, as well as the need for strong links with employers as a strategy for promoting and facilitating the employability of ex-offenders. In 2017, a 'Jobs & Opportunities Expo' was held in Mountjoy prison in Dublin, attended by Community Employment Scheme representatives, education and training providers, resettlement supports, and, perhaps most importantly, employers who had vacancies to be filled. These employers were invited to interview prisoners and 50 prisoners were chosen to attend the event (having been coached in CV preparation and interview skills by IASIO Gate Service Training and Employment Officers).[29] As the first event of its kind, an initiative such as this has potentially long-term and far-reaching positive consequences in terms of connecting prisoners with service providers on the outside as well as breaking down barriers and stereotypes which may traditionally have prevented employers from hiring ex-prisoners. Feedbacks from the employers at this event were extremely positive in terms of candidates they met and their employability.[30]

Other agencies and supports, such as the Connect project,[31] the Pathways Project, the Linkage Service,[32] Trasna,[33] mentoring programmes

[28] Seymour and Costello (2005) op. cit., at p. 59. See also O'Loingsigh (2004) op. cit.

[29] A report on the event can be accessed here: https://www.acjrd.ie/files/Final_Report_Recommendations_Mountjoy_Expo_2017.pdf (last accessed 11/03/2018).

[30] Some prisoners were offered a job upon release.

[31] This project uses an individual programme planning system to provide support and structured activities for prisoners: Hickey, C. *Crime and Homelessness* (Dublin: Focus Ireland and PACE, 2002).

[32] This is a collaborative initiative between the Probation Service and the IASIO.

[33] Trasna is a work programme run by Jobcare, which assists ex-offenders break the cycle of reoffending through employment and personal support and development: See www.jobcare.ie. See also Ingle, R. (2008, July 1) Building a better life on the outside. *Irish Times*.

like Care After Prison[34] and the Prisoner Support Network,[35] PACE,[36] and the Probation Service[37] which operate to address ex-offenders' employment (and other) needs in the community, play a vital role in the rehabilitation of such individuals. The issues with such after-care services, however, are that they are often operated on a small scale, are localised, and remain heavily reliant upon voluntary and religious organisations.[38] Despite some encouraging developments in recent years,[39] the lack of a fully accessible coordinated governmental-level approach to dealing with the reintegration of offenders means that it remains aspirational rather than effective systemic policy. Beyond this, there is a further hurdle to effecting real integration of ex-offenders into the workforce—the requirement to disclose a criminal record.

Disclosure of a Criminal Record and Employer Discrimination

It is evident that there are many factors that undermine ex-offenders' ability to acquire and sustain work, including substance abuse problems, lack of education and skills, and poor employment in the past. To this list

[34] A peer led charity organisation which provides information, support, and referral for ex-offenders, their families, and victims of crime.

[35] The Prisoner Support Network is a recent development started by former prisoners to assist prisoners upon release, aiming in particular to enhance access to service providers in areas like health, housing, education, and employment. Another example is a mentoring programme run by Business in the Community Ireland, operating in a number of Irish prisons, which assists in enhancing the employment potential of prisoners: See Martynowicz and Quigley (2010) op. cit., at p. 39.

[36] PACE is an agency that works exclusively with ex-offenders. It works in partnership with a wide range of agencies to provide training and accommodation for offenders, ex-offenders, prisoners, and ex-prisoners.

[37] The Probation Service provides work training and placement projects for offenders, often in collaboration with other agencies. The Probation Service also works in prisons to advise and assist prisoners, and furthermore, funds and supports community organisations in the provision of services to released offenders.

[38] The IPRT Report in 2010 refers to the 'post-code lottery' that dictates the provision of after-care services for ex-prisoners, which inevitably limits access to services: Martynowicz and Quigley (2010) op. cit., at p. 31 (see para. 7.1).

[39] More recently, the government have committed to expand the Community Return Programme and Community Support Scheme to assist the rehabilitation of offenders: Department of Justice and Equality. (2016) *Annual Report 2016*. Dublin: Department of Justice.

can be added the problem of employer discrimination. There is an obligation upon an applicant, if asked, to reveal any past convictions to a potential employer. This can provide a significant and often unfair barrier to acquiring and keeping meaningful employment for ex-offenders. Research has shown that employers routinely require disclosure of criminal record and that revealing such information has an adverse effect upon employment prospects. It seems that often employers have preconceived notions about ex-offenders and this can be a barrier to successful integration into the labour market for many individuals. Evidence in research suggests that ex-offenders are often excluded automatically, purely because of the existence of a record, regardless of the type of offence committed, the time that has passed since the conviction, or the relevance of the conviction to the job being sought.[40]

The exclusion of ex-offenders from the labour market has been well documented in countries around the world (Ahmed & Lang 2017; Backman et al. 2017). In the UK, despite the protection from disclosure afforded under the Rehabilitation of Offenders Act 1974 as amended, a significant portion of potential candidates are excluded from employment on the grounds of their criminal record (Home Office 2002). In 2016, a Yougov survey commissioned by the Department for Work and Pensions in 2016 found that 50% of employers would not even consider employing an ex-offender, regardless of the offence or sentence received.[41] The same survey further revealed that, while 32% had concerns about ex-offenders' skills and capability, 40% were worried about the public image of their business and 45% were concerned ex-offenders would be unreliable in their post.

The reality of this situation is keenly felt by ex-prisoners who have been interviewed on the issue. In a study documented by Rhodes, disclosure of criminal record was a matter of concern for all ex-offenders interviewed, regardless of whether they had good employment histories or

[40] This has continuously been acknowledged in Ireland, including by the Law Reform Commission in their 2007 report on spent convictions: Law Reform Commission, LRC 84-2007, *Report on Spent Convictions* (Dublin: Law Reform Commission, 2007). Often, it is the type and nature of the offence committed that impacts most negatively on the recruitment of ex-offenders.

[41] https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/42yrwvixdo/YG-Archive-160126-DWPwaves.pdf (last accessed January 2018)

not (Rhodes 2008). One interviewee commented: "Its like you can't judge every book by its cover because people have had crap starts in life and they actually need that chance but its trying to find an employer that will give them that chance…. It's a case of you don't tell them and they might find out or you do tell them and you don't get that chance."[42] The Prison Reform Trust has noted that the chances of finding work after prison are slimmer for women, with fewer than 1 in 10 having a job to go to when they get out (Prison Reform Trust 2014). The effect of having a record for many ex-offenders is thus an experience of prolonged or permanent 'status degradation'[43] and exclusion.

For many employers, the problem can often be the lack of a process in place for what to do if someone ticks the criminal record box, rather than outright discrimination. In this age of litigation, the fear of potential liability for negligent hiring is understandable. Employers can find themselves in a vulnerable position and many can feel that the risk is just too high. In other circumstances, however, short-sighted stereotypes play a key role in undermining an ex-offender's opportunity to gain employment. The negative assumption of 'once an offender, always an offender' seems to attach and the assumption of recidivism is emblematic of the increasingly risk-averse culture of our society. The reality is that the perceived risk is much higher than the actual one, considering that empirical evidence shows that ex-offenders in stable employment are much less likely to reoffend (Ramakers et al. 2017). Of course, where an obvious risk exists, employers cannot be censured in making a reasoned and informed decision not to hire someone.

It is perhaps useful to learn that most employers who report knowingly employing ex-offenders share a positive impression of the experience. Once given the chance, ex-offenders have proven to be valuable and hard-working members of the work force, with complaints being in the minority and focused upon individual issues rather than pertaining to the criminal past of the worker. Employers also tend to be more willing to engage ex-offenders when they have access to practical help and employer

[42] Ibid., at p. 11.

[43] See Schwartz, R. and Skolnick, J.H. 'Two Studies of Legal Stigma' (1962) 10 (2) *Social Problems* 133–142.

supports, such as accessible and appropriate guidance and networking opportunities with other employers.[44]

While it is common in many jurisdictions for employers to conduct background checks on potential candidates, in Ireland the extent of such screening is restricted by law. A practice had developed in the Irish context where employers required prospective employees to make an access request for personal data under the Data Protection Acts 1988 and 2003 to An Garda Síochána (the Irish police force) and then supply the employer with this information. As of 2014, this practice is now unlawful and employers can face heavy penalties for engaging in it. The National Vetting Bureau (Children and Vulnerable Persons) Act 2012 as amended, however, provides for a mandatory national vetting process for persons who seek employment in certain limited protected areas, namely concerning work with children and vulnerable adults. Private employers do not have access to this vetting procedure, but they can require candidates to disclose their record in an employment application form. The candidate is required to 'tick the box' if they have ever been convicted of a criminal offence in Ireland or in any other country. Failure to 'tick the box' or providing employers with false information is grounds for retraction of a job offer, or dismissal if discovered post hiring. The negative consequences of this disclosure requirement have led to a 'ban the box' campaign in many jurisdictions, in order to give ex-offenders a fair and equal opportunity to seek employment.

Traditionally, research conducted in Ireland revealed that employers routinely ask applicants to declare criminal record and display a marked reluctance to employ an applicant with a record to his name (Butler 1999). A study carried out by the Irish Business Employers' Confederation back in 2002 indicated that only 52% of employers would consider employing an ex-offender.[45] This figure increased to 63% if there was

[44] The Irish Association for the Social Integration of Offenders (IASIO) provides Irish employers with such support and information.

[45] See Lawlor, P. and McDonald, E. *Story of Success: Irish Prisons Connect Project, 1998–2000* (Dublin: The Stationary Office, 2001), at pp. 40–41. This study is referred to in the 2004 Report commissioned by the Department of Justice, Equality and Law Reform: Kilcommins, S., McClean, E., McDonagh, M., Mullally, S. and Whelan, D. *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* (University College Cork, Law Department, 2004).

some type of support provided, such as contact with the Probation Service. Furthermore, of these employers, most mentioned low-level positions like manual work, with only 19% saying they would consider the qualifications of the individual before considering them for a position. Ex-offenders in this jurisdiction then, often face the same discrimination highlighted in research elsewhere. As a result, many individuals may conceal their past convictions and consequentially face dismissal from the job if the employer subsequently discovers it.[46] More recent engagements with employers, however, convey an improved attitude towards the hiring of ex-offenders (such as the Mountjoy expo) and the value of such engagement has been noted at governmental level. It is widely acknowledged that prejudicial exclusion of ex-offenders from employment is detrimental on both an individual and societal level. Links with businesses and prospective employers have been deemed vital in combating the stereotypical negative attitudes towards ex-offenders.

Legal steps have been taken in many common law jurisdictions in order to alleviate prejudicial stereotyping. Many jurisdictions have adopted an anti-discrimination approach. This essentially means that if an individual is applying for a job it would be unlawful to unreasonably discriminate against the individual on the basis of having a criminal record. Reasonable discrimination is permitted in order to protect vulnerable members of society. Common law jurisdictions like Canada, Australia, and New Zealand have all made provision for anti-discrimination measures, in addition to spent conviction schemes. The effect of combining these two approaches is that the anti-discrimination legislation is a reinforcement of the spent conviction scheme, but remains separate from it. Civil jurisdictions like Spain and Portugal also contain broad anti-discrimination measures. Back in 2002, the National Economic and Social Forum (NESF) recommended that in Ireland the Employment Equality Act 1998 should be amended to include protection from discrimination on the grounds of a criminal record.[47] The idea was teased

[46] The factor of criminal record is not one of the grounds protected under the Unfair Dismissals Acts 1977–2005.

[47] NESF (2002) *Re-integration of Prisoners*, at pp. 91–92. A highly prudent suggestion has been made under the White Paper on Crime, to introduce tax incentives for employers in order to entice them to employ ex-offenders: White Paper on Crime, Consultation Process, *Discussion Document*

out further in a report commissioned by the Department of Justice, Equality and Law Reform, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*, which documented a comparative review of international employment legislation prohibiting discrimination on four grounds; socioeconomic status, trade union membership, criminal conviction/ex-prisoner/ex-offender, and political opinion. The report was intended to provide a knowledge basis which would assist the Department of Justice in deciding whether it would be desirable to include these grounds in addition to discriminatory grounds existing under the Employment Equality Act 1998.[48] However, none of these grounds formed part of the amendments under the Equality Act 2004, and are still not included as discriminatory grounds in employment law in Ireland.

Spent Conviction Schemes

A fundamental aspect of the problem highlighted above is that a criminal conviction remains permanently on the individual's record, without any opportunity for expungement of that record. The Gardiner Report (1972) in the UK examined the barrier this imposed for individuals and recommended that in the interests of rehabilitation, assisting ex-offenders to gain employment was crucial (Justice 1972). The report led to the Rehabilitation of Offenders Act 1974, which provided for one of the earliest common law expungement schemes. Expungement schemes essentially allow an individual not to disclose his past convictions in certain circumstances. Usually, such schemes are limited and include exclusions on the basis of the length of the sentence, of certain offences and for certain sensitive posts. There are also exclusions in terms of admissibility of evidence in criminal proceedings and criminal investigations. Furthermore, the schemes usually require a rehabilitation period in which no further offences are committed.

1: Crime Prevention and Community Safety (Dublin: Department of Justice, Equality and Law Reform, 2010), at p.18.

[48] The existing grounds of discrimination are as follows: gender, age, marital status, family status, sexual orientation, religious beliefs, disability, race, and member of travelling community.

The rationale behind spent convictions begins with an acknowledgment that past record is not always indicative of likely future behaviour. This was the view of the Law Reform Commission of Australia, who considered old convictions to be irrelevant to most decision-making processes relating to the individual.[49] The New Zealand[50] and Canadian[51] systems also considered that individuals should be able to put old convictions behind them and not have them reflect negatively on their character. This idea was firmly established in the UK under the Rehabilitation of Offenders Act 1974, where a 'rehabilitation' period was considered significant. The Gardiner report felt that for ex-offenders who had settled down and become responsible citizens, "society too has to accept that they are now respectable citizens, and no longer hold their past against them."[52] The aim, at least in the employment context, was to "restore the offender to a position in society no less favourable than that of one who has not offended."[53]

The idea behind expunging a record was not to erase the conviction but rather to limit the effect that it would have.[54] Those who oppose the schemes have argued that it is an 'institutionalised lie'[55] that distorts the public record, and furthermore, that it constitutes a serious curtailment of the right to freedom of information and expression (in relation to matters of public record). With regard to the latter argument it must be noted that there is no general public right of access to criminal records and in any event the public's right to know must always be balanced with the individual's right to privacy. In relation to the former charge, as the Irish Law Reform Commission has argued, such concerns are unfounded, as it is not a case of wiping the slate clean. The conviction record remains,

[49] Australian Law Reform Commission, LRC 37-1989, *Report on Spent Convictions* (ALRC, 1989), at p. 12.

[50] The Criminal Records (Clean Slate) Act 2004.

[51] The Criminal Records Act 1985, section 5(a)(ii).

[52] Justice (1972) op. cit., at p. 5.

[53] Justice (1972) op. cit., at p. 5.

[54] The Police, the Courts, and other authorities working in the public interest still have access to criminal record.

[55] Mayfield, M. 'Revisiting Expungement: Concealing Information in an Information Age' (1997) *Utah Law Review* 1057. See also Greenslade, B. 'Eyes open policy: employment of a person with a criminal record' (1986) *New Zealand Law Journal* 386.

but it is the obligation to disclose that it is limited (Law Reform Commission 2007).

It would seem to be an unduly harsh penalty to never allow ex-offenders to escape from the mistakes of their past, and it would also appear to be counterproductive from the point of rehabilitation. The Home Office report, *Breaking the Cycle* observed that there are no winners if ex-offenders are excluded from the labour market: "Not those with a criminal record denied the opportunity to put their past behind them. Not employers who lose out on committed and conscientious employees … [a]nd certainly not our communities, because denying employment opportunities to people with a criminal record increases the risk of re-offending.… Opening up employment to people who want to put their offending behind them will make our communities safer and more productive."[56]

The idea of introducing a scheme for expunging criminal records for adult offenders began to reverberate the Irish legal consciousness in 2007. Prior to this, the Children Act 2001, section 258, provided that offences committed by those under the age of 18 can be considered spent, subject to certain conditions. Three years must have lapsed since the date of the conviction and no further offences must have been committed during this period. The provision applies retrospectively and thus has significant effect. The provision does, however, include limitation on its scope in terms of offence-type. A conviction cannot become spent if the offence is one that has been tried in the Central Criminal Court, thus excluding very serious crimes like murder, rape, and other serious sexual offences. In terms of spent conviction schemes generally, the Irish provision for juvenile offenders is more liberal and broad-reaching.[57] The consequence for young offenders is that once the conviction becomes spent under the Act, they do not have to disclose this information under any circumstance, even if seeking employment in sensitive areas such as employment involving supervision of children.

[56] Home Office, *Breaking the Cycle - a Report on the review of the Rehabilitation of Offenders Act 1974* (London: Home Office, 2002), at p. 2.

[57] Note that s.258(4)(d) provides that the Minister for Justice may by order exclude or modify the application of the 2001 Act. No exclusions or modifications have been made to date.

In the case of *Cox v Ireland*,[58] the Supreme Court upheld the finding of unconstitutionality on the part of the Offences Against the State Act 1939, section 34, which prohibited a person convicted of certain scheduled offences from holding a job in the public service for seven years after the conviction. The Supreme Court considered this provision to be an infringement of the right to earn a livelihood under Article 40.3 of the Irish Constitution.[59] In applying a proportionality test, the Court felt that the section was impermissibly wide and indiscriminate.[60] The Irish Law Reform Commission considered this case to be relevant to the issue of lifelong criminal records. The Commission felt that the judgement by the Supreme Court could be used to ground an argument that in the current situation the Irish law fails to adequately protect the right to earn a livelihood, since a criminal record carries with it "continuous and disproportionate penalties which are unjustified and unsubstantiated by any considerations of public safety."[61] A lifelong criminal record is not a proportionate response to most offending behaviour. Therefore, taking on board the need to ensure public safety, it recommended that the law should be changed to recognise the adverse and unfair consequences of a criminal record and reflect the idea that it is not necessarily relevant to all decision-making with regard to the individual. The recommendations of the Commission initially resulted in a Spent Convictions Bill, but it was sidelined in favour of producing more crime control-oriented bills. Eventually in 2016, after much lobbying by interest groups (the Irish Penal Reform Trust in particular) the government signed into law the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016. This Act signals an important milestone in the rehabilitation of offenders in Ireland, bringing this jurisdiction into line with most other EU Member States.

Under the Act, a range of minor offences become automatically spent after seven years, meaning that a conviction for an offence covered under the Act does not have to be disclosed after seven years, except in certain

[58] *Cox v Ireland* [1992] 2 I.R. 503

[59] *Cox v Ireland*, at p. 522.

[60] *Cox v Ireland*, at pp. 523–524.

[61] *Cox v Ireland*, at p. 33.

circumstances. The seven years is from the date the custodial or non-custodial sentence becomes operative. Generally, no more than one conviction may be regarded as spent. More than one conviction will mean that none of the convictions can be regarded as spent. However, if a person is convicted of two or more offences committed simultaneously or arising from the same incident the convictions can be regarded as one single conviction. Section 5 of the Act sets out the convictions which may be regarded as spent after 7 years, including offences in the District Court and those which result in a term of imprisonment of 12 months or less. Serious offences like murder and sexual offences are excluded.[62]Certain jobs and professions are also exempt from the proposed scheme, meaning full disclosure will be required even where the conviction would otherwise have been spent.[63] Disclosure may still be required in court proceedings where a judge considers it applicable, although the Act now generally provides that spent convictions are not to be raised in the context of misconduct evidence or under cross-examination of an accused at trial. Disclosure must still be made, however, in the context of Garda interviews, in applying for citizenship, when leaving and entering the state, and the Act does not apply to employment relating to children or vulnerable adults, which is governed by the relevant vetting legislation.

While considered to be a welcome and long overdue addition to Irish law, many of the Act's restrictions have drawn severe criticism, with many interest groups arguing that the scheme does not go far enough in allowing ex-offenders to leave the sins of their past behind. Both the Irish Penal Reform Trust (IPRT 2008) and the Irish Human Rights Commission (IHRC 2009) have questioned the rationale behind many of the restrictions. When considering the proposal for reform back in 2007, the IHRC recommended that the legislation should provide shorter periods of rehabilitation, proportionate to the sentence imposed rather than a generally applicable rehabilitation period which may be too long in many circumstances and fail to offer any real incentive to ex-offenders.[64] The

[62] The exclusions in the act are similar to the provisions in the UK and elsewhere. Despite taking a restricted approach, it is still believed that this will catch a significant number of individuals given that prison sentences tend to be short, with the majority under six months.

[63] Schedule 2 of the Act.

[64] IHRC (2009), at pp. 9–10.

IPRT has also questioned the rationale of excluding categories of offenders from the parameters of the scheme. It is argued that the exclusion of any category of offender should be supported by empirical evidence and in the absence of such evidence the singling out of any category including sex offenders seems arbitrary.[65] While appreciating that this may indeed be true, the change implemented in Ireland by virtue of the 2016 Act is an extremely positive step in the right direction. The Minster for Justice and Equality at the time, Frances Fitzgerald, in announcing the publication of the Act acknowledged that it

> should be of particular benefit to ex-offenders, who often find their path to employment blocked, once they admit to a previous offence. Society's interests and those of the offender who mends his or her ways can coincide. It is in everyone's interest that offenders who have paid their debt to society and want to leave crime behind are encouraged to do so.[66]

In combination with post-release supports in education and other areas, spent convictions schemes can offer a meaningful incentive to offenders to lead law-abiding lives, and to some extent combat the unfair prejudice they may otherwise face from employers.

The Value of Employment for Ex-offenders and Society

It is universally acknowledged that employment is a key factor in the rehabilitation of offenders. Research has consistently revealed that the likelihood of reoffending is strongly associated with finding stable employment of sufficient income and quality (Uggen 2000; Allan & Steffensmeier 1989). It has been documented that unemployed ex-offenders are almost twice more likely to reoffend than those who have gained full time or part time employment.[67] Those who have served time

[65] IPRT (2008), at pp. 3–4.

[66] http://www.justice.ie/en/JELR/Pages/PR16000094 (Last accessed March 2017).

[67] Law Reform Commission (2007) op. cit. See generally Home Office, 2001. *Building bridges to employment for offenders*, *Research Study 226.* London: Home Office; McCullagh, C. (1992).

in prison are particularly at risk.[68] In Ireland, high recidivism rates[69] suggest that for many the search for legitimate employment has been unsuccessful. A study by O'Donnell et al. in 2008 found that unemployment is indeed a significant factor contributing to recidivism.[70]

The reality is that offenders often come from disadvantaged backgrounds with little or no education or skills. The result is frequently exclusion from the labour market, a problem augmented by a criminal and especially a prison record. A criminal record can act as a further barrier to accessing stable employment in the long term. The stigma of a criminal record may follow people for years after they have 'paid' for their offence and can be difficult to shake. Anti-discrimination policies and spent convictions schemes are a worthy step in eroding some of the legal barriers to integrating with society. They acknowledge the right of the individual not to be unfairly discriminated against,[71] the right to earn a livelihood, the right to privacy,[72] and especially to be treated proportionately. Widening employment opportunities for ex-offenders, and encouraging employers to take them on, is considered to be of benefit for both the individual and society alike, by allowing integration into mainstream life, thereby reducing offending behaviour.

Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland *Irish Journal of Sociology* 2, 1–19; O'Donnell, I (2002). The Re-integration of Prisoners. *Administration,* 50 (2), 80–96.

[68] See generally O'Donnell (2002) op. cit.

[69] A study in 2008 revealed that almost half (49.2%) of offenders are reimprisoned within four years of release. O'Donnell, I., Baumer, E.P., and Hughes, N. (2008) Recidivism in the Republic of Ireland. *Criminology and Criminal Justice* 8, 123–146. A study in 2013 by the Irish Prison Service found similarly high rates of recidivism, with lack of employment being a key factor: Irish Prison Service. (2013). *Recidivism Study* Dublin: Irish Prison Service, Dublin.

[70] O'Donnell et al. (2008) op. cit. at pp. 134–135.

[71] Article 14 of the ECHR prohibits discrimination on any ground in the enjoyment of the rights and freedoms under the Convention. Under the Article, treatment is discriminatory if it has 'no objective and reasonable justification' or if there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (*Lithgow and Others v The United Kingdom*, Judgement of 8 July 1986, (1986) 8 E.H.R.R. 329, at para. 177). It could be argued that requiring disclosure of a criminal record may give rise to discriminatory treatment under Article 14.

[72] The right to privacy is an unenumerated right under Article 40.3 of the Irish Constitution, which can only be restricted for the common good. Article 8 of the ECHR also provides for this right, interference with which can only be justified on the grounds that it is necessary in a democratic society in the interests of national security, public safety, or for the prevention of disorder.

Such considerations must of course be balanced with important public concerns. For employers, there is the issue of informed decision-making and potential liability. It could be argued that spent conviction schemes disproportionately affect employers and undermine the trusting nature of the employer-employee relationship. There is also the need to protect victims and vulnerable groups from the risks posed by certain types of offenders. It is acknowledged that some ex-offenders may necessarily be excluded from certain types of employment in the interests of public protection. Vetting by An Garda Siochana, for example, reduces the risk of convicted sex offenders working with children and/or vulnerable adults in the public sector. Such discriminatory treatment can be considered a legitimate aim and proportionate to the aim sought to be realised. It should also be noted here that revelation of past convictions does not necessarily mean that the individual cannot or will not be employed. It means that such information can be used in the decision-making process.

One final practical issue which must be noted here is the importance of making ex-offenders (and indeed employers) aware of the implications of the 2016 Act. Earlier studies of the Rehabilitation of Offenders Act 1974 in the UK revealed that over 90% of ex-offenders had little or no knowledge or understanding of their position under the 1974 Act and this broad lack of knowledge also pertained to employers (Apex Trust 1989).[73] The consequence of this being that those entitled to benefit under those provisions, as amended, were not in fact aware of how the expungement provisions affected them. Despite the silent appearance of the 2016 Act in Ireland and the underwhelming media coverage of it, some efforts have been made to inform those who may be affected by the provisions. The Irish Penal Reform Trust has produced an informative booklet for ex-offenders, details of the Act have been added to the Citizens Information website, and many solicitors' firms across the country have also added a note on the implications of the provisions.

[73] This problem was alluded to in Ireland in relation to s.258 of the Children Act 2001: comments of Eugene Reagan to Conor Lenihan (in relation to Garda vetting), 196 Seanad Debates 2 July 2009.

Access to Housing

While unemployment is a common experience among many ex-offenders, homelessness can exacerbate the difficulties in entering the labour market. Homeless individuals tend to have poor qualifications, low basic skills, and chaotic lifestyles, and unstable accommodation further impedes their ability to access and hold a steady job.[74] The lifestyle of homeless ex-offenders and their heightened susceptibility to return to crime and drug abuse acts as a barrier to breaking the cycle of crime and homelessness. In Ireland, research conducted by Seymour and Costello has documented the problem of unemployment for homeless ex-offenders as identified by the individuals themselves. One prisoner in the study commented: "You haven't a chance of getting a job when your homeless…. I can't get out of the circle of crime because of not having somewhere to live…. No one will take you on when you live on the streets."[75]

Homelessness[76] as an issue in the aftermath of conviction is not confined to the limited scope of accessing employment. It is an issue in and of its own right, exacerbating the marginalisation of ex-offenders within society. Prisoners are particularly at risk of homelessness upon release.[77] Organisations like Focus Ireland[78] and PACE[79] who work with homeless

[74] Hickey (2002) op. cit. at pp. 13–14.

[75] Male 250, Aged 34, Remand prisoner, Cloverhill, sleeping rough on committal, in Seymour and Costello (2005) op. cit. at p. 61.

[76] Homelessness is defined under the Housing Act 1988 and has been characterised as comprising poverty, social exclusion, disengagement, and isolation: Seymour, M. (2007). Homelessness and Offending: Marginalisation, Segregation and the Challenges to Social Inclusion'. Presented at the 10th Annual Conference of the Association for Criminal Justice Research and Development: Community, Custody and Aftercare, The Journey Towards Social Inclusion: available at www.acjrd.ie (last accessed December 2016).

[77] The issue was most recently reiterated by the Houses of the Oireachtas Joint Committee on Justice and Equality (2018) *Report on Penal Reform and Sentencing*. Available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/reports/2018/2018-05-10_report-on-penal-reform-and-sentencing_en.pdf (Last accessed May 2018).

[78] Focus Ireland was originally established in 1985 to target the needs of homeless women in Dublin, and has expanded to provide a variety of services for homeless persons, including day centres and emergency accommodation.

[79] PACE is an organisation established in 1969 exclusively for ex-offenders. In partnership with other agencies (e.g. the Probation and Welfare Service) it provides services like education and train-

ex-offenders have highlighted that homelessness can be both a cause and a consequence of criminal behaviour, and that there are a variety of factors which can contribute to this enduring issue. It has become clear through studies done in this jurisdiction that the composition of Irish prisons is disproportionately made up of those from disadvantaged backgrounds, who lack education and have histories of unemployment (O'Mahony 1997, 1998; Carmody & McEvoy 1996). It has been shrewdly observed that "for most Irish prisoners, the loss of liberty entailed by imprisonment amounts to little more than the barely-noticed presence of iron bars, because their life experience outside prison is equally one of profound lack of freedom-it is an experience of coercion, limitation, rejection and failure almost wherever they turn."[80] Many individuals are trapped in a cycle of poverty and deprivation, and homelessness has resulted from such poverty, family breakdowns, and often drug abuse.[81] The majority of homeless prisoners in a study by Seymour had a diverse and lengthy history of both homelessness and imprisonment prior to their current committal, with 90% of those homeless on committal having been in prison in the previous five years and 24% having been in on six or more occasions.[82] In general, studies in Ireland and elsewhere reveal that the types of crimes committed by homeless offenders prior to committal tend to be of a non-serious, survivalist nature, including begging, shoplifting, and prostitution.[83] Their visibility and presence on the streets becomes a factor in processing by both the police and the courts (Hartman McNamara et al. 2013; O'Donnell 1998).

Homelessness remains a problem post-conviction, particularly following release from prison. Even those who may have not experienced homeless prior to incarceration can find themselves facing this issue as a consequence of their incarceration. Time in prison profoundly increases

ing and supported accommodation, with the intention that such support will break the cycle of prison and recidivism.

[80] A statement by Father Peter McVerry reported in O'Mahony (2005) op. cit. at p. 155.

[81] See also Kingston, S. and Webster, C. (2015) The most "undeserving" of all? How poverty drives young men to victimisation and crime. *The Journal of Poverty and Social Justice*, 23 (3), 215–227.

[82] Seymour (2007) op. cit.

[83] See also Payne, J., Macgregor, S., and McDonald, H. (2015) Homelessness and housing stress among police detainees: Results from the DUMA program *Trends & Issues in Crime and Criminal Justice*, 492, 1–8.

the individual's risk of becoming homeless. Homes may be lost as a result of incarceration, due to inability to repay a mortgage. Conversely, privately rented accommodation and local authority housing can be lost on entry into imprisonment and can be extremely difficult to regain on the outside. Often, prisoners are given little or short notice of their release and compounded by the fact that access to social welfare can be delayed upon leaving prison this can force many to live on the streets or in homeless hostels. The undesirability of this situation can lead many to contemplate criminal activity just to be able to gain access to the relative security of prison life once again. In a study of homeless amongst Irish women in 2015, many of the participants viewed imprisonment as preferable to hostel life as it provided better facilities and supports (Mayock et al. 2015).[84]

The problem of homelessness among ex-offenders is exacerbated by the current economic environment and housing policy in Ireland. Homelessness generally has become a topical issue in Ireland in the past two years (Holland 2018). Accusations that the Irish government is failing in its obligation to fulfil the most basic needs of the homeless have led to calls for the right to housing to be incorporated into either the Bunreacht na hÉireann (Irish Constitution) or legislation (Burns 2018).

Accessing public housing may also be more problematic for certain categories of offenders particularly drug offenders, sex offenders, and those who lack family support during and after their sentences. In the US, a drug conviction can lead to a lifetime ban on welfare assistance, and those who violate parole or probation conditions are 'temporarily' ineligible for food stamps, social security income benefits and public housing.[85] Certain offenders are also excluded from federally assisted public housing and such housing may be denied in relation to drug-related or violent criminal behaviour (i.e. behaviour that would adversely affect other residents' health safety or peaceful enjoyment of the property). Sex offenders who are subject to registration for life are permanently ineligible for federally assisted housing, and restrictive housing

[84] See also Edwards, E. (2018, January 17) Women being "thrown" into homelessness after leaving prison. *The Irish Times*.

[85] See Travis (2002), at p. 23. This can be particularly harsh on ex-offenders with children.

policies operate in the US in relation to sex offenders generally (Zygoba & Ragbir 2016).

In Ireland, there is no general exclusionary scheme or housing areas where certain categories of offenders may live and work (such as in the US). Local authorities and housing committees are permitted, however, to exclude tenants and potential tenants on public safety grounds.[86] Drug offenders and sex offenders are especially censured and feel the effects much more than other categories.[87] Such individuals can be excluded from residing in a particular area on the basis of the views of ad hoc committees who are against them living in their area. In Seymour and Costello's study, local authorities reported difficulties in housing sex offenders due to the fact that accommodation was strongly family orientated.[88] Many of the support housing offered to ex-prisoners can also exclude drug offenders and sex offenders.[89] In some cases at least, such exclusion can be a disproportionate consequence of conviction and prolongs the punitive measures experienced by the individual.[90] Moreover, interviewees (service providers) in a Report by the Irish Penal Reform Trust all identified the provision of suitable accommodation as being especially crucial to working with sex offenders in the aftermath of incarceration,[91] and this has been identified by statutory agencies as an

[86] In general, the Housing (Miscellaneous Provisions) Act 1997 permits local authorities to exclude tenants or potential tenants on the basis of antisocial behaviour, which is defined in broad terms under the Act. Committing offences like intimidation, assault, and arson can also result in exclusion or removal from local authority housing.

[87] It is observed that sex offenders in particular are a group who, though not often homeless before committal, are at risk of homelessness on release due to rejection from family and friends. The homelessness experienced by these individuals is more likely to be temporary as they usually possess the skills (due to relatively stable upbringing) to acquire housing again.

[88] Seymour and Costello (2005) op. cit., at p. 117.

[89] For example, none of the transitional and supportive housing facilities provided by PACE accept convicted sex offenders.

[90] It might be argued that excluding drug offenders and sex offenders is legitimate to social order and protection, but this is not substantiated by any empirical evidence. While evidence-based decisions may be proper, providing blanket exclusion to these categories of ex-offenders is not proportionate. An unintended consequence may also be to push the offender underground where criminality fosters at a greater intensity. At the very least if exclusion from one area is legitimate on an individual-based assessment the offender should be offered alternative accommodation in another area.

[91] Martynowicz and Quigley (2010) op. cit., at p. 46.

area requiring urgent attention.[92] Housing instability is consistently associated with recidivism and may actually undermine the purpose of notification laws, thus compromising public safety rather than enhancing it (Levenson & Zgoba 2015; Steiner et al. 2015; Rydberg et al. 2014; Levenson et al. 2013).

The problem of homelessness post-conviction incorporates a range of complex issues, from homelessness prior to conviction, time spent in prison, and other issues such as substance dependency, poor family relations, and mental health issues.[93] A criminal record, or rather more importantly a prison record, is but one contributing factor here. Nonetheless, it is an important one, and given that homelessness is strongly associated with offending behaviour, it should be recognised as a potential causative factor in the risk of reoffending among such individuals.

Travel

Access to travel can also be negatively affected by a criminal past. Travel is frequently linked with gaining employment and thus an obligation to disclose in the context of travel can also negatively impact job opportunities for ex-offenders. Travel has become an integral aspect of social life in modern times. People travel for holidays, business trips, and for prolonged stays in other counties where they find employment and set up

[92] Department of the Environment, Heritage and Local Government, *The Way Home: A Strategy to Address Adult Homelessness in Ireland 2008–2013* (2008), available at: http://www.environ.ie/en/Publications/DevelopmentandHousing/Housing/FileDownLoad,18192,en.pdf. It should be noted however, that the Multi-Agency Group (MAG) established in 2004 has undertaken work to tackle the issue of homelessness among this ex-offender group. See Department of Justice and Equality (2009) *The Management of Sex Offenders: A Discussion Document.* Dublin: Department of Justice and Equality, at p. 12.

[93] See Seymour and Costello (2005). In combating homelessness, a multi-agency approach is called for. It has been recognised that homelessness will not be resolved through the provision of housing or shelter alone but rather in conjunction with other services, such as addiction or mental health treatment, education, training, and support. Ex-offenders also need to be made aware of services available to them. To date, such information has been ad hoc and sporadic, leading to a lack of certainty amongst ex-offenders and lack of effectiveness in the provision of such services. This problem is exacerbated by the shortage in housing services available for homeless offenders.

homes. Part of the travel process involves applying for passports and visas to government agencies, in addition to checks at airports. This is so as to provide verification of who a person is, why they wish to enter the state and other personal information. It is a practice that could be viewed in the context of what Nicolas Rose termed the 'securitisation of identity.'[94] As part of this identity verification, all relevant personal information must be disclosed to the authorities including the existence of past convictions. The effect can be an exclusion of the ex-offender from availing of the travel opportunities enjoyed by others.[95]

Travelling Abroad

The right to travel has been recognised as a constitutional right in Ireland. In the case of *Ryan v AG*,[96] the court indicated that it was a personal right of the citizen to move freely within the State. Subsequently, the right to travel abroad, and obtain a passport in this regard, was recognised in the case the *State (M) v AG*.[97] Even though there is no express requirement for citizens to obtain a passport to travel abroad, the Department of Foreign Affairs is given the responsibility of granting passports[98] and, in practice, admission to foreign states depends upon the production of this document.[99] The right is not an absolute one and freedom to travel can be denied or restricted if public order or the common good require it.

The conditions for the issuing of passports are not governed by any statute or regulations. The discretion pertaining to such decisions is

[94] See Rose (2000). E-passports have also been introduced in many countries including Ireland (Passport Act 2008) to augment this securitisation of identity. Such passports include biometric data comprising information, including relating to distinctive physical characteristics and measurements of such characteristics. So far, fingerprints are not included.

[95] Disclosing a criminal record will not always preclude the individual from travelling, but it is likely that many will be denied.

[96] *Ryan v AG* [1965] I.R. 294.

[97] *State (M) v AG* [1979] I.R. 73.

[98] The Ministers and Secretaries Act 1924.

[99] Citizens of Ireland and the UK can move freely between these states without the requirement to carry a passport and can work freely in the other's labour market as though they were citizens of that country: Ingoldsby, B. 'Regular Migration to Ireland,' Paper delivered at the Incorporated Law Society Seminar: Rights to reside in Ireland, Blackhall Place, Dublin, 14 May 2004.

therefore extremely wide albeit subjected to judicial review. However, if the decision is made on grounds of national security or public policy, then the Courts are unlikely to go against the decision of the government. In the *State (M) v AG*, Finlay J referred to the US Supreme Court's recognition of a constitutional right to travel in *Kent v Dulles*[100] and then to a number of other cases including *Haig v Agee*,[101] where Burger CJ said that the right to travel was subordinate to national security and foreign policy considerations and subject to reasonable regulation. In Ireland, section 12(1) of the Passport Act 2008 sets out the circumstances where the Minister for Foreign Affairs 'shall' refuse a passport. These include where the person is likely to prejudice national security or the security of another state (section 12(1)(c)(i)), endanger public safety or order (section 12(1)(c)(ii)), and where it would be contrary to the common good (section 12(1)(c)(iii)). A passport shall also be refused where the Minister has been notified that a Court has ordered the person to surrender their passport.[102] Hence, included in the personal information required, a criminal record can be considered by the relevant authorities, and may often result in the refusal of a vital travel document to an ex-offender. A decision to exclude will undoubtedly be based upon the type, nature, and seriousness of the offence which forms the past conviction.

It is important to note that vindicating the right to travel does not guarantee entry to a foreign state. It is the destination country that regulates the entry and stay of individuals into its jurisdiction. Most countries will usually request a criminal record check of the individual seeking to enter and spent convictions legislation will have no effect upon the duty to disclose. Ireland is a visa-waiver country, so most people travelling from here to the US, for example, will be eligible for a visa. There are a number of exceptions which include people in certain jobs, people who overstayed a student or holiday visa in the US, and people who have a criminal conviction. A typical non-immigrant visa application asks the following questions: '*Have you ever been arrested or convicted of any offence*

[100] *Kent v Dulles* (1958) 357 U.S. 116.

[101] *Haig v Agee* (1981) 453 U.S. 280.

[102] For example, as a condition of bail. A passport may also be cancelled for any of the reasons in s.12(1).

(even if pardoned for it)? 'Have you ever unlawfully sold/distributed drugs?' If the answer is yes, this will not automatically exclude the person, but they may be required to personally appear before a consular officer who will then determine the issue on the merits of the case. Type and seriousness of the offence will be significant. A typical application for an immigrant visa provides that a person is excluded who has been convicted of a crime of moral turpitude. The most commonly mentioned crime is the distribution of drugs and also having been convicted of two or more offences of which the total sentence is five years or more. Furthermore, the spouse, son, and daughter of a drug trafficker, who knowingly benefited from the trafficking, will also be denied access to a visa.[103] Applications for American visas are made to the American Embassy in Dublin.[104] Although not all those with past convictions will be denied, it is fair to say that a large portion of them are turned down.[105]

Travelling to Australia can also be problematic for those with a criminal past. In applying for a visa to visit or stay in Australia, an applicant must satisfy the Australian Department of Immigration and Citizenship of his/her good character, and to this end must fill out a Fact Sheet detailing character.[106] A person will fail the character test where any of the following are present: a substantial criminal record; if one has or has had association with an individual, group, or organisation suspected of being or having been involved in criminal conduct; having regard to past and present criminal conduct the person is not found to be of good character; having regard to past and present general conduct the person is not found to be of good character; if there is a significant risk that the person will engage in criminal conduct in Australia (e.g. harassment, stalking, molestation) and present a danger to the Australian community.[107] With regard to what constitutes a substantial criminal record, this is defined in the

[103] All this information is available on the US Embassy website: www.dublin.usembassy.gov.

[104] It should be noted that the final say on entry to any country lies with security control in the destination airport.

[105] 'Travelling to the U.S. from Ireland,' RTE Travel (www.rte.ie/travel/).

[106] Fact Sheet 79 is known as the Character Requirement under section 501 of the Migration Act 1958. It is linked to the class of visa being applied for through the Public Interest Criteria (PIC) 4001. Note that the onus is on the applicant.

[107] This information is available on the Australian Government website: www.immi.gov.au.

Migration Act 1958, as amended, as being sentenced to death or life imprisonment, being sentenced to 12 months or more imprisonment, having two or more terms of imprisonment (where the total is two years or more) and an acquittal for an offence on grounds of unsound mind or insanity (and the person has been detained in a facility/institution as a result). Failing the character test does not necessarily mean refusal of the application, but is taken into account in deciding whether to refuse or cancel the visa.[108] A right of appeal is reserved and may be made to the Administrative Appeals Tribunal (AAT).[109] Such a right of appeal does not exist where the decision (to refuse or cancel the visa) has been made by the Minister for Immigration and Citizenship. If a visa has been refused or cancelled on the grounds of past criminal record, then the individual is permanently excluded from Australia. Furthermore, past character is also relevant in an application for Australian citizenship. In applying for citizenship based on descent, the individual must show that they are of good character and to this effect must reveal any convictions received, whether in Australia or elsewhere.[110] Moreover, any convictions that might otherwise be considered spent must also be declared for the purpose of assessing the application.[111] Thus, criminal record can be an extremely important factor when seeking an Australian visa, and while the existence of such a record does not lead to automatic expulsion or refusal of a visa, the prominence given to it in the application process means that it is regarded as a highly important and significant factor.

One other issue is that, in some circumstances, a police certificate of character may be required before applying for a visa to some countries. The individual seeking the visa must apply to their local Garda station for such a certificate, which will inevitably involve a record check by the Gardaí. The certificate will then contain information of any past convic-

[108] Other factors that are taken into account in relation to an existing visa include the following: protection of the Australian community, whether the individual has been living in Australia as a minor, the length of time living lawfully in Australia, family ties, age, health, and education.

[109] Usually, such appeals are for persons already living in Australia, but those applying for entry may also have their application reviewed if they have a sponsor or nomination in Australia.

[110] A conviction in this context is defined as a guilty verdict in a court of law, resulting in imprisonment, a fine, or a good behaviour bond. Other application forms (e.g. for a parent visa) also require proof of good character.

[111] This information is available at www.immi.gov.au/allforms/pdf/118.pdf.

tions and/or if the individual has ever come to the attention of the Gardaí.[112]

Entering the State

Ireland has its own procedure regarding the entry of foreign nationals into the state.[113] As a member state of the EU, Ireland is obliged to offer freedom of movement to citizens of other member states for up to three months with a passport. The entry, stay, and removal of non-nationals are not covered under the Treaties and there is no general right pertaining to them. The Aliens Order 1946, article 5, provides that one of the grounds for refusing entry to a non-national is that the person has been convicted of an offence punishable by imprisonment for at least one year. Application for a visa is made to the Department of Foreign Affairs. The decision on an application is taken by or on the authority of the Minister for Justice, Equality and Law Reform. Included in a typical visa application for entry to Ireland are the following questions: *'Do you have criminal convictions in any country?' 'What was the conviction for?' 'Where and when were you convicted?' 'What was your sentence?'*[114]

Obliging individuals to disclose their criminal record in relation to travel applications is further evidence of the unanticipated ancillary measures that attach to a conviction. While denying passports and/or entry to some ex-offenders may be justified in the interests of security and public policy, it is important that the exclusion is proportionate to that aim. Otherwise it amounts to arbitrary discrimination that cannot be justified or substantiated by any consideration of public safety. Stereotypical views of ex-offenders—as persons who always pose a risk and are likely to reoffend—promote the continuation of punishment against them and contradict the aims of rehabilitation and reintegration.

---

[112] A Certificate of Character will not be issued for employment purposes but may be issued in relation to the setting up or registering of a business in another EU member State. Information available at www.citizensinformation.ie.

[113] The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 does not apply to disclosure in this context.

[114] This information is available on the Government website (www.gov.ie).

Miscellaneous

The range of circumstances where a criminal record impacts upon decision-making is not restricted to the areas above. It can be taken into account in many other areas and can often be used to deny the individual of full citizenship status and some of the rights that pertain to it. For example, a criminal record can lead to deportation, exclusion from welfare assistance (e.g. drug offenders can be excluded from receiving public assistance and food stamps), ineligibility for student loans, a prohibition on fostering or adopting, disqualification from voting, and ineligibility to be elected to public office or serve on a jury. Many of these long term effects of a conviction are present in Ireland. A criminal record can affect an ex-offender in terms of public service, foreign travel, obtaining licences and insurance. In addition, individuals who have offended in the past can be ineligible for jury service in Ireland.

Public Service and Jury Membership

A criminal record is a factor which is considered in relation to all posts involving the deployment of some public service. The Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 provides that certain types of employment are excluded from the provisions of the scheme, including civil and public servants. While this does not preclude ex-offenders from holding public office or from becoming a member of the public service, disclosure of the record may well result in such. Moreover, not only does a criminal record affect the individual's access to such jobs, it could also affect their position in an existing job. A civil servant who is convicted of an offence must disclose this fact to his/her Personnel Officer. Disclosure is also required where the person is given the benefit of the Probation Act when charged with a criminal offence.[115] In certain circumstances, this may have implications for his or her official position,

[115] The Probation Act can be applied (i) where summary proceedings for an offence are brought, the case is proven and the Court decides not to proceed to conviction or (ii) on conviction on indictment of an offence which is punishable by imprisonment and the Court places the convicted person on probation rather than imprison him or her.

probably depending upon the type and seriousness of the offence committed. The Civil Service Codes of Standards and Behaviour provides that the departments or offices involved should exercise discretion in dealing with cases in the light of all of the merits of each case and under the Data Protection Acts 1988 and 2003 such information is to be treated discreetly. No record of this situation will be kept unless the information is relevant to the official duties being carried out by the individual.[116]

Section 8 of the Juries Act 1976 disqualifies from jury service individuals with a criminal record. Normally all citizens aged 18 and over can be called for jury service, but the Act sets out a number of exceptions to this general rule based upon ineligible persons, persons excused as of right, and persons disqualified.[117] Individuals with a criminal record fall into this latter category. Disqualification is largely based upon the time spent in prison rather than the gravity of the offence. Section 8 provides that a person shall be excluded from jury service if on conviction of an offence in any part of Ireland

(a) He has been sentenced to imprisonment/penal servitude for life/five years/detention under section 103 of the Children Act 1903, or

(b) He has at any time in the last ten years been sentenced to a term of imprisonment of at least three months and has served any part of that sentence.

Thus, while not all individuals with past convictions are excluded, an appreciable section of them are. The Act further provides that it is a criminal offence punishable by a fine to serve on a jury knowing you are ineligible or disqualified. The key issue is presumably the requirement of impartiality of a juror. It is reasonable and logical to assume that a person who has personal experience of the criminal justice system and who has spent a significant amount of time in prison may have difficulty in deliberating upon a case impartially and fairly. Nonetheless, this exclu-

[116] Civil Service Code of Standards and Behaviour: Available at http://www.sipo.ie/en/Codes-of-Conduct/Civil-Servants/ (last accessed 20/03/2018).

[117] The Juries Act 1976, Part II, as amended by the Civil Law (Miscellaneous Provisions) Act 2008.

sion is not insignificant. Lord Devlin once described the jury as "the lamp that shows that freedom lives."[118] Such is the importance attributed to the role of the jury and consequentially participation in such represents a fundamental aspect of civic responsibility and belonging, from which many ex-offenders are excluded.

Insurance

Although the issue of insurance might seem to have little correlation with past criminal convictions, it is another area where risk becomes an important factor and where the concept of 'moral hazard' can negatively impact upon decisions made with regard to insurance applications. In Irish law there is a duty to disclose a criminal record on insurance applications.[119] The doctrine of *uberrimae fides* or utmost good faith, which operates in insurance law, obligates applicants to disclose all facts that are material to the issue of risk. What constitutes material fact is considered to be "a matter of circumstance which could reasonably influence the judgment of a prudent insurer in deciding whether he would take the risk and, if so, in determining the premium he would demand."[120] The applicant is thus required, whether directly asked or not, to disclose all facts that might so influence the insurer and failure to do so can result in avoidance of the contract and liability thereunder.[121] It is evident that past criminal record may be considered material in the context of insurance applications, but

[118] Devlin, P. *Trial by Jury* (London: Stevens 1956) at p. 164. In Ireland, the right to trial by a jury is guaranteed under Article 38.5 of the Irish Constitution.

[119] See generally Kilcommins, S. (2002). The duty to disclose previous criminal convictions in Irish insurance law. *Irish Jurist* 37 167–186; Ellis, H. (1990). Disclosure and Good Faith in Insurance Contracts. 8 Irish Law Times 45.

[120] *Chariot Inns Ltd v Assicurazioni SPA and Coyle Hamilton Philips Ltd*. [1981] I.R. 225 at p. 226.

[121] Hasson argued for a situation where if the insurer does not ask about past record they may be considered to have waived their right to this information. Hasson, R.A. (1969). The Doctrine of *Uberrimae Fides* in Insurance Law – a critical evaluation Modern Law Review 32, 615–637. However, Kilcommins notes that since the judiciary unequivocally accept that the scope of the duty extends beyond questions asked, this is unlikely: Kilcommins (2002) op. cit., at p. 176.

there are some incoherencies in the legal approach to this issue that result in the law being unsettled and often unclear.[122]

In the case of *Aro Road and Land Vehicles v The Insurance Corporation of Ireland*,[123] the court had to consider whether past criminal convictions were a material fact that must be disclosed. In the case the defendant carriers sought to repudiate liability under an insurance policy on the grounds that the plaintiff company had failed to disclose that the managing director had a past conviction for receiving stolen goods (and sentenced to imprisonment) over 20 years earlier. In the High Court the judge, although personally considering that the non-disclosure was immaterial, found in favour of expert evidence which suggested that a reasonable and prudent underwriter would regard the matter of prior convictions as material, and non-disclosure as a good reason for refusing to underwrite the risk. The Supreme Court, however, felt the trial judge had erred in permitting a profession to be the final arbiter of what is reasonable. Moreover, the court considered that convictions of almost 20 years standing may remain undisclosed.[124]

It is clear then that historical convictions may not be material, but it remains ambiguous as to whether, in the context of other convictions, there must be a link between the past conviction and the risk posed. It may be that not all past convictions will be considered material and non-disclosure might apply only to those that bear some relevance to the current risk. In the absence of such a nexus between the record and the risk, the record may still be considered to be material on the basis of moral hazard. As a consequence of the enactment of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, however, the individual no longer has to disclose spent convictions in insurance applications. This is applicable apart from any conviction for fraud, deceit, or dishonesty in respect of a claim under a policy of insurance or a policy of assurance.

[122] This is problematic, considering a vital element of the law is that it should be certain ('rule of law' principle).

[123] *Aro Road and Land Vehicles v The Insurance Corporation of Ireland* [1986] I.R. 403.

[124] *Aro Road and Land Vehicles v The Insurance Corporation of Ireland*, at p. 414.

Such convictions (even if they would otherwise be considered spent) must still be disclosed on any insurance or assurance proposal or form.[125]

The purpose of disclosure is obviously to enable the insurer to make an informed decision whether to accept the risk and proceed or whether to withdraw from negotiations. The nature of the disclosure is linked to this concept of moral hazard upon which insurers can rely to refuse the insurance sought or alternatively to avoid subsequent liability. One might argue that past criminal record should only ever be considered a material fact where there is a direct link to the particular risk. Otherwise the practical and deterrent value of disclosure is questionable.

Some additional issues to consider in the context of insurance applications include the requirement to disclose charges where a case is pending and the relevance of an associate's criminal records. According to the court in *Reynolds and Anderson v Phoenix Assurance Co. Ltd.*,[126] a case broadly endorsed in Ireland,[127] the relevant fact is not that the individual has been charged with an offence but that a crime has been committed and disclosure is thus required even though the proposer protests his innocence.[128] Disclosure of arrest, charge, and committal for trial is thus required, where the offence has been committed and also the commission of an offence where the person was acquitted or an offence that remains undetected at the time of entering into negotiations on the policy.[129] In relation to criminal associates, many jurisdictions require an applicant to not only disclose their own past record but also the convictions of his/her associates.[130] An associate's criminal record may be material if there is a sufficient link between the crime committed and the current risk. The

[125] Section 8 (2). Those who commit an offence before the age of 18 do not have to disclose that fact once the record has become expunged under the Children Act 2001.

[126] *Reynolds and Anderson v Phoenix Assurance Co. Ltd and Others* [1978] 2 Lloyd's Rep. 440.

[127] *Latham v Hibernian Insurance Company Ltd and Peter J. Sheridan and Company Ltd*, Unreported, High Court, 22 March 1991.

[128] *Reynolds and Anderson v Phoenix Assurance Co. Ltd and Others*, per Forbes J, at p. 460.

[129] Kilcommins (2002) op. cit., at p. 174. It is uncertain whether disclosure would be required where the allegations of a crime are unfounded. Note also the problematic nature of requiring disclosure of offences not discovered at the time of proposing. Such a requirement may infringe upon the privilege against incrimination (as there is no guarantee that this information will not be used as evidence in a subsequent criminal action). See *Re National Irish Bank Ltd* [1999] 3 I.R. 190.

[130] *Lambert v Co-op Insurance Society Ltd* [1975] 2 Lloyd's Rep. 485.

Irish Courts have not directly dealt with this issue, even though the opportunity to do so has arisen in case-law.[131] It remains to be seen whether this will be a fact the courts will see as material to the risk of insuring. Another issue of ambiguity is whether or not there is an obligation to disclose past convictions in the absence of any direct question about the existence of such by in the insurer. In the case of *Aro Road and Land Vehicles v The Insurance Corporation of Ireland*,[132] the court suggested that where an insurer does not ask, the question of materiality should then shift from a prudent insurer to a reasonably assured test.[133] Finally, if the individual is denied insurance, he is also usually bound to disclose this fact to other insurance companies in addition to the reasons for the refusal.

Character Evidence in Civil Proceedings

Earlier in this book, the use and impact criminal records as evidence in criminal trials was examined. The use of criminal records is not confined to criminal trials, however, and such information can also be utilised in civil proceedings. Evidence of past convictions in civil proceedings can be adduced as evidence in chief and also under cross-examination. In civil cases, past record can be adduced for a number of reasons: it is in issue in the proceedings, it demonstrates that the person has a propensity to act in the particular manner alleged in the proceedings, it is relevant to credibility.

The law of defamation provides a number of examples of how past record can be relevant. A claimant's character can be directly relevant to the issue of liability for defamation where justification is the defence pleaded. Thus, if a defendant has stated that the claimant is a thief, past

[131] See *Latham v Hibernian Insurance Company Ltd and Peter Sheridan and Company Ltd*, High Court, 4 December, 1991.

[132] *Aro Road and Land Vehicles v The Insurance Corporation of Ireland* [1986] I.R. 403.

[133] *Aro Road and Land Vehicles v The Insurance Corporation of Ireland*, per McCarthy, J. at p. 412. Kilcommins argues that it could be possible to expand the circumstances in which the test of materiality would switch from a prudent insurer to a reasonable assured test. The onus in relation to disclosure shifts in this equation from the applicant to the insurer: Kilcommins (2002) op. cit., at p. 179.

convictions for theft may be admitted as relevant to justify the statement.[134] Character can also be relevant to the amount of damages that a claimant is entitled to if successful. In such an eventuality, the damages recoverable would be directly related to the estimation in which the individual was previously held. In the case of *Scott v Sampson*,[135] the court held that although evidence of specific acts of misconduct were inadmissible, evidence of past convictions relevant to the issue may be given against the claimant to mitigate damages awarded.[136] Such evidence may also be proved in cross-examination as relevant to the issue of credibility.[137] Moreover, in civil proceedings any person who gives evidence, regardless of whether they are party to the proceedings, may be cross-examined on their criminal record.[138] This evidence is considered to be relevant to the issue of the person's credibility. The cross-examination of a witness on the issue of past convictions is subject to judicial discretion to disallow any questions which are irrelevant, unjust, or oppressive. In determining whether the questions are proper, the trial judge may have regard to whether they are of such a nature that they would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.[139] Alternatively, the questions are improper and ought not to be permitted if the imputation which they convey relates to a matter so remote that it would not significantly affect the credibility of the witness.[140] Significantly, the issue of proportionality was

[134] Whether character incorporates general reputation or specific acts of misconduct or both will depend upon the circumstances of the particular case: *Maisel v Financial Times Ltd* [1915] 84 L.J.K.B. 2145. A defence of fair comment can similarly be rebutted by evidence of good character at the time of publication of the alleged defamatory material: *Cornwell v Myskow* [1987] 2 All E.R. 504 (CA).

[135] [1882] 8 Q.B.D. 491. This case was approved by the House of Lords in *Plato Films Ltd v Sneidel* [1961] A.C. 1090.

[136] The reason was the burden this would impose on the claimant to defend his whole past life and also because of the inconvenience of prolonging proceedings to prove specific acts that may have only a remote bearing on the case. The court decided that character for must mean reputation in general, and must relate to the segment of claimant's life to which the defamation relates.

[137] See *Goody v Odhams Press Ltd* [1967] 1 Q.B. 333.

[138] Section 6 of the Criminal Procedure Act 1865 provides for the examination of witnesses on their past convictions. The cross-examining party is permitted to prove the conviction if the witness denies it or refuses to answer.

[139] Per Sankey L.J. in *Hobbs v Tinling & Co. Ltd*. [1929] 2 K.B. 1.

[140] Per Sankey L.J. in *Hobbs v Tinling & Co. Ltd*. [1929] 2 K.B. 1.

referred to by Sankey L.J. in *Hobbs v Tinling & Co. Ltd*. as a principle that must be applied in determining the importance of the imputation as against the importance of the testimony.[141]

When adduced as part of the case (evidence in chief) the purpose of past record can be to demonstrate propensity. In civil cases, there does not seem to be an adherence to a general rule of exclusion like there is in the context of criminal cases. The reason for this can partly be attributed to the fact that the majority of civil cases are heard by a judge sitting alone. Thus, the dangers that pertain to admitting such evidence in criminal trials, namely, jury prejudice, are largely absent in civil proceedings. The civil courts are less wary of admitting the evidence of past misconduct or similar fact evidence and base their decision more on a balancing of the probative value against the risks of unfairness to the defence.[142] Admissibility is a matter of discretion as opposed to a rule of law in civil cases. The clearest statement of the rule governing in civil proceedings may be found in the English case of *Mood Music Publishing Company Ltd v De Wolfe Ltd*.[143] The Court of Appeal there stated: "[i]n civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice and is able to deal with it."[144]

In *Jones v Greater Manchester Police Authority*,[145] evidence of a propensity to commit sexual offences against young males was considered relevant in civil proceedings for a sex offender order, and the admission of this evidence did not breach Articles 6 or 8 of the European Convention on Human Rights nor render the proceedings unfair. Furthermore, in *O'Brien v Chief Constable of South Wales Police*,[146] the House of Lords applied a logically probative test and emphasised that it was not necessary to apply the test of ensuring that the probative value of the evidence out-

[141] *Hobbs v Tinling & Co. Ltd*. [1929] 2 K.B. 1.

[142] See, for example, the case of *West Midlands Passenger Executive v Singh* [1988] 2 All E.R. 873, where the court admitted evidence of an employer's history of discriminatory work practices.

[143] *Mood Music Publishing Company Ltd v De Wolfe Ltd* [1976] Ch. 119 (CA).

[144] Ibid., at p. 127.

[145] [2001] E.W.H.C. Admin 189.

[146] *O'Brien v Chief Constable of South Wales Police* [2005] 2 All E.R. 931 (HL).

weighed its prejudicial effect which undoubtedly applied in criminal cases. The case was a civil action for misfeasance in public office and malicious prosecution in which the court approved the admission of evidence of prior acts of similar impropriety on the part of a Detective Inspector.

Guardianship and Care of Children

In all circumstances where the welfare of children is involved, the existence of a criminal record must be disclosed. This is in the context of custody, guardianship, adoption, and generally any situation involving the care of children (outside employment context). While the existence of past convictions may not preclude the individual from carrying on these roles, it is a factor to which due regard must be had. In the UK, a Practice Direction issued with the Rehabilitation of Offenders Act 1974 provided that although spent convictions should not be referred to in court proceedings, this general rule did not apply in relation to civil proceedings involving children, such as adoption or custody. If asked, the individual must disclose his/her past record. The rationale follows on the idea that a court is satisfied that justice cannot be done unless such evidence is admitted. In the case of *Re P*,[147] the court ordered the removal of a child from her family after evidence was admitted that her siblings had each been sexually abused in the past. Stephen Brown L.J. stated that "in these cases, which are difficult and anxious, the court is not trying an allegation of a criminal offence, it is assessing the needs of the court's ward."[148] The Irish Law Reform Commission in their Report on *Spent Convictions* also considered that criminal convictions should continue to be disclosed in circumstances involving the welfare of children, and consequentially, disclosure in this context is outside the parameters of the 2016 legislation. Under section 7 of this Act it is provided that evidence of previous convictions, including those otherwise considered spent, may still be given/required "in any proceedings concerning the adoption, guardianship or custody of, or access to, a child, including proceedings

[147] *Re P* [1987] 2 F.L.R. 467 (CA).

[148] *Re P* [1987] 2 F.L.R. 467 (CA), per Stephen Brown L.J. at p. 471. See also *Re G. (A Minor) (Child Abuse: Standard of Proof)* [1987] 1 W.L.R. 1461.

under the Child Care Acts 1991 to 2015." Once asked, the individual is not entitled to deny the existence of a criminal record.

Applying for Licences

Past criminal character can be important in decisions regarding the granting of licences. The provisions of the 2016 Act do not apply in relation to disclosure for certain types of licences including public service vehicle, private security, taxi, and firearm licences. Disclosure of all convictions, including spent convictions, must still be made in applying for such licences.

In order to hold a firearms certificate ('gun licence'), an individual must be over 18, have a valid reason for holding a gun, of sound mind and of good character. The latter three requirements are as in the opinion of a Garda Superintendent, under the Firearms Act 1925 section four, as amended by the Criminal Justice Act 2006 section 32. In considering whether the person is of good character, the Gardaí can have regard to the criminal record of the person, and having criminal associates may also be a cause for concern to the Gardaí. Reforms made under the Criminal Justice (Miscellaneous Provisions) Act 2009 include a new form (Form FCA1), section 2.4 of which deals with the previous history of the applicant. Answering in the positive to any of the questions in this section does not automatically preclude an application for a gun licence, but it will lead to further enquiries being made.[149] The questions are as follows: *have you ever been found guilty of, or do you have charges pending for any offence in Ireland or abroad?; have you ever been subject of an order issued by a court in relation to the use, attempted use or threatened use force against another?; have you ever been refused a firearms certificate?; have you ever had a firearms certificate revoked?*

Furthermore, some individuals can be disentitled from holding a firearm if they have committed certain specified offences under section 8 of the 1925 Act. Section 8(d) of the 1925 Act, as amended by section 37 of the Criminal Justice Act 2006 disentitles certain people from holding a

[149] See generally An Garda Síochána, *The Garda Commissioner's Guidelines as to the Practical Application and Operation of the Firearms Act 1925–2009*. Available at www.garda.ie.

firearm including a person sentenced to imprisonment for the following: an offence under the Firearms Act 1925–2009, the Offences Against the State Act 1939–1998 or the Criminal Justice (Terrorist Offences) Act 2005; an offence under the law of another State involving the production or use of a firearm and the sentence has not yet expired or it expired within the last five years. Those disentitled under the Act cannot obtain a licence under any conditions.[150] In the context of applying for a liquor licence, section 6 of the Intoxicating Liquor Act 2008 provides that the Revenue Commissioner shall not grant a new wine traders off-licence to a person unless a certificate is received from a District Court judge and presented to them. Section 7 then provides that a District Court may refuse a certificate entitling an individual to the relevant off-licence on a number of grounds, one of which is the character, past misconduct, and/or unfitness of the person.[151] Although not much information is available on the subject of past record, it is clear that it may be a factor taken into consideration by the court in assessing character for the purpose of granting or refusing a certificate to obtain a licence. It is not dictated that the past record must bear particular relevance to the application for a liquor licence (such as the past offence involved intoxication), so presumably all past convictions may be considered in the decision-making process. Furthermore, section 6(3) states that a Garda Superintendent from within the district and any person residing in the area of the premises in question, may object to the application and may appear and give evidence in the court. While in many instances this will have nothing to do with past record of the applicant, it is reasonable to assert that in some circumstances it may, particularly considering that a Garda Superintendent may object.

More information is available on the law in relation to taxi licences or SPSV licences.[152] Applications for taxi driver licences are processed by the Gardaí in the locality of the person and this process involves a criminal record check as part of assessing whether the person is fit and proper to

[150] Information at www.garda.ie.

[151] The relevant off-licence is a wine, spirits, or beer off-licence.

[152] Small Public Service Vehicle licence. The National Transport Authority is the regulator for all SPSVs.

hold a licence. A licence may be refused or revoked if the person has a conviction and is not deemed to be fit and proper. There is, however, a right to appeal this decision to the District Court. The Taxi Regulation Act 2013 introduced a system of automatic disqualification under Part 4 from holding a SPSV licence for those convicted of certain offences (s.30). The specified offences are listed under Part 1 and Part 2 of the Schedule to the Act and include murder, war crimes, serious sexual offences and terrorist offences under Part 1 and a broader range of offences under Part 2, such as manslaughter, non-fatal offences against the person, sexual offences, theft and fraud offences, public order offences and firearms offences. Those convicted of offences under Part 1 of the Schedule are disqualified from holding a licence for life, while disqualification periods vary in relation to convictions for offences under Part 2 (S.30(2)). Section 30(8) of the Act permits an individual to apply to the appropriate court to be allowed to apply for or continue to hold a licence. The court may grant the application where it considers that the person is suitable to apply for a licence and in determining this the court must take into account a number of factors listed under section 30 (10). These include the nature of the offence of conviction, the welfare and safety of passengers in the SVSP and the conduct of the person since their conviction. Part 6 of the Act also provides for revocation of a licence by a court upon conviction for an offence under the Act which in the opinion of the court makes the person unsuitable to hold the licence.

Interest groups such as the National Taxi Drivers' Union (NTDU), while welcoming the move towards vetoing unsuitable drivers, were concerned about the retrospective effect of the provisions (O'Brien 2004). They felt that excluding drivers who had 'historical' convictions for some criminal offences would be unfair, and to deprive such persons of their livelihood was potentially unconstitutional. In response to such criticism, it was pointed out that provision already exists for those refused their licence to appeal to the District Court thus providing a safeguard for the rights of such individuals (O'Brien 2004). The underlying policy reason for the mandatory disqualification provisions under the 2013 Act are deemed to be the welfare and safety of the public. In view of the potential for the provisions to be challenged (in light of the constitutional right to earn a livelihood) the government sought to ensure that the periods of

disqualification were proportionate, thus reserving a life time ban for those convicted of the most serious offences (under Part 1 of the Schedule), and allowing a tiered system of disqualification for other types of convictions. Despite this, many still consider the new law to be quite burdensome, particularly for those who have an old conviction and who have been a taxi driver for many year, perhaps even most of their working life. A person in such circumstances can still apply to a court to retain their licence, and there is nothing to suggest that the courts take anything other than a fair approach in this regard. Nonetheless it signals a shift in policy and a perpetuation of the effect of a criminal record.

It is also worth noting the European Communities (Road Haulage and Road Passenger Transport Operator's Licences) Regulations 2009.[153] These regulations provide for disqualification of a person with convictions for offences listed in the Act from holding an operator's licence.[154] The offences include murder, manslaughter, offences under the Non-Fatal Offences Against the Person Act 1997 (section 4 and 5), offences under the Criminal Justice (Theft and Fraud) Act 2001, drug trafficking offences,[155] and sexual offences.[156] The disqualification is to follow on from the conviction of the individual of the offence and to last for two years if the offence is tried summarily and five years if tried on indictment.[157] Breach of this disqualification is an offence and can result in a fine not exceeding €5000 and/or imprisonment for a term not exceeding six months, on summary conviction. Alternatively, the offence can be tried on indictment and result in a maximum fine of €500,000 and/or to imprisonment for a term not exceeding three years.[158] The stated purpose for these provisions is to disqualify persons with serious convictions from

[153] S.I. No. 318/2009. These regulations were made by the then Minister for Transport Noel Dempsey in exercise of the powers conferred by section 3 of the European Communities Act 1972 (No. 27 of 1972) for the purpose of giving effect to Council Directive No. 96/26/EC of 29 April 1996 1, and Council Directive No. 98/76/EC of 1 October 1998 2.

[154] Section 3.

[155] Within the meaning of section 3 of the Criminal Justice Act 1994.

[156] Within the meaning of section 3 of the Sex Offenders Act 2001.

[157] Section 3(3) provides that a disqualification is to take effect upon (a) the expiration of the ordinary time for bringing an appeal against the conviction concerned or (b) in the event of an appeal, where the conviction concerned is confirmed, its confirmation, or its withdrawal.

[158] Section 4.

those occupations,[159] although beyond this the purpose in terms of effect is unclear.

Concluding Observations

While the use of criminal record information by employers, insurers, licence providers, and so on may indeed be necessary in a vast array of circumstances, it is clear that its use is nonetheless a collateral consequence of a criminal conviction. Despite positive intentions and rehabilitative efforts in areas such as education and training, a criminal record can effectively prohibit individuals from partaking in many inclusive forms of social life, from work to travel to obtaining insurance. Such lifelong consequences are not necessarily a proportionate response to most types of offending behaviour. Moreover, these unintended consequences are imposed and experienced outside the formal justice system and thus are without the protections and guarantees of this system. In particular, there is no guarantee that the principle of proportionality will be effectively applied. This is the case despite the fact that the ancillary measures outside the formal system can impact in a far more serious way upon the lives of ex-offenders, essentially affecting their life-chances. There are little or no formal constraints on the way criminal record information is used. Thus, it becomes a discretionary matter in the decision-making process by employers, insurers, and others, and this may expose ex-offenders to unnecessary and disproportionate prejudice. Exclusion from the activity as a result of this prejudice is both an individual issue and a public concern. Ex-offenders who are integrated back into society are far less likely to reoffend and so they should be encouraged to succeed where practicable and reasonable to do so. It is argued that assisting ex-offenders to move on with their lives may be essential to the future trajec-

[159] 'Occupation of road haulage operator' means the activity of any person transporting merchandise, goods, or material for hire or reward by means of either a motor vehicle or a combination of vehicles; 'occupation of road passenger transport operator' means the activity of any person operating, by means of motor vehicles so constructed and equipped as to be suitable for carrying more than 9 persons, including the driver, and intended for that purpose, passenger transport services for the public or for specific categories of users against payment by the person transported or by the transport organiser (section 3).

tory of crime rates and crime victimisation. Evidenced-based exclusion from certain types of employment or access to licences, and so on, is to be preserved, as being in the interests of public safety and security. Arbitrary discrimination and legal policies requiring blanket disclosure (or sometimes policies failing to protect non-disclosure) are regrettable and counterproductive if they fail to allow those who wish to succeed the opportunity to do so legitimately.

Bibliography

Ahmed, A., & Lang, E. (2017). The Employability of Ex-Offenders: A Field Experiment in the Swedish Labor Market. *Journal of Labour Policy, 6*(1), 1–23.

Allan, A., & Steffensmeier, D. (1989). Youth, Unemployment and Property Crime: Differential Effects of Job Availability and Job Quality on Juvenile and Young Adult Arrest Rates. *American Sociological Review, 53*, 107–123.

Apex Trust. (1989). *Making Rehabilitation Work: From High Hopes to Practical Failure*. London: Apex Trust.

Australian Law Reform Commission. (LRC 37-1989). *Report on Spent Convictions*. Australian Law Reform Commission.

Bardon, S. (2017, July 17). Law Would Allow Employers Access to Criminal Records. *The Irish Times*.

Bäckman, O., Estrada, F., & Nilsson, A. (2017). Locked Up and Locked Out? The Impact of Imprisonment on Labour Market Attachment. *British Journal of Criminology*. https://doi.org/10.1093/bjc/azx071.

Burns, S. (2018, June 11). UN Backs Calls to Make Housing a Constitutional Right in Ireland. *The Irish Times*.

Burton Jr., V. S., Fisher, C., Jonson, C. L., & Cullen, F. T. (2014). Confronting the Collateral Consequences of a Criminal Conviction: A Special Challenge for Social Work With Offenders. *Journal of Forensic Social Work, 4*(2), 80–103.

Butler, B. (1999). *Conference Report, Accessing Employment, 2000 and Beyond, 1999*. Dublin and Hillsborough Castle.

Carmody, P., & McEvoy, M. (1996). *A Study of Irish Female Prisoners*. Dublin: Stationary Office.

Carswell, D. (2018, June 20). David Drumm Jailed for Six Years for Conspiracy to Defraud. *The Irish Times*.

Commission of Inquiry Into the Penal System. (1985). *Report of the Commission of Inquiry Into the Penal System*. Dublin: Stationary Office.

Department of Justice and Equality. (2009). *The Management of Sex Offenders: A Discussion Document*. Dublin: Department of Justice and Equality.

Dolan, K., & Carr, J. (2015). *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*. Washington, DC: Institute for Policy Studies.

Edwards, E. (2018, January 17). Women Being 'Thrown' Into Homelessness After Leaving Prison. *The Irish Times*.

Ellis, H. (1990). Disclosure and Good Faith in Insurance Contracts. *Irish Law Times, 8*, 45.

Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans.). London: Penguin Books.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Greenslade, B. (1986). Eyes Open Policy: Employment of a Person with a Criminal Record. *New Zealand Law Journal*, 386.

Hartmann McNamara, R., Crawford, C., & Burns, R. (2013). Policing the Homeless: Policy, Practice, and Perceptions. *Policing: An International Journal of Police Strategies & Management, 36*(2), 357–374.

Hasson, R. A. (1969). The Doctrine of Uberrimae Fides in Insurance Law-A Critical Evaluation. *Modern Law Review, 32*, 615–637.

Hickey, C. (2002). *Crime and Homelessness*. Dublin: Focus Ireland and PACE.

Holland, K. (2018, March 29). 'Loss of Confidence' as Number of Homeless Families Rise. *The Irish Times*.

Home Office. (2001). *Building Bridges to Employment for Offenders, Research Study 226*. London: Home Office.

Home Office. (2002). *Breaking the Cycle—A Report on the Review of the Rehabilitation of Offenders Act 1974*. London: Home Office.

Hoskins, J. (2014). Ex Offender Restrictions. *Journal of Applied Philosophy, 31*(1), 33–48.

Houses of the Oireachtas Joint Committee on Justice and Equality. (2018). *Report on Penal Reform and Sentencing*. Dublin: Houses of the Oireachtas Joint Committee on Justice and Equality.

Ingle, R. (2008, July 1). Building a Better Life on the Outside. *The Irish Times*.

Ipsa-Landa, S., & Loeffler, C. E. (2016). Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement Seekers in Illinois. *Criminology, 54*(3), 387–412.

Irish Human Rights Commission. (2009). *Observations on the Spent Convictions Bill 2007*. Dublin: Irish Human Rights Commission.

Irish Penal Reform Trust. (2008). *Position Paper on Spent Convictions Bill 2007*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2012). *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor*. Dublin: Irish Penal Reform Trust.

Irish Prison Service. (2013). *Recidivism Study*. Dublin: Irish Prison Service.

Jacobs, J. B. (2015). *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.

Jacobs, J. B., & Larrauri, E. (2015). *European Criminal Records & Ex-Offender Employment*. New York University Public Law and Legal Theory Working Papers, Paper 532.

Jones, D. (2015). When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences. *Stanford Journal of Civil Rights & Civil Liberties, 11*(2), 237–268.

Justice, The Howard League for Penal Reform. (1972). *Living it Down-The Problem of Old Convictions*. London: Stevens & Sons.

Kilcommins, S. (2002). The Duty to Disclose Previous Criminal Convictions in Irish Insurance Law. *The Irish Jurist, 37*, 167–186.

Kilcommins, S., McClean, E., McDonagh, M., Mullally, S., & Whelan, D. (2004). *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*. Dublin: Department of Justice and Equality.

Kingston, S., & Webster, C. (2015). The Most 'Undeserving' of All? How Poverty Drives Young Men to Victimisation and Crime. *The Journal of Poverty and Social Justice, 23*(3), 215–227.

Larrauri, E. (2011). Conviction Records in Spain: Obstacles to Reintegration of Offenders? *European Journal of Probation, 3*(1), 50–62.

Larrauri, E., & Jacobs, J. B. (2013). A Spanish Window on European Law and Policy on Employment Discrimination Based on Criminal Record. In T. Daems, D. van Zyl Smit, & S. Snacken (Eds.), *European Penology?* Oxford: Hart Publishing.

Law Reform Commission. (LRC 84-2007). *Report on Spent Convictions*. Dublin: Law Reform Commission.

Lawlor, P., & McDonald, E. (2001). *Story of Success: Irish Prisons Connect Project, 1998–2000*. Dublin: The Stationary Office.

LeBel, T., Ritchie, M., & Maruna, S. (2017). Can Released Prisoners "Make It?" Examining Formerly Incarcerated Persons' Belief in Upward Mobility and the American Dream. In S. Stojkovic (Ed.), *Prisoner Reentry: Critical Issues and Policy Directions*. New York: Palgrave Macmillan.

Levenson, J. S. (2016). Hidden Challenges: Sex Offenders Legislated Into Homelessness. *Journal of Social Work*. https://doi.org/10.1177/1468017316654811.

Levenson, J. S., & Zgoba, K. (2015). Community Protection Policies and Repeat Sexual Offenses in Florida. *International Journal of Offender Therapy and Comparative Criminology*. https://doi.org/10.1177/0306624X15573946.

Levenson, J. S., Ackerman, A. R., & Harris, A. J. (2013). Catch Me If You Can: An Analysis of Fugitive Sex Offenders. *Sexual Abuse: Journal of Research and Treatment*. https://doi.org/10.1177/1079063213480820.

Martynowicz, A., & Quigley, M. (2010). *"It's Like Stepping on a Landmine…"—Reintegration of Prisoners in Ireland*. Dublin: Irish Penal Reform Trust.

Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association Books.

Maruna, S. (2014). Reintegration as a Right and the Rites of Reintegration: A Comparative Review of De-stigmatization Practices. In J. A. Humphrey & P. Cordella (Eds.), *Effective Interventions in the Lives of Criminal Offenders*. New York: Springer.

Mayfield, M. (1997). Revisiting Expungement: Concealing Information in an Information Age. *Utah Law Review*, 1057–1085.

Mayock, P., Sheridan, S., & Parker, S. (2015). *The Dynamics of Long-Term Homelessness Among Women in Ireland*. Dublin: Homeless Executive.

McCartan, K., & Kemshall, H. (2015). Sex Offender (Re)Integration Into the Community: Realities and Challenges. *Journal of Sexual Aggression, 21*(1), 1–3.

McCullagh, C. (1992). Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland. *Irish Journal of Sociology, 2*, 1–19.

McGahey, R. (1986). Economic Conditions, Neighbourhood Organisation and Urban Crime. In A. J. Reiss Jr. & M. Tonry (Eds.), *Communities and Crime*. Chicago: University of Chicago Press.

McHugh, R. (2013). *Tracking the Needs and Service Provision for Women Ex-Prisoners*. Dublin: Association for Criminal Justice Research and Development.

Mears, D., & Cochran, J. (2015). *Prisoner Reentry in the Era of Mass Incarceration*. Thousand Oaks, CA: Sage.

Middlemass, K. M. (2017). *Convicted and Condemned: The Politics and Policies of Prisoner Reentry*. New York: NYU Press.

Morgan, M., & Kett, M. (2003). *The Prison Adult Literacy Survey: Results and Implications*. Dublin: Irish Prison Service.

NACRO. (2010). *Developing Proposals for Sentencing and Achieving a Rehabilitation Revolution, Submission to Ministry of Justice*. London: NACR.

National Economic and Social Reform. (2002). *Re-integration of Prisoners Forum Report, No. 22*. Dublin: National Economic and Social Reform.

O'Brien, T. (2004, July 27). No Licence for Those Convicted. *The Irish Times*.

O'Brien, C. (2018, February 6). Half of Prisoners Drop Out of School Before Junior Certificate. *The Irish Times*.

O'Donnell, I. (1998). Crime, Punishment and Poverty. In I. Bacik & M. O'Connell (Eds.), *Crime and Poverty in Ireland*. Dublin: Round Hall Sweet and Maxwell.

O'Donnell, I. (2002). The Re-integration of Prisoners. *Administration, 50*(2), 80–96.

O'Donnell, I., Baumer, E. P., & Hughes, N. (2008). Recidivism in the Republic of Ireland. *Criminology & Criminal Justice, 8*(2), 123–146.

O'Loingsigh, G. (2004). *Getting Out, Staying Out: The Experiences of Prisoners Upon Release*. Dublin: Community Technical Aid.

O'Mahony, P. (1997). *Mountjoy Prisoners: A Sociological and Criminological Profile*. Dublin: Stationary Office.

O'Mahony, P. (1998). Punishing Poverty and Personal Adversity. In I. Bacik & M. O'Connell (Eds.), *Crime and Poverty in Ireland*. Dublin: Round Hall Sweet and Maxwell.

Payne, J., Macgregor, S., & McDonald, H. (2015). Homelessness and Housing Stress Among Police Detainees: Results from the DUMA Program. *Trends & Issues in Crime and Criminal Justice, 492*, 1–8.

Petersilia, J. (2001). Prisoner Reentry: Public Safety and Reintegration Challenges. *The Prison Journal, 81*(3), 360–375.

Pijoan, E. L. (2014). Legal Protections Against Criminal Background Checks in Europe. *Punishment and Society, 16*(1), 50–73.

Prison Reform Trust. (2014). *Working It Out: Employment for Women Offenders*. London: Prison Reform Trust.

Ramakers, A., Nieuwbeerta, P., Van Wilsem, J., & Dirkzwager, A. (2017). Not Just Any Job Will Do: A Study on Employment Characteristics and Recidivism Risks After Release. *International Journal of Offender Therapy and Comparative Criminology, 61*(16), 1795–1818.

Rhodes, J. (2008). Ex-Offenders, Social Ties and the Routes Into Employment. *Internet Journal of Criminology, 1*, 1–20.

Rose, N. (2000). Government and Control. *British Journal of Criminology, 40*, 321–339.

Rydberg, J., Grommon, E., Huebner, B. M., & Bynum, T. (2014). The Effect of Statewide Residency Restrictions on Sex Offender Post Release Housing Mobility. *Justice Quarterly, 31*(2), 421–444.

Schmitts, J., & Warner, K. (2010). *Ex-Offenders and the Labour Market*. Washington, DC: Centre for Economic and Policy Research.

Schwartz, R., & Skolnick, J. H. (1962). Two Studies of Legal Stigma. *Social Problems, 10*(2), 133–142.

Seymour, M. (2007). *Homelessness and Offending: Marginalisation, Segregation and the Challenges to Social Inclusion*. 10th Annual Conference of the Association for Criminal Justice Research and Development: Community, Custody and Aftercare, The Journey Towards Social Inclusion.

Seymour, M., & Costello, L. (2005). *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody*. Dublin: Dublin Institute of Technology.

Steiner, B., Makarios, M. D., & Travis, L. F. (2015). Examining the Effects of Residential Situations and Residential Mobility on Offender Recidivism. *Crime & Delinquency, 61*(3), 375–401.

Tewksbury, R. (2014). Evidence of Ineffectiveness: Advancing Argument Against Sex Offender Residence Restrictions. *Criminology and Public Policy, 13*(1), 135–138.

Travis, J. (2002). Invisible Punishment: An Instrument of Social Exclusion. In M. Mauer & M. Chesney-Lind (Eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: The New Press.

Uggen, C. (2000). Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism. *American Sociological Review, 65*, 529–546.

Uggen, C., & Blahnik, L. (2015). The Increasing Stickiness of Public Labels. In J. Shapland, S. Farrall, & A. Bottoms (Eds.), *Global Perspectives on Desistance*. London: Routledge.

Visher, C. A., & Travis, J. (2003). Transitions from Prison to Community: Understanding Individual Pathways. *Annual Review of Sociology, 29*(1), 89–113.

White Paper on Crime. (2010). *Consultation Process, Discussion Document 1: Crime Prevention and Community Safety*. Dublin: Department of Justice and Equality.

Williams, K., Papadopoulou, V., & Booth, N. (2012). *Prisoners' Childhood and Family Backgrounds*. London: Ministry of Justice.

Zgoba, K., & Ragbir, D. (2016). Sex Offender Registration and Notification Act (SORNA). *Sexual Violence*, 33–49.

9

Conclusion

An International Criminal Records Database

The significance of criminal record information is growing exponentially. The criminal biographies of citizens are progressively promoted as a positive resource for agencies working within the criminal justice system—though by no means confined to such. In 2012, the European Criminal Records Information System (ECRIS)[1] was established in order to enable the efficient exchange of information between member states regarding criminal convictions in the EU.[2] The ECRIS database was introduced with the express intention of ensuring the sharing of conviction information between EU countries in a coherent and efficient manner, to permit police authorities, judges, and prosecutors to have access to comprehensive data on the criminal history of persons

[1] EU Council Framework Decision 2009/315/JHA (26 February 2009).

[2] More recently, proposals have been approved to extend the database to allow member states to share information on the convictions of non-EU nationals. On 19 January 2016, the European Commission proposed a Directive (COM[2016] 07 final) aimed at amending Council Framework Decision 2009/315/JHA as regards the ECRIS system and replacing Council Decision 2009/316/JHA. Further proposals to improve the ECRIS system have also been made in 2017 (COM[2017] 344).

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8_9

obtained in other EU countries and to eliminate the possibility of offenders avoiding conviction by moving from one EU country to another. The information that may be passed includes fingerprints and national ID numbers (where available). The establishing of this kind of system is considered important in enabling "the efficient exchange of information on previous convictions of criminals and is a vital tool in combating trans-boarder criminals."[3] Prior to the introduction of this database, it was argued that in terms of scope it should be restricted to crimes with a transnational-organised dimension (Bacik 2008). This would include terrorist-related activities, money laundering or fraud at an EU level, organised crime, and sexual crime where there is an organised transnational element. Such a restriction does not seem to apply to the database as implemented.

In 2012, the Irish Government approved the drafting of the Criminal Records Information System Bill, in order to implement the ECRIS system into Irish law. The Bill, which has yet to be enacted, provides that criminal records obtained from another state under this Act may only be used for the purposes of criminal investigation, criminal proceedings, or for the purposes specified in obtaining the information, or for preventing an immediate and serious threat to public security. The drafting of the Bill came prior to the introduction of the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016, but it does state that the Spent Convictions Bill (as it was then called) would not apply to disclosure of criminal records on request by other states, nor to criminal records data transmitted to this state by another state. It is unclear if this position will be retained once the legislation is eventually enacted, although it seems likely. The issue of whether or not the European Criminal Record (ECR) could become spent has not been clearly addressed, nationally or internationally. It is argued that allowing for entries to the ECR to be expunged is important in the interests of rehabilitation of ex-offenders. Further consideration of this issue is advisable but could prove problematic given the fact that expungement schemes vary considerably across the member states.

[3] Then Minister for Justice and Equality, Mr Dermot Ahern: Brady, T. (2009, January 3) Judges get access to EU criminal records. *Irish Independent*.

The UK's plans to leave the EU (following a referendum in 2016) have also generated uncertainty regarding the issue of criminal justice cooperation as between the UK and Ireland.[4] While the full scope of consequences (of Brexit) remains speculation at this point, Campbell has surmised that in general terms "Brexit will lead inevitably to a diminution in the level and nature of cooperation between the UK and remaining EU member states, for structural, legal, political, and practical reasons."[5] In view of such, it has been considered imperative for the UK and Irish Governments to clarify the status and rights of each other's citizens within their respective criminal justice systems in this regard (Murray et al. 2018).

While ECRIS may provide for greater coherency and structure in the sharing of information across EU states, the introduction of this database is not unproblematic. For one, it can clearly impact upon a person's right to privacy and family life under Article 8 of the European Convention on Human Rights. In recognising the potential for interference with this right it is essential that personal information contained on the system is at the very least accurate and disclosed only in proper circumstances.[6] It should furthermore be capable of being accessed in limited circumstances (similar to Europol data)[7] and open to challenge where inaccurate information is being kept or where the information is wrongfully disclosed to third parties.[8] The idea of protecting the human rights and civil liberties of EU citizens is not so easily reconcilable with broadening the reach of a criminal record via an EU database.[9] In order to ensure that the retention and disclosure of such data does not fall foul of Article 8, its use must be

[4] See ACJRD Twentieth Annual Conference. (2017) The Brexit Impact on Criminal Justice Cooperation in Ireland: Available at https://www.acjrd.ie/files/The_Brexit_Impact_on_Criminal_Justice_Cooperation_in_Ireland_-_ACJRD_2017.pdf (Last accessed March 2018).

[5] Campbell, C. 'Government fears "essential" extradition powers to combat crime will be lost after Brexit' *The Detail*, 23 November 2017.

[6] See Jackson, A. and Davies, G. (2017) 'Making the case for ECRIS: Post-'Brexit' sharing of criminal records information between the European Union and United Kingdom' *The International Journal of Evidence & Proof* 21(4): 330.

[7] Europol Convention, Article 19.

[8] Bacik (2008).

[9] It has been argued that democratic accountability in the expansion of the criminal jurisdiction and powers of the EU and its agents must also be considered: Bacik (2008) at p. 208; Irish Human Rights Commission (2005) *Observations on the Scheme of the Criminal Justice (International Co-Operation) Bill 2005*. Dublin: IHRC.

in pursuance of a legitimate aim and in all circumstances necessary and proportionate in a democratic society.

ECRIS is not the only EU-wide information-sharing provision to emerge in the past number of years. In April 2016, the European Parliament and the Council adopted Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime. In 2018, the Department of Justice and Equality announced plans to incorporate this Directive, known as the PNR Directive, into Irish law.[10] The proposed legislation will require airlines to provide advance passenger information to the authorities (including law enforcement agencies) in respect of flights from outside the EU entering or leaving the State.

The last important EU-level change to note is the General Data Protection Regulation (GDPR) which came into force on 25 May 2018, replacing the existing data protection framework under the EU Data Protection Directive. In anticipation of this Regulation coming into force, the Data Protection Act 2018 was enacted in Ireland in May, providing for changes to the Data Protection Acts 1988 and 2003. Under the GDPR, there are two key types of data—personal data and special category personal data. The latter type includes any offence committed or alleged proceedings for an offence committed or alleged, the disposal of such proceedings, or the sentence of any court in such proceedings. The processing of special category data is prohibited unless the person consents to such or if the processing is authorised by law (e.g. to comply with employment legislation). Chapter 2 of the Data Protection Act 2018 makes provision for the processing of special categories of personal data (by law). This includes processing in the context of employment and social welfare law (s.46), for the purpose of legal advice and legal proceedings (s.47), for the administration of justice (s.49), for insurance and pension purposes (s.50), in the context of medical care, treatment, and related issues (s.52 & 53), for archiving purposes (s.54), and on a more

[10] Department of Justice and Equality. (2018, February 18) Minister Flanagan announces proposed counter-terrorism legislation requiring advance passenger information for flights entering or leaving the State. *Press Release*.

general level, for reasons of substantial public interest (s.51).[11] Section 55 of the Act also provides that personal data relating to criminal convictions and offences can only be processed under the control of an official authority (such as in the administration of justice). The Act also requires that suitable and specific measures be taken to safeguard the fundamental rights and freedoms of data subjects, though it is unclear yet as to what such measures will specifically entail.

The Eternal Record

The consequence of conviction for a criminal offence is most notably the *de jure* sentence handed down, be it custodial or otherwise. The idea of proportionality operating within the criminal justice system presupposes that there is a finality to the sentence and punishment of the individual. The reality is that once a conviction is recorded against the offender it labels them as such, often perpetually. A criminal record stays with the individual and can affect him or her in countless ways into the future.

It is evident that criminal record is an issue that exists at every level of the criminal justice system. Past convictions can and frequently are invoked in the decision-making process that impact upon pretrial, trial, sentencing, and post-release stages. Thus, as documented in this book, criminal records can be employed in the pretrial processes of police investigation and bail applications. The Gardaí can employ past record to investigate crime and process suspects with greater expediency, while a judge hearing a bail application can use past convictions to determine the merits of granting or refusing pretrial liberty. Criminal records can also be invoked in the trial process as evidence in chief and under cross-examination. In this area, the general rule is one of exclusion, with evidence of past convictions only being adduced as an exception, or where the accused invokes a provision under the Criminal Justice (Evidence) Act 1924. Moreover, the existence of a criminal record is significant at

[11] This is without prejudice to the Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016.

sentencing stage and impacts upon the sentence handed down for a subsequent offence. The consequence of its use in this immediate setting is that an ex-offender will receive a more severe penalty than a first-time offender. Furthermore, once imposed, criminal records are permanently retained and become the basis on which post-release measures are inflicted. An ex-offender, by virtue of his record, can be fastened to a system of notification orders, supervision orders, and monitoring orders, which manage his freedom in the community. Beyond this, criminal records factor into the informal social sphere where disclosure requirements in areas like employment, travel, and licence applications operate. In some of these areas, the use of past record is a result of deliberate policies focused upon ex-offenders, while in other areas its impact is often indirect and unanticipated.

In recent times, the use of criminal records has increased in intensity, and this issue has begun to feature much more prominently in legal and statutory provisions. In the pretrial sphere, increased powers of the Gardaí and new developments in the area of international police communications on the subject of past offenders, in addition to the implementation of a DNA database, ensure that criminal record will continue to play an increasing role in the exercise of the police function. In recent years, the impact of past record has been augmented in the context of bail applications by virtue of the Bail Acts 1997 and 2007, which expressly endorse the use of this factor by a judge deciding whether or not to grant pretrial liberty. Moreover, in the area of trial, the law has evolved from taking a primarily exclusionary stance and rarely incorporating the issue of past record, to amplifying focus upon this issue in current times. In relation to evidence in chief, changes in the applicable test have signalled a shift from relying upon striking similarity in the convictions to a broader test of admissibility premised upon balance, but which does not preclude the admission of dissimilar past convictions. There have also been changes to the use of past convictions in the area of cross-examination, which broaden the circumstances where past record evidence can be invoked. One of the most notable areas where the use of criminal records has intensified is in the context of sentencing, where mandatory minimum sentencing provisions have grown, and applied greater pressure upon sen-

tencing judges to impose prescribed penalties for second-time offenders. Such changes reflect the general ethos of the law as it moves towards enhanced attention upon repeat offenders. Furthermore, the post-release sphere has perhaps witnessed the most dramatic change in the treatment of ex-offenders. There has been a significant surge in provisions that seek to control and manage the offender, particularly sex offenders, drug trafficking offenders, and other serious offenders in the aftermath of imprisonment.

These changes have occurred at a time when concepts such as control, security, risk management, and political expediency are featuring more prominently in the determination of criminal justice policies. To further such policies, the ex-offender, while he has always been a person of interest, seems to becoming a more attractive candidate for harsh justice and risk reduction management strategies. This is not necessarily wrong per se. In some areas there is a need to create laws that provide safety by monitoring those convicted of serious crimes in the past and thus the use of past record is often for an entirely legitimate and necessary purpose. Public protection and other such interests are valid and important goals of the criminal justice system and laws should strive to achieve these goals. The concern is that, particularly in relation to ancillary consequences in the community, there is little regulation over when and how criminal history information is used by decision makers, like employers. Stereotypical perceptions of the unreformable criminal can hold negative consequences, not simply for the individual but for society also. Offenders who are successful in integrating into society, having acquired stable employment, for example, are far less likely to reoffend.

The need for balance and proportionality in this area is essential. In recent times, it seems that offenders' rights are persistently accorded less merit and consideration as an overwhelming desire for security takes hold. The modern preoccupation with control and management of those considered to pose a threat to public safety has resulted in tension between public interest considerations and individual liberties. So great is the emphasis placed upon the State's ability to control crime and criminals, particularly in the aftermath of imprisonment, that the public simply accepts that the need for such is self-evident. Risk and the elimination of

risk becomes an ultimate concern.[12] Preoccupation with protection should not however mean total disregard of offenders' rights. While there is often logic in retaining criminal record, there should also be a measure of fairness and proportionality in its use. The increasing focus upon criminal record, for example, the growing number of ancillary measures such as registration requirements, amplifies concerns as to whether proportionality is being applied in the formulation and implementation of legal policies. A lifelong criminal record is not a proportionate response to the majority of offending behaviour. There must come a point in time when the individual has paid their debt to society and be permitted to live their lives free from unnecessary interference. To this effect, the recent emergence of spent convictions legislation in Ireland is a very positive initiative.

The use of criminal records can have severe and sometimes unanticipated consequences for ex-offenders. These consequences operate in the narrow sphere in which past record is considered and can also have broader and more general implications. Thus, from a narrow perspective, an ex-offender can be subject to greater scrutiny from the Gardaí, be more readily denied the right to pretrial liberty, find that his past behaviour can be adduced as evidence of his guilt at trial, be punished more severely for a subsequent offence, be restricted by the imposition of notification orders, monitoring orders, and other such post-release requirements, and be inhibited in accessing employment, travel, and insurance because of the legal obligation to disclose past convictions. From a broader perspective, the consequences of having a criminal record are that it serves to perpetually mark the individual as an 'offender.' This legal label can be employed to restrict the person's rights and liberties in the future. The reality for many ex-offenders is that their debt to society is never paid and they can remain marginalised and excluded from main-

[12] Kemshall and Maguire identify this risk penology as possessing "an all consuming desire to eliminate threats to safety [which] produces ever more sophisticated technologies of information-gathering, classification, surveillance, control and exclusion; in which attention shifts from the individual to the aggregate 'risk group'; and in which concepts such as individual justice, rights and accountability lose their meaning." Kemshall, H. and Maguire, M. (2002) Public Protection, Partnership and Risk Penality: the multi-agency risk management of sexual and violent offenders. In Gray, N., Laing, J., and Noaks, L. (eds.) *Criminal Justice, Mental Health and the Politics of Risk.* London: Cavendish Publishing, at p. 170.

stream social life. Ex-offenders are a group upon whom a diminished status is frequently bestowed and who are often denied access to complete participation in the community and to the exercise of all the rights enjoyed by its members. Citizenship status is frequently suspended through social and legal mechanisms which view the offender through an altered prism of populist hatred. The perception of offenders in today's world is overtly negative. Public attitudes seem to be in favour of perpetually condemning offenders to fervent contempt and distain and to adopt a stance of intolerance to their social engagement. The attitude towards sex offenders is a prominent example of this. Sexual offending is a very serious type of offending behaviour and produces emotive condemnation from the public, often justifiably so. Restrictive measures against such individuals are accepted unquestioningly, but often without any meaningful examination as to whether such measures will in fact enhance safety. Proposed electronic tagging, for example, is currently part of a revamp of the law relating to the monitoring of sex offenders. The reality of tagging sex offenders may however fall short of societal expectations. Tagging is not a long-term solution—you cannot tag someone forever as this would certainly not be human rights compliant. Thus, the fix is short term, and while it may address some immediate concerns in relation to individual offenders following conviction or release from prison, it does not provide the means for effectively dealing with sexual offending behaviour in the long term.[13] Moreover, the effectiveness of this measure generally is empirically unproven. Evidence that it reduces recidivism is scant and experience in other countries has demonstrated that it has significant limitations in this regard. Instead, evidence has shown that stigmatisation and restrictions from being constantly monitored can impair reintegration into society. Monitoring high-risk recidivist sex offenders is in the public interest, but this should also be accompanied by rehabilitative supports to enhance the prospect of such individuals ceasing to pose a threat. Any talk of rehabilitating sex offenders, or ex-offenders generally, should not serve to undermine the anguish of victims or diminish

[13] In the short term, it may be useful to assist in the transition period between prison and re-entering society in order to facilitate this transition, and also potentially to monitor high-risk offenders to verify compliance with a sex offender order.

the need for support and advocacy on their behalf. It should not be an either/or choice. There is responsibility to address both the needs of victims and to assist with the rehabilitation of offenders. Evidence supports the proposition that providing treatment and support for those who have served their sentence and wish to be part of the community again will be far more successful in reducing reoffending behaviour in the long term. From the perspective of desistence, policies which promote retention of the criminal characteristic (e.g. notification laws) may also be counterproductive given that research has shown that people tend to grow out of crime.

Societal perceptions can affect the individual's self-perception, sometimes to the point where they no longer identify with the collective mass of the public but rather with a criminal sub-category. In this instance, the offender label may act as a self-fulfilling prophecy, perpetuating a life of crime and marginalisation from the community. Not all offenders want to change their lives to becoming law-abiding citizens—to this extent, making that choice to change is the first key step.[14] But for those who are intent on beginning their life afresh, the stigma of the label may prove insurmountable, affecting access to employment and other such socially inclusive activities. The law effectively labels individuals as offenders, and this label prolongs the stigma of a criminal conviction. This author would be inclined to agree with Hudson's observation that "[w]hatever their crime, no person is devoid of humanity, and labels … which define people entirely by their wrongdoing should be contested."[15]

An evidence-based approach to the use of criminal records both within the criminal justice system and beyond is clearly warranted. It is necessary and desirable for this information to be retained and utilised in many circumstances. Sometimes though, it is the general status of 'offender,' rather than an evidence-based individualised risk potential, that gives rise to consideration of past record, as a consequence of which the individual can be unfairly denied restoration of full citizenship rights and thus inclu-

[14] Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild their Lives*. Washington, DC, American Psychological Association.

[15] Hudson (2003) op. cit., at p. 223.

sion in society. In the interests of proportionality, there should come a point where we consider an offender's debt to society paid and eliminate arbitrary and discriminatory use of criminal records. So long as they are eternally retained, affecting the individual's life chances far into the future, there is indeed truth to the assertion that the criminal record may well be the severest of all penalties.[16]

Bibliography

Association for Criminal Justice Research Development. (2017). *Annual Conference: The Brexit Impact on Criminal Justice Cooperation in Ireland*. Dublin: ACJRD.

Bacik, I. (2008). The European Criminal Record in Ireland. In C. Stephanou & H. Xanthanki (Eds.), *Towards a European Criminal Record*. New York: Cambridge University Press.

Brady, T. (2009, January 3). Judges Get Access to EU Criminal Records. *The Irish Independent*.

Campbell, C. (2017). Government Fears "Essential" Extradition Powers to Combat Crime Will be Lost After Brexit. *The Detail.*

Department of Justice and Equality. (2018, February 18). Minister Flanagan Announces Proposed Counter-Terrorism Legislation Requiring Advance Passenger Information for Flights Entering or Leaving the State. *Press Release*.

Hudson, B. (2003). *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2nd ed.). Buckingham: Open University Press.

Irish Human Rights Commission. (2005). *Observations on the Scheme of the Criminal Justice (International Co-Operation) Bill 2005*. Dublin: IHRC.

Jackson, A., & Davies, G. (2017). Making the Case for ECRIS: Post-'Brexit' Sharing of Criminal Records Information Between the European Union and United Kingdom. *The International Journal of Evidence & Proof, 21*(4), 330–350.

Kemshall, H., & Wood, J. (2010). *Child Sex Offender Review (CSOR): Public Disclosure Pilots, A Process Evaluation*. London: Home Office.

[16] Law Reform Division (1985). *Living Down a Criminal Record: problems and proposals.* Wellington: Government Publications, at p. 8.

Law Reform Division. (1985). *Living Down a Criminal Record: Problems and Proposals*. Wellington: Government Publications.

Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association Books.

Murray, C., O'Donoghue, A., & Warwick, B. (2018). *Discussion Paper on Brexit*. Dublin: Irish Human Rights and Equality Commission.

Bibliography

Acorn. (1991). Similar Fact Evidence and the Principle of Inductive Reasoning: Makin Sense. *Oxford Journal of Legal Studies, 11*(1), 63–91.

Agamben, G. (1995). *Homo Sacer: Sovereign Power and Bare Life* (D. Heller-Roazen, Trans.). Stanford: Stanford University Press.

Ahmed, A., & Lang, E. (2017). The Employability of Ex-Offenders: A Field Experiment in the Swedish Labor Market. *Journal of Labour Policy, 6*(1), 1–23.

Allan, A., & Steffensmeier, D. (1989). Youth, Unemployment and Property Crime: Differential Effects of Job Availability and Job Quality on Juvenile and Young Adult Arrest Rates. *American Sociological Review, 53*, 107–123.

Allen, R. J. (1984). The Impact of Arrest Records on the Exercise of Police Discretion. *Law and Contemporary Problems, 47*(4), 287–302.

An Garda Síochána. (2009). *The Garda Commissioner's Guidelines as to the Practical Application and Operation of the Firearms Act 1925–2009*. Dublin: An Garda Síochána.

An Garda Síochána. (2015). *Annual Report*. Dublin: An Garda Síochána.

Apex Trust. (1989). *Making Rehabilitation Work: From High Hopes to Practical Failure*. London: Apex Trust.

Ashworth, A. (1983). *Sentencing and Penal Policy*. London: Weidenfield & Nicolson.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8

Ashworth, A. (1994). *The Criminal Process: An Evaluative Study*. Oxford: Clarendon Press.

Ashworth, A. (2005). *Sentencing and Criminal Justice* (4th ed.). Cambridge: Cambridge University Press.

Ashworth, A. (2017). *Deserved Criminal Sentences*. London: Hart Publishing.

Ashworth, A., Gardner, J., Morgan, R., Smith, A. T. H., Von Hirsch, A., & Wasik, M. (1998). Neighbouring on the Oppressive: The Government's Anti-Social Behaviour Order Proposals. *Criminal Justice, 16*, 7–14.

Ashworth, A., Emmerson, B., & MacDonald, A. (2012). *Human Rights and Criminal Justice*. London: Sweet and Maxwell.

Association for Criminal Justice Research Development. (2017). *Annual Conference: The Brexit Impact on Criminal Justice Cooperation in Ireland*. Dublin: ACJRD.

Australian Law Reform Commission. (LRC 37-1989). *Report on Spent Convictions*. Australian Law Reform Commission.

Bacik, I. (2001). Incorporation of the European Convention on Human Rights. *Irish Criminal Law Journal, 11*(1), 18–21.

Bacik, I. (2002). Women and the Criminal Justice System. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.

Bacik, I. (2008). The European Criminal Record in Ireland. In C. Stephanou & H. Xanthanki (Eds.), *Towards a European Criminal Record*. New York: Cambridge University Press.

Bacik, I., Kelly, A., O'Connell, M., & Sinclair, H. (1997). Crime and Poverty in Dublin: An Analysis of the Association Between Community Deprivation, District Court Appearance and Sentence Severity. *Irish Criminal Law Journal, 7*, 104–133.

Bäckman, O., Estrada, F., & Nilsson, A. (2017). Locked Up and Locked Out? The Impact of Imprisonment on Labour Market Attachment. *British Journal of Criminology*. https://doi.org/10.1093/bjc/azx071.

Bardon, S. (2017, July 17). Law Would Allow Employers Access to Criminal Records. *The Irish Times*.

Baur, J. E., Hall, A. V., Daniels, S. R., Buckley, M. R., & Anderson, H. J. (2018). Beyond Banning the Box: A Conceptual Model of the Stigmatization of Ex-Offenders in the Workplace. *Human Resources Management Review, 28*(2), 204–219.

Beattie, J. M. (1986). *Crime and the Courts in England 1660–1800*. Princeton, NJ: Princeton University Press.

Beccaria, C. (1963). *On Crimes and Punishments* (H. Paolucci, Trans.). Indianapolis, IN: Bobbs-Merrill Company.

Becker, H. (1963). *Outsiders: Studies in the Sociology of Deviance*. New York: The Free Press.

Behan, C., & O'Donnell, I. (2008). Prisoners, Politics and the Polls: Enfranchisement and the Burden of Responsibility. *The British Journal of Criminology, 48*, 319–336.

Bernburg, J. G., Krohn, M. D., & Rivera, C. J. (2006). Official Labelling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labelling Theory. *Journal of Research in Crime and Delinquency, 43*(1), 67–88.

Blumstein, A., & Nakamura, K. (2009). Redemption in the Presence of Widespread Criminal Background Checks. *Criminology, 2*(47), 327.

Bottomley, K. (1973). *Decision in the Penal Process*. London: Martin Robertson.

Bottoms, A. E., & Brownsword, R. (1982). The Dangerousness Debate After the Floud Report. *British Journal of Criminology, 22*, 229.

Brady, T. (2009, January 3). Judges Get Access to EU Criminal Records. *The Irish Independent*.

Braithwaite, J. (1989). *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

Brogden, M. (1994). Gatekeeping and the Seamless Web of the Criminal Justice Process. In M. McConville & L. Bridges (Eds.), *Criminal Justice in Crisis*. London: Edward Elgar.

Burnett, R., & Maruna, S. (2006). The Kindness of Prisoners: Strengths-Based Resettlement in Theory and in Action. *Criminology and Criminal Justice, 6*(1), 83–106.

Burns, S. (2018, June 11). UN Backs Calls to Make Housing a Constitutional Right in Ireland. *The Irish Times*.

Burton Jr., V. S., Fisher, C., Jonson, C. L., & Cullen, F. T. (2014). Confronting the Collateral Consequences of a Criminal Conviction: A Special Challenge for Social Work With Offenders. *Journal of Forensic Social Work, 4*(2), 80–103.

Butler, B. (1999). *Conference Report, Accessing Employment, 2000 and Beyond, 1999*. Dublin and Hillsborough Castle.

Campbell, C. (2017). Government Fears "Essential" Extradition Powers to Combat Crime Will be Lost After Brexit. *The Detail.*

Caputo, A., & Brodsky, S. (2003). Citizen Coping with Community Notification of Released Sex Offenders. *Behavioral Sciences & the Law, 22*, 239–252.

Carey, G. (1998). The Rule of Law, Public Order Targeting and the Construction of Crime. *Irish Criminal Law Journal, 8*(1), 26–50.

Carmody, P., & McEvoy, M. (1996). *A Study of Irish Female Prisoners*. Dublin: Stationary Office.

Carswell, D. (2018, June 20). David Drumm Jailed for Six Years for Conspiracy to Defraud. *The Irish Times*.

Commission of Inquiry Into the Penal System. (1985). *Report of the Commission of Inquiry Into the Penal System*. Dublin: Stationary Office.

Connor, D., & Tewksbury, R. (2017). Public and Professional Views of Sex Offender Registration and Notification. *Criminology, Criminal Justice, Law & Society, 18*(1), 1–27.

Cressey, D. (1962). Role Theory, Differential Association and Compulsive Crimes. In A. M. Rose (Ed.), *Human Behaviour and Social Processes: An Interactionist Approach*. Boston: Houghton Mifflin.

Cross, R., & Tapper, C. (2010). *Cross & Tapper on Evidence* (12th ed.). Oxford: Oxford University Press.

Deegan, G. (2015, February 13). Sex Offender Ordered Not to Have Tinder, Facebook Profiles. *Irish Times*.

Delson, N. (2006). Using Global Positioning Systems (GPS) for Sex Offender Management. *Association for the Treatment of Sexual Abusers Forum, 18*, 24–30.

Department of Justice and Equality. (1997). *Tackling Crime: Discussion Paper*. Dublin: Stationary Office.

Department of Justice and Equality. (1998). *The Law on Sexual Offences—A Discussion Paper*. Dublin: Department of Justice and Equality.

Department of Justice and Equality. (2006, December 19). McDowell Publishes Draft Legislation to Counter Gangland Crime. *Press Release*.

Department of Justice and Equality. (2007, March 15). Criminal Justice Bill Published. *Press Release*.

Department of Justice and Equality. (2009). *The Management of Sex Offenders: A Discussion Document*. Dublin: Department of Justice and Equality.

Department of Justice and Equality. (2016). *Annual Report*. Dublin: Department of Justice and Equality.

Department of Justice and Equality. (2018, February 18). Minister Flanagan Announces Proposed Counter-Terrorism Legislation Requiring Advance Passenger Information for Flights Entering or Leaving the State. *Press Release*.

Department of the Environment, Heritage and Local Government. (2008). *The Way Home: A Strategy to Address Adult Homelessness in Ireland 2008–2013*. Dublin: Department of the Environment, Heritage and Local Government.

Devlin, P. (1976). *Trial by Jury*. London: Stevens & Sons.

Dolan, K., & Carr, J. (2015). *The Poor Get Prison: The Alarming Spread of the Criminalization of Poverty*. Washington, DC: Institute for Policy Studies.

Doob, A., & Webster, C. (2003). Sentence Severity and Crime: Accepting the Null Hypothesis. *Crime and Justice, 30*, 143.

Editorial. (2007, April 26). Criminal Justice Bill Increases Erosion of Civil Rights. *The Irish Time*s.

Editorial. (2008, January 23). Coughlan Murder—Why was This Criminal in Ireland? *Irish Examiner*.

Editorial. (2009, June 26). Convicted Sex Offender Failed to Comply with Terms of Register. *Mullingar Advertiser*.

Editorial. (2016, June 16). Mandatory Sentencing of Criminals 'An Expensive Mistake'. *Irish Independent*.

Edney, R., & Bagaric, M. (2007). *Australian Sentencing; Principles and Practice*. Melbourne: Cambridge University Press.

Edwards, E. (2018, January 17). Women Being 'Thrown' Into Homelessness After Leaving Prison. *The Irish Times*.

Ehlers, S., Schiraldi, V., & Ziedenberg, J. (2004). *Still Striking Out: Ten Years of California's Three Strikes Law*. Washington, DC: Justice Policy Institute.

Ellis, H. (1990). Disclosure and Good Faith in Insurance Contracts. *Irish Law Times, 8*, 45.

Ericson, R., & Haggerty, K. (1997). *Policing the Risk Society*. Toronto: University of Toronto Press.

Farrall, S., & Bowling, B. (1999). Structuration, Human Development and Desistance from Crime. *British Journal of Criminology, 39*(2), 253–268.

Farrall, S., & Caverley, A. (2006). *Understanding Desistance from Crime: Theoretical Directions in Resettlement and Rehabilitation*. Maidenhead: Open University Press.

Farrell, R. A., & Swigert, V. L. (1978). Prior Offence Record as a Self-Fulfilling Prophecy. *Law & Society Review, 12*(3), 437–453.

Fennell, C. (2009). *The Law of Evidence in Ireland* (3rd ed.). Dublin: Lexis Nexis Butterworths.

Fish, M. J. (2008). An Eye for and Eye: Proportionality as a Moral Principle of Punishment. *Oxford Journal of Legal Studies, 28*(1), 57–71.

Fitch. (2006). *Megan's Law: Does It Protect Children? (2)*. London: NSPCC.

Fitzgerald, C. (2008). Californication of Irish Sentencing Law. *Irish Criminal Law Journal, 18*(2), 42.

Fitzgerald O'Reilly, M. (2013). Post Release Supervision of Sex Offenders. *Irish Criminal Law Journal, 23*(4), 108.

Fitzgerald O'Reilly, M. (2017, July 3). Seeking to Track Sex Offenders Poses Human Rights Questions. *Irish Examiner*.

Fitzgerald O'Reilly, M. (2018). Information Pertaining to Released Sex Offenders: To Disclose or Not to Disclose, That Is the Question. *The Howard Journal of Crime and Justice, 57*(2), 204–230.

Floud, J., & Young, W. (1981). *Dangerousness and Criminal Justice*. London: Heinemann.

Forrest, C. (2016). Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry. *Corrections Today, 78*(1), 30–31.

Foucault, M. (1977). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans.). London: Penguin Books.

Foucault, M. (1984). Right of Death and Power over Life. In P. Rabinow (Ed.), *The Foucault Reader*. England: Penguin Books.

Foucault, M. (1991). Governmentality. In G. Burchell, C. Gordon, & P. Miller (Eds.), *The Foucault Effect*. Chicago: The University of Chicago Press.

Garland, D. (1990). *Punishment and Modern Society: A Study in Social Theory*. Oxford: Clarendon Press.

Garland, D. (1996). The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society. *The British Journal of Criminology, 36*, 445–471.

Garland, D. (2001). *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford: Oxford University Press.

Glick, L. B. (1995). *Criminology*. Boston: Allyn & Bacon.

Goldcamp, J. S. (1985). Danger and Detention: A Second Generation of Bail Reform. *Journal of Criminal Law and Criminology, 76*, 1–74.

Gottfredson, M., & Gottfredson, D. (1988). *Decision Making in Criminal Justice: Towards the Rational Exercise of Discretion*. New York: Plenum Press.

Gottfredson, M., & Hirschi, T. (1990). *A General Theory of Crime*. Stanford: Stanford University Press.

Greenslade, B. (1986). Eyes Open Policy: Employment of a Person with a Criminal Record. *New Zealand Law Journal*, 386.

Griffin, D. (2005). Restorative Justice: A Real Alternative? *Irish Criminal Law Journal, 15*, 2.

Hamilton, C. (2002). Presumed Guilty? The Summer Anti-Crime Package of 1996 and the Presumption of Innocence. *Irish Student Law Review*, 10.

Harris, A., Levenson, J., Lobanov-Rostovsky, C., & Walfield, S. (2016). Law Enforcement Perspectives on Sex Offender Registration and Notification: Effectiveness, Challenges, and Policy Priorities. *Criminal Justice Policy Review*. https://doi.org/10.1177/0887403416651671.

Hart, H. L. A. (1968). *Punishment and Responsibility: Essays in the Philosophy of Law*. New York and Toronto: Oxford University Press.

Hart, H. L. A., & Gardner, J. (2008). *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed.). Oxford: Oxford University Press.

Hartmann McNamara, R., Crawford, C., & Burns, R. (2013). Policing the Homeless: Policy, Practice, and Perceptions. *Policing: An International Journal of Police Strategies & Management, 36*(2), 357–374.

Hasson, R. A. (1969). The Doctrine of Uberrimae Fides in Insurance Law-A Critical Evaluation. *Modern Law Review, 32*, 615.

Headley, J. (2004). Proportionality Between Crimes, Offences and Punishments. *St. Thomas Law Review, 17*, 247.

Hebenton, B., & Seddon, T. (2009). From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age. *The British Journal of Criminology, 49*(3), 343–362.

Hebenton, B., & Thomas, T. (1993). *Criminal Records: State, Citizen and the Politics of Protection*. Avebury: Aldershot.

Hebenton, B., & Thomas, T. (1996). Sexual Offenders in the Community: Reflections on Problems of Law, Community and Risk Management in the U.S.A., England and Wales. *International Journal of the Sociology of Law, 24*, 427–443.

Heffernan, L. (2005). *Evidence: Cases and Materials*. Dublin: Thomson Round Hall.

Heffernan, L. (2008). A DNA Database. *Irish Criminal Law Journal, 18*(4), 105–111.

Heffernan, L. (2009). The Retention of DNA and Fingerprint Data. In I. Bacik & L. Heffernan (Eds.), *Criminal Law and Procedure: Current Issues and Emerging Trends*. Dublin: First Law.

Heffernan, L. (2015). The Taking of Forensic Samples from Suspects under the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. *Practice and Procedure Review, 1*(1), 1–17.

Hickey, C. (2002). *Crime and Homelessness*. Dublin: Focus Ireland and PACE.

HMSO, White Paper. (1990). *Crime, Justice and Protecting the Public: The Governments Proposals for Legislation*. Cm965. London: HMSO.

Hogan, D. (2007). *Applying a Human Rights Perspective to Criminal Justice Policy and Legislation in Ireland*. Annual Conference for Human Rights and Criminal Justice. Irish Human Rights Commission and Law Society of Ireland.

Holland, K. (2018, March 29). 'Loss of Confidence' as Number of Homeless Families Rise. *The Irish Times*.

Home Office. (1986). *Protection of Children: Disclosure of Criminal Background of Those with Access to Children*. London: Home Office.

Home Office. (1999). *Disclosure to the Employment Service of Restrictions That Should be Placed on the Employment of Potentially Dangerous Offenders*. London: Home Office.

Home Office. (2001a). *Building Bridges to Employment for Offenders, Research Study 226*. London: Home Office.

Home Office. (2001b). *Consultation Paper on the Review of Part 1 of the Sex Offenders Act 1997*. London: Home Office.

Home Office. (2002). *Breaking the Cycle—A Report on the Review of the Rehabilitation of Offenders Act 1974*. London: Home Office.

Home Office. (2007). *Review of the Protection of Children from Sex Offenders*. London: Home Office.

Hoskins, J. (2014). Ex Offender Restrictions. *Journal of Applied Philosophy, 31*(1), 33–48.

Hough, M., Jacobson, J., & Millie, A. (2003). *The Decision to Imprison: Sentencing and the Prison Population*. London: Prison Reform Trust.

Houses of the Oireachtas Joint Committee on Justice and Equality. (2018). *Report on Penal Reform and Sentencing*. Dublin: Houses of the Oireachtas Joint Committee on Justice and Equality.

Hudson, B. (2003). *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2nd ed.). Buckingham: Open University Press.

Hudson, B. (2013). *Justice in the Risk Society: Challenging and Re-affirming Justice in Late Modernity*. London: Sage Publications.

Hugo, V. (1982). *Les Miserables* (40th ed., N. Denny, Trans.). London: Penguin Classics.

Hunter, R., Ingleby, R., & Johnstone, R. (Eds.). (1995). *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*. St Leonards: Alan and Unwin.

Ingle, R. (2008, July 1). Building a Better Life on the Outside. *The Irish Times*.

Ingoldsby, B. (2004). *Regular Migration to Ireland*. Dublin: Incorporated Law Society Seminar, Rights to Reside in Ireland.

Institute of Criminology. (2003). *Public Order Offences in Ireland: A Report by the Institute of Criminology, Faculty of Law, University College Dublin for the National Crime Council*. Dublin: Stationary Office.

Ipsa-Landa, S., & Loeffler, C. E. (2016). Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement Seekers in Illinois. *Criminology, 54*(3), 387–412.

Irish Council for Civil Liberties. (2007). *What's Wrong with the Criminal Justice Bill?* Dublin: Irish Council for Civil Liberties.

Irish Council for Civil Liberties. (2010, January 19). Rights Watchdog to Scrutinise Privacy Safeguards in DNA Database Bill. *Press Release.*

Irish Human Rights Commission. (2005). *Observations on the Scheme of the Criminal Justice (International Co-Operation) Bill 2005*. Dublin: IHRC.

Irish Human Rights Commission. (2006). *Observations on Additional Proposals for Amendments to the Criminal Justice Bill 2004*. Dublin: IHRC.

Irish Human Rights Commission. (2007). *Observations on the Criminal Justice Bill 2007*. Dublin: Irish Human Rights Commission.

Irish Human Rights Commission. (2009). *Observations on the Spent Convictions Bill 2007*. Dublin: Irish Human Rights Commission.

Irish Penal Reform Trust. (2006). *Submission of the IPRT to the EU Committee for the Prevention of Torture or Degrading Treatment or Punishment*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2008). *Position Paper on Spent Convictions Bill 2007*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2009). *Position Paper 3 Mandatory Sentencing*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2012). *The Vicious Circle of Social Exclusion and Crime: Ireland's Disproportionate Punishment of the Poor*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2015). *Position Paper 11, Bail and Remand*. Dublin: Irish Penal Reform Trust.

Irish Penal Reform Trust. (2016). *The Practice of Pre-Trial Detention in Ireland, Research Report*. Dublin: Irish Penal Reform Trust.

Irish Prison Service. (2009). *Sex Offender Management Policy: Reducing Re-offending, Enhancing Public Safety*. Dublin: Irish Prison Service.

Irish Prison Service. (2013). *Recidivism Study*. Dublin: Irish Prison Service.

Irish Prison Service. (2016). *The Integrated Treatment and Management of Those Convicted of Sexual Violence*. Dublin: Irish Prison Service.

Irish Prison Service. (2017). *Annual Report*. Dublin: Irish Prison Service.

Jackson, A., & Davies, G. (2017). Making the Case for ECRIS: Post-'Brexit' Sharing of Criminal Records Information Between the European Union and United Kingdom. *The International Journal of Evidence & Proof, 21*(4), 330–350.

Jacobs, J. B. (2015). *The Eternal Criminal Record*. Cambridge, MA: Harvard University Press.

Jacobs, J. B., & Larrauri, E. (2015). *European Criminal Records & Ex-Offender Employment*. New York University Public Law and Legal Theory Working Papers, Paper 532.

Jennings, W., & Zgoba, K. (2015). An Application of an Innovative Cost-Benefit Analysis Tool for Determining the Implementation Costs and Public Safety Benefits of SORNA with Educational Implications for Criminology and Criminal Justice. *Journal of Criminal Justice Education, 26*(2), 147–162.

Johnson, H. (2015). Data Retention—Scope of Police Powers: R (on the Application of Catt) v Commissioner of Police of the Metropolis and Anor and R (on the Application of T) v Commissioner of Police of the Metropolis [2015] UKSC 9. *Communications Law, 20*(2), 56–59.

Jones, D. (2015). When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences. *Stanford Journal of Civil Rights & Civil Liberties, 11*(2), 237–268.

Jones, T., & Newburn, T. (2006). Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Politics. *British Journal of Criminology, 46*, 781.

Jones, T., Newburn, T., & Reiner, R. (2017). Policing and the Police. In A. Liebling, S. Maruna, & L. McAra (Eds.), *The Oxford Handbook of Criminology* (6th ed.). Oxford: Oxford University Press.

Jowell, J. (1989). The Rule of Law Today. In J. Jowell & D. Oliver (Eds.), *The Changing Constitution* (6th ed.). Oxford: Oxford University Press.

Justice, The Howard League for Penal Reform. (1972). *Living it Down-The Problem of Old Convictions*. London: Stevens & Sons.

Kane, C. (2008, October 28). 43 Killings in 4 Years Were by People Out on Bail. *Irish Examiner*.

Keith, M. (1993). *Race, Riots and Policing: Law and Disorder in a Multi-racist Society*. London: University College London Press.

Kelpie, C. (2018, July 3). Gardaí to Get Access to Top EU Security Database. *Irish Independent*.

Kemshall, H., & Maguire, M. (2002). Public Protection, Partnership and Risk Penality: The Multi-agency Risk Management of Sexual and Violent Offenders. In N. Gray, J. Laing, & L. Noaks (Eds.), *Criminal Justice, Mental Health and the Politics of Risk*. London: Cavendish Publishing.

Kemshall, H., & Wood, J. (2010). *Child Sex Offender Review (CSOR): Public Disclosure Pilots, A Process Evaluation*. London: Home Office.

Kemshall, H., Dominey, J., & Hilder, S. (2012). Public Disclosure: Sex Offenders' Perceptions of the Pilot Scheme in England. Compliance,

Legitimacy and Living a "Good Life". *Journal of Sexual Aggression, 18*(3), 311–324.

Kilcommins, S. (2002). The Duty to Disclose Previous Criminal Convictions in Irish Insurance Law. *The Irish Jurist, 37*, 167–186.

Kilcommins, S., & Vaughan, B. (2008). *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland*. Devon: Willan Publishing.

Kilcommins, S., McClean, E., McDonagh, M., Mullally, S., & Whelan, D. (2004a). *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination*. Dublin: Department of Justice and Equality.

Kilcommins, S., O'Donnell, I., O'Sullivan, E., & Vaughan, B. (2004b). *Crime, Punishment and the Search for Order in Ireland*. Dublin: Institute of Public Administration.

Kilkelly, U. (2009). *ECHR and Irish Law* (2nd ed.). Briston: Jordans.

King, A., & Maruna, S. (2009). Once a Criminal, Always a Criminal?: 'Redeemability' and the Psychology of Punitive Public Attitudes. *European Journal of Crime Policy and Research, 15*, 7–24.

Kingston, S., & Webster, C. (2015). The Most 'Undeserving' of All? How Poverty Drives Young Men to Victimisation and Crime. *The Journal of Poverty and Social Justice, 23*(3), 215–227.

Lacombe, D. (2008). Consumed with Sex: The Treatment of Sex Offenders in Risk Society. *The British Journal of Criminology, 48*, 55–74.

Lageson, S. E. (2017). Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness. *Law & Society Review, 51*(1), 8–41.

Lageson, S. E., & Maruna, S. (2018). Digital Degradation: Stigma Management in the Internet Age. *Punishment and Society, 20*(1), 113–133.

Larrauri, E. (2011). Conviction Records in Spain: Obstacles to Reintegration of Offenders? *European Journal of Probation, 3*(1), 50–62.

Larrauri, E. (2014a). Criminal Record Disclosure and the Right to Privacy. *Criminal Law Review, 10*, 723–737.

Larrauri, E. (2014b). Legal Protections Against Criminal Background Checks. *Punishment & Society, 16*(1), 50–73.

Larrauri, E., & Jacobs, J. B. (2013). A Spanish Window on European Law and Policy on Employment Discrimination Based on Criminal Record. In T. Daems, D. van Zyl Smit, & S. Snacken (Eds.), *European Penology?* Oxford: Hart Publishing.

LaSota, J. A., & Bromley, G. W. (1974). *Release of Arrest and Conviction Records: Project on Law Enforcement Policy and Rulemaking*. Arizona: Arizona State University.

Law Commission. (1996). *Consultation Paper No 141, Criminal Law—Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*. London: Home Office.

Law Reform Commission. (LRC 78-2005). *Report on the Establishment of a DNA Database*. Dublin: Law Reform Commission.

Law Reform Commission. (LRC 84-2007). *Report on Spent Convictions*. Dublin: Law Reform Commission.

Law Reform Commission. (LRC CP 29-2004). *Consultation Paper on the Establishment of a DNA Database*. Dublin: Law Reform Commission.

Law Reform Commission. (LRC IP 8-2016). *Regulatory Enforcement and Corporate Offences*. Dublin: Law Reform Commission.

Law Reform Commission. (LRC-50-1995). *Report on An Examination of the Law of Bail*. Dublin: Law Reform Commission.

Law Reform Division. (1985). *Living Down a Criminal Record: Problems and Proposals*. Wellington: Government Publications.

Law Society of Ireland. (2007a, February 27). Law Society's Deep Concern at Government's Intention to Rush Through Far-Reaching Changes in Criminal Law. *Press Release*.

Law Society of Ireland. (2007b). *Public Consultation: Re-Balancing Rights? Contemporary Issues in Human Rights and Criminal Justice*. Dublin: Law Society of Ireland.

Lawlor, P., & McDonald, E. (2001). *Story of Success: Irish Prisons Connect Project, 1998–2000*. Dublin: The Stationary Office.

LeBel, T., Ritchie, M., & Maruna, S. (2017). Can Released Prisoners "Make It?" Examining Formerly Incarcerated Persons' Belief in Upward Mobility and the American Dream. In S. Stojkovic (Ed.), *Prisoner Reentry: Critical Issues and Policy Directions*. New York: Palgrave Macmillan.

Lemert, E. M. (1951). *Social Pathology: A Systematic Approach to the Theory of Sociopathic Behavior*. New York: McGraw-Hill.

Leng, R., McConville, M., & Sanders, A. (1996). Researching the Discretions to Charge and to Prosecute. In A. Sanders (Ed.), *Prosecution in Common Law Jurisdictions*. Aldershot: Dartmouth.

Levenson, J. S. (2016a). Community Control of Sex Offenders. In R. Laws & W. O'Donoghue (Eds.), *Treatment of Sex Offenders: Strengths and Weaknesses in Assessment and Intervention*. New York: Springer.

Levenson, J. S. (2016b). Hidden Challenges: Sex Offenders Legislated Into Homelessness. *Journal of Social Work*. https://doi.org/10.1177/1468017316654811.

Levenson, J. S., & Zgoba, K. (2015). Community Protection Policies and Repeat Sexual Offenses in Florida. *International Journal of Offender Therapy and Comparative Criminology*. https://doi.org/10.1177/0306624X15573946.

Levenson, J., Brannon, Y., Fortney, T., & Bake, J. (2007). Public Perceptions About Sex Offenders and Community Protection Policies. *Analyses of Social Issues and Public Policy, 7*(1), 1–25.

Levenson, J. S., Ackerman, A. R., & Harris, A. J. (2013). Catch Me If You Can: An Analysis of Fugitive Sex Offenders. *Sexual Abuse: Journal of Research and Treatment*. https://doi.org/10.1177/1079063213480820.

Lloyd-Bostock, S. (2000). The Effects in Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study. *Criminal Law Review*, 734.

Macpherson, W. (1999). *The Stephen Lawrence Inquiry, Cm 4262-1*. London: Stationary Office.

Maguire, M., Morgan, R., & Reiner, R. (2007). *The Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.

Maher. (2007). Development in Bad Character Evidence: Undermining the Accused's Shield. *Dublin University Law Journal, 14*(1), 57.

Marshall, T. H. (1977). *Class, Citizenship and Social Development*. London: University of Chicago Press.

Martynowicz, A., & Quigley, M. (2010). *"It's Like Stepping on a Landmine…"—Reintegration of Prisoners in Ireland*. Dublin: Irish Penal Reform Trust.

Maruna, S. (1999). *Desistance and Development: The Psychosocial Process of 'Going Straight'*. Belfast: British Criminology Conference Queens University. Retrieved from http://www.britsoccrim.org/volume2/003.pdf.

Maruna, S. (2001). *Making Good: How Ex-Convicts Reform and Rebuild Their Lives*. Washington, DC: American Psychological Association Books.

Maruna, S. (2004). Desistance from Crime and Explanatory Style: A New Direction in the Psychology of Reform. *Journal of Contemporary Criminal Justice, 20*(2), 184–200.

Maruna, S. (2014). Reintegration as a Right and the Rites of Reintegration: A Comparative Review of De-stigmatization Practices. In J. A. Humphrey & P. Cordella (Eds.), *Effective Interventions in the Lives of Criminal Offenders*. New York: Springer.

Maruna, S., & Immarigeon, R. (Eds.). (2004). *After Crime and Punishment: Pathways to Offender Reintegration*. Devon: Willan Publishing.

Maruna, S., & LeBel, T. P. (2003). Welcome Home? Examining the "Reentry Court" Concept from a Strengthsbased Perspective. *Western Criminology Review, 4*(2), 91–107.

Maruna, S., & Roy, K. (2006). Amputation or Reconstruction? Notes on the Concept of "Knifing Off" and Desistance from Crime. *Journal of Contemporary Criminal Justice, 22*(2), 1–21.

Maruna, S., Immarigeon, R., & LeBel, T. P. (2004a). Ex-Offender Reintegration: Theory and Practice. In S. Maruna & R. Immarigeon (Eds.), *After Crime and Punishment: Pathways to Offender Reintegration*. Cullompton, Devon: Willan Publishing.

Maruna, S., LeBel, T. P., Mitchell, N., & Naples, M. (2004b). Pygmalion in the Reintegration Process: Desistance from Crime Through the Looking Glass. *Psychology, Crime and Law, 10*(3), 271–281.

Mayfield, M. (1997). Revisiting Expungement: Concealing Information in an Information Age. *Utah Law Review*, 1057–1085.

Mayock, P., Sheridan, S., & Parker, S. (2015). *The Dynamics of Long-Term Homelessness Among Women in Ireland*. Dublin: Homeless Executive.

McCartan, K., & Kemshall, H. (2015). Sex Offender (Re)Integration Into the Community: Realities and Challenges. *Journal of Sexual Aggression, 21*(1), 1–3.

McConville, M., Sanders, A., & Leng, R. (1991). *The Case for the Prosecution*. London: Routledge.

McCullagh, C. (1992). Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland. *Irish Journal of Sociology, 2*, 1–19.

McCullagh, C. (1995). Getting the Criminals We Want—The Social Production of the Criminal Population. In P. Clancy, S. Drury, K. Lynch, & L. O'Dowd (Eds.), *Irish Society: Sociological Perspectives*. Dublin: Institution of Public Administration.

McCullagh, C. (1996). *Crime in Ireland: A Sociological Introduction*. Cork: Cork University Press.

McCullagh, C. (2002). How Dirty Is the White Collar? Analysing White Collar Crime. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.

McCullagh, C. (2010). Two-Tier Society; Two-Tier Crime; Two Tier Justice. In S. Kilcommins & U. Kilkelly (Eds.), *Regulatory Crime in Ireland*. Dublin: First Law.

McCullagh, C. (2014). From Offenders to Scumbags: Changing Understandings of Crime and Criminals in Contemporary Ireland. *Irish Journal of Sociology, 22*(1), 8–27.

McGahey, R. (1986). Economic Conditions, Neighbourhood Organisation and Urban Crime. In A. J. Reiss Jr. & M. Tonry (Eds.), *Communities and Crime*. Chicago: University of Chicago Press.

McGuire, J. (Ed.). (2002). *Offender Rehabilitation and Treatment: Effective Programmes and Policies to Reduce Re-offending*. Chichester: Wiley.

McHugh, R. (2013). *Tracking the Needs and Service Provision for Women Ex-Prisoners*. Dublin: Association for Criminal Justice Research and Development.

McWilliams, W., & Pease, K. (1990). Probation Practice and an End to Punishment. *The Howard Journal, 29*(1), 14–24.

Mears, D., & Cochran, J. (2015). *Prisoner Reentry in the Era of Mass Incarceration*. Thousand Oaks, CA: Sage.

Methven, E., & Carter, D. (2016). Serious Crime Prevention Orders. *Current Issues in Criminal Justice, 28*(2), 227–238.

Middlemass, K. M. (2017). *Convicted and Condemned: The Politics and Policies of Prisoner Reentry*. New York: NYU Press.

Mingus, W., & Burchfield, K. B. (2012). From Prison to Integration: Applying Modified Labeling Theory to Sex Offenders. *Criminal Justice Studies, 25*(1), 97–109.

Monahan, J. (2004). The Future of Violence Risk Management. In M. Tonry (Ed.), *The Future of Imprisonment*. New York: Oxford University Press.

Moore, K., Stuewig, J., & Tangney, J. (2015). The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediational Model. *Deviant Behaviour, 37*(2), 196–218.

Morgan, R., & Jones, P. (1992). Jail or Bail? In S. Casale & E. Stockdale (Eds.), *Criminal Justice Under Stress*. London: Blackstone Press.

Morgan, M., & Kett, M. (2003). *The Prison Adult Literacy Survey: Results and Implications*. Dublin: Irish Prison Service.

Mulcahy, A., & O'Mahony, E. (2005). *Policing and Social Marginalisation in Ireland*. Working Paper 05/02. Dublin: Combat Poverty Agency.

Murphy, G. (2007). An Analysis of Sentencing Provisions in the Criminal Justice Act 2006. *Judicial Studies Institute Journal, 1*, 60–100.

Murray, C., O'Donoghue, A., & Warwick, B. (2018). *Discussion Paper on Brexit*. Dublin: Irish Human Rights and Equality Commission.

NACRO. (1992). *Legislation on Bail: What Should be Done?* London: NACRO.

NACRO. (2010). *Developing Proposals for Sentencing and Achieving a Rehabilitation Revolution, Submission to Ministry of Justice*. London: NACR.

National Crime Forum. (1998). *Report of the National Crime Forum*. Dublin: Institute of Public Administration.

National Economic and Social Reform. (2002). *Re-integration of Prisoners Forum Report, No. 22*. Dublin: National Economic and Social Reform.

Newburn, T., & Reiner, R. (2007). Policing and the Police. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *The Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.

Ni Raifeartaigh, U. (1993). The Law Reform Commission *Consultation Paper on Sentencing*. *Irish Law Times, 11*, 101.

Ni Raifeartaigh, U. (1997). Reconciling Bail Law with the Presumption of Innocence. *Oxford Journal of Legal Studies, 17*(1), 17.

O'Brien, T. (2004, July 27). No Licence for Those Convicted. *The Irish Times*.

O'Brien, C. (2018, February 6). Half of Prisoners Drop Out of School Before Junior Certificate. *The Irish Times*.

O'Donnell, I. (1997). Crime, Punishment and Poverty. *Irish Criminal Law Journal, 7*(2), 134–151.

O'Donnell, I. (1998). Crime, Punishment and Poverty. In I. Bacik & M. O'Connell (Eds.), *Crime and Poverty in Ireland*. Dublin: Round Hall Sweet and Maxwell.

O'Donnell, I. (2002). The Re-integration of Prisoners. *Administration, 50*(2), 80–96.

O'Donnell, I. (2005). Putting Prison in Its Place. *Judicial Studies Institute Journal, 5*(2), 54–68.

O'Donnell, I., & O'Sullivan, E. (2001). *Crime Control in Ireland: The Politics of Intolerance*. Cork: Cork University Press.

O'Donnell, I., & O'Sullivan, E. (2003). Imprisonment and the Crime Rate in Ireland. *Economic & Social Review, 34*(1), 33–64.

O'Donnell, I., Teljeur, C., Hughes, N., Baumer, E., & Kelly, A. (2007). When Prisoners Go Home: Punishment, Social Deprivation and the Geography of Reintegration. *Irish Criminal Law Journal, 17*(4), 3–9.

O'Donnell, I., Baumer, E. P., & Hughes, N. (2008). Recidivism in the Republic of Ireland. *Criminology & Criminal Justice, 8*(2), 123–146.

O'Keefe, C. (2008, January 23). We Need EU-Wide Database to Monitor Criminals. *Irish Examiner.*

O'Loingsigh, G. (2004). *Getting Out, Staying Out: The Experiences of Prisoners Upon Release*. Dublin: Community Technical Aid.

O'Mahony, P. (1993). *Crime and Punishment in Ireland*. Dublin: Round Hall Press.

O'Mahony, P. (1995). The Proposed Constitutional Referendum on Bail: An Unholy Grail? *Irish Law Times, 13*, 234.

O'Mahony, P. (1997). *Mountjoy Prisoners: A Sociological and Criminological Profile*. Dublin: Stationary Office.

O'Mahony, P. (1998). Punishing Poverty and Personal Adversity. In I. Bacik & M. O'Connell (Eds.), *Crime and Poverty in Ireland*. Dublin: Round Hall Sweet and Maxwell.

O'Mahony, P. (2002). The Constitution and Criminal Justice. In P. O'Mahony (Ed.), *Criminal Justice in Ireland*. Dublin: Institute of Public Administration.

O'Malley, P. (2001). Risk, Crime and Prudentialism Re-visited. In K. Stenson & R. R. Sullivan (Eds.), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies*. Devon: Willan.

O'Malley, T. (2006). *Sentencing Law and Practice* (2nd ed.). Dublin: Round Hall.

O'Malley, T. (2009a). *The Criminal Process*. Dublin: Thomson Reuters, Round Hall.

O'Malley, T. (2009b). Sentencing Recidivist Sex Offenders: A Challenge for Proportionality. In I. Bacik & L. Heffernan (Eds.), *Criminal Law and Procedure: Current Issues and Emerging Trends*. Dublin: First Law.

O'Malley, T. (2011). *Sentencing: Towards a Coherent System*. Dublin: Round Hall.

O'Malley, T. (2013). *Sexual Offences* (2nd ed.). Dublin: Round Hall.

O'Malley, T. (2016). *Sentencing Law and Practice* (3rd ed.). Dublin: Round Hall.

O'Sullivan, J., Hoggett, J., Kemshall, H., & McCartan, K. (2016). Understandings, Implications and Alternative Approaches to the Use of the Sex Offenders Register in the UK. *Irish Probation Journal, 13*, 84–101.

Packer, H. L. (1964). Two Models of the Criminal Process. *University of Pennsylvania Law Review, 113*, 1–68.

Pager, D. (2003). The Mark of a Criminal Record. *American Journal of Sociology, 5108*, 937–975.

Palmer, A. (1994). The Scope of the Similar Fact Rule. *Adelaide Law Review, 16*, 161.

Payne, J., Macgregor, S., & McDonald, H. (2015). Homelessness and Housing Stress Among Police Detainees: Results from the DUMA Program. *Trends & Issues in Crime and Criminal Justice, 492*, 1–8.

Petersilia, J. (2001). Prisoner Reentry: Public Safety and Reintegration Challenges. *The Prison Journal, 81*(3), 360–375.

Petersilia, J., & Turner, S. (1993). Intensive Probation and Parole. In M. Tonry (Ed.), *Crime and Justice: An Annual Review of Research* (Vol. 19). Chicago: University of Chicago Press.

Phillips, C., & Brown, D. (1998). *Entry Into the Criminal Justice System: A Survey of Police Arrests and Their Outcomes, A Research and Statistics Directorate Report, No. 185*. London: Home Office.

Pijoan, E. L. (2014). Legal Protections Against Criminal Background Checks in Europe. *Punishment and Society, 16*(1), 50–73.

Power, H. (1999). The Crime and Disorder Act 1998 (1) 'Sex Offenders, Privacy and the Police'. *Criminal Law Review*, 3–16.

Pratt, J. (2017). Risk Control, Rights and Legitimacy in the Limited Liability State. *British Journal of Criminology, 57*(6), 1322–1339.

Prison Reform Trust. (2014). *Working It Out: Employment for Women Offenders*. London: Prison Reform Trust.

Ramakers, A., Nieuwbeerta, P., Van Wilsem, J., & Dirkzwager, A. (2017). Not Just Any Job Will Do: A Study on Employment Characteristics and Recidivism Risks After Release. *International Journal of Offender Therapy and Comparative Criminolology, 61*(16), 1795–1818.

Reaves, B. A. (1991). *Pre-trial Release of Felony Defendants*. Washington, DC: Bureau of Justice Statistics.

Regan, L. (1995). *Taken Down in Evidence*. Dublin: Gill & Macmillan.

Rhodes, J. (2008). Ex-Offenders, Social Ties and the Routes Into Employment. *Internet Journal of Criminology, 1*, 1–20.

Roberts, J. V. (1997). The Role of Criminal Record in the Sentencing Process. *Crime and Justice, 22*, 303–362.

Roberts, J. V., & Yalincak, O. K. (2014). Revisiting Prior Record Enhancement Provisions in State Sentencing Guidelines. *Federal Sentencing Reporter, 26*(3), 177–190.

Rogan, M. (2008). Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and "Post-Release" Orders. *Dublin University Law Journal, 15*(1), 298–323.

Rogers, J. (2007, April 4). Elements of the Criminal Justice Bill Do Not Stand Up to Scrutiny. *The Irish Times*.

Rose, N. (2000). Government and Control. *British Journal of Criminology, 40*, 321–339.

Ross, D. (2003). Accused Introduces His Own Bad Character. *Deakin Law Review, 8*(2), 291–303.

Rottman, D. B. (1984). *The Criminal Justice System: Policy and Performance*. Dublin: National Economic and Social Council.

Russell, S. (2010). Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing. *U.C. Davis Law Review, 43*, 1135–1182.

Ryan, A. (2000). Arrest and Detention: A Review of the Law. *Irish Criminal Law Journal, 10*(1), 2–10.

Rydberg, J., Grommon, E., Huebner, B. M., & Bynum, T. (2014). The Effect of Statewide Residency Restrictions on Sex Offender Post Release Housing Mobility. *Justice Quarterly, 31*(2), 421–444.

Sampson, R., & Laub, J. (1993). *Crime in the Making: Pathways and Turning Points Through Life*. Cambridge: Harvard University Press.

Sampson, R., & Laub, J. (2001). Understanding Desistence from Crime. *Crime and Justice: A Review of Research, 28*, 1–70.

Sanders, A., & Young, R. (1994). The Rule of Law, Due Process and Pre-trial Criminal Justice. *Current Legal Problems, 47*, 125.

Sanders, A., & Young, R. (2007). From Suspect to Trial. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *The Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.

Sanders, A., Young, R., & Burton, M. (2010). *Criminal Justice* (4th ed.). New York: Oxford University Press.

Schmitts, J., & Warner, K. (2010). *Ex-Offenders and the Labour Market*. Washington, DC: Centre for Economic and Policy Research.

Schulenberg, J. (2016). Police Decision-Making in the Gray Zone. *Criminal Justice and Behavior, 43*(4), 459–448.

Schwartz, R., & Skolnick, J. H. (1962). Two Studies of Legal Stigma. *Social Problems, 10*(2), 133–142.

Seymour, M. (2007). *Homelessness and Offending: Marginalisation, Segregation and the Challenges to Social Inclusion*. 10th Annual Conference of the Association for Criminal Justice Research and Development: Community, Custody and Aftercare, The Journey Towards Social Inclusion.

Seymour, M., & Costello, L. (2005). *A Study of the Number, Profile and Progression Routes of Homeless Persons Before the Court and in Custody*. Dublin: Dublin Institute of Technology.

Shute, S. (2002). Appropriation and the Law of Theft. *Criminal Law Review*, 445–458.

Sibley, D. (1995). *Geographies of Exclusion*. London: Routledge.

Simon, J. (2007). *Governing Through Crime*. New York: Oxford University Press.

Skolnick, J. (1979). Police Work. In C. Campbell & J. Wiles (Eds.), *Law and Society: Readings in the Sociology of Law*. Oxford: Oxford University Press.

Smith, D. (1986). The Neighbourhood Context of Police Behaviour. In A. Reiss & M. Tonry (Eds.), *Communities and Crime*. Chicago: University of Chicago Press.

Smith, D., & Gray, J. (1983). *Police and People in London*. Aldershot: Gower.

Smith, D. J. (2007). Crime and the Life Course. In M. Maguire, R. Morgan, & R. Reiner (Eds.), *Oxford Handbook of Criminology* (4th ed.). Oxford: Oxford University Press.

Soothill, K., Francis, B., & Fligelsone, R. (2002). *Patterns of Offending Behaviour: A New Approach, Research Findings No. 171*. London: Home Office.

Spohn, C., & Holleran, D. (2002). The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders. *Criminology, 40*, 329.

Steiner, B., Makarios, M. D., & Travis, L. F. (2015). Examining the Effects of Residential Situations and Residential Mobility on Offender Recidivism. *Crime & Delinquency, 61*(3), 375–401.

Stephen, J. (1883). *A History of the Criminal Law of England*. London: Macmillan & Co.

Stojkovic, S. (Ed.). (2017). *Prisoner Reentry: Critical Issues and Policy Directions*. New York: Palgrave Macmillan.

Tannenbaum, F. (1951). *Crime and the Community*. New York: Columbia University Press.

Terry, K. (2015). Sex Offender Laws in the United States: Smart Policy or Disproportionate Sanctions? *International Journal of Comparative and Applied Criminal Justice, 39*(2), 113–127.

Tewksbury, R. (2014). Evidence of Ineffectiveness: Advancing Argument Against Sex Offender Residence Restrictions. *Criminology and Public Policy, 13*(1), 135–138.

Tewksbury, R., Jennings, W., & Zgoba, K. (2012). A Longitudinal Examination of Sex Offender Recidivism Prior to and Following the Implementation of SORN. *Behavioral Sciences & the Law, 30*, 308–328.

The Law Reform Commission. (LRC CP 6-1993). *Consultation Paper on Sentencing*. Dublin: Law Reform Commission.

The Probation Service. (2017). *Annual Report*. Dublin: The Probation Service.

Thomas, T. (2000). Protecting the Public: Some Observations on the Sex Offenders Bill 2000. *Irish Criminal Law Journal, 10*(2), 12.

Thomas, T. (2004). When Public Protection Becomes Punishment? The U.K. Use of Civil Measures to Contain the Sex Offender. *European Journal on Criminal Policy and Research, 10*, 337–351.

Thomas, T. (2005). *Sex Crime: Sex Offending and Society* (2nd ed.). Devon: Willan Publishing.

Thomas, T. (2007). *Criminal Records: A Database for the Criminal Justice System and Beyond*. New York: Palgrave Macmillan.

Thomas, T. (2011). *The Registration and Monitoring of Sex Offenders: A Comparative Study*. New York: Routledge.

Thomas, T. (2016). *Policing Sexual Offences and Sex Offenders*. London: Palgrave Macmillan.

Thomas, T., & Hebenton, B. (2013). Dilemmas and Consequences of Prior Criminal Record: A Criminological Perspective from England and Wales. *Criminal Justice Studies, 26*(2), 228–242.

Tonry, M. (1996). *Sentencing Matters*. New York: Oxford University Press.

Tonry, M. (2004). *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy*. Cullompton: Willan.

Tonry, M. (2014). The Questionable Relevance of Previous Convictions to Punishments for Later Crimes. In J. V. Roberts & J. V. Von Hirsch (Eds.), *Previous Convictions at Sentencing*. Oxford: Hart.

Travis, J. (2002). Invisible Punishment: An Instrument of Social Exclusion. In M. Mauer & M. Chesney-Lind (Eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: The New Press.

Tribe, L. H. (1970). An Ounce of Detention: Preventive Justice in the World of John Mitchell. *Virginia Law Review, 56*, 371.

Trotter, C., McIvor, G., & McNeill, F. (Eds.). (2016). *Beyond the Risk Paradigm in Criminal Justice. Series: Beyond the Risk Paradigm*. Basingstoke: Palgrave Macmillan.

Uggen, C. (2000). Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism. *American Sociological Review, 65*, 529–546.

Uggen, C., & Blahnik, L. (2015). The Increasing Stickiness of Public Labels. In J. Shapland, S. Farrall, & A. Bottoms (Eds.), *Global Perspectives on Desistance*. London: Routledge.

Uggen, C., Manza, J., & Behrens, A. (2004). 'Less Than the Average Citizen': Stigma, Role Transition and the Civic Reintegration of Convicted Felons. In S. Maruna & R. Immarigeon (Eds.), *After Crime and Punishment: Pathways to Offender Reintegration*. Cullompton, Devon: Willan Publishing.

Uggen, C., Manza, J., & Thompson, M. (2006). Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders. *The Annals of the American Academy of Political and Social Science, 605*, 281–310.

Vaughan, B. (2000). Punishment and Conditional Citizenship. *Punishment and Society, 2*(1), 23–39.

Vaughan, B. (2002). The Potential Dangers of Risk Analysis for the Criminal Justice System. *Irish Criminal Law Journal, 12*(3), 3–7.

Visher, C. A., & Travis, J. (2003). Transitions from Prison to Community: Understanding Individual Pathways. *Annual Review of Sociology, 29*(1), 89–113.

Vold, G., Bernard, T., Snipes, J., & Gerould, A. L. (2015). *Vold's Theoretical Criminology* (7th ed.). New York: Oxford University Press.

Von Hirsch, A. (1976). *Doing Justice: The Choice of Punishments*. New York: Hill and Wang.

Von Hirsch, A. (1981). Desert and Previous Convictions in Sentencing. *Minnesota Law Review, 65*, 591.

Von Hirsch, A. (1992). Proportionality in the Philosophy of Punishment. *Crime and Justice, 16*, 55–98.

Von Hirsch, A. (2002). Record-Enhanced Sentencing in England and Wales. In S. Rex & M. Tonry (Eds.), *Reform and Punishment: The Future of Sentencing*. Cullompton: Willan Publishing.

Von Hirsch, A. (2005). Proportionate Punishments. In A. Von Hirsch & A. Ashworth (Eds.), *Principled Sentencing*. Oxford: Oxford University Press.

Von Hirsch, A. (2009). Incapacitation. In A. Ashworth, A. Von Hirsch, & J. Roberts (Eds.), *Principled Sentencing: Readings on Theory and Policy* (3rd ed.). Oxford: Hart Publishing.

Von Hirsch, A. (2014). Proportionality and the progressive Loss of Mitigation: Some Further Reflections. In J. V. Roberts & J. V. Von Hirsch (Eds.), *Previous Convictions at Sentencing*. Oxford: Hart.

Von Hirsch, A., & Roberts, J. V. (2004). Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Purposes and the Role of Previous Convictions. *Criminal Law Review*, 639

Von Hirsch, A., Bottoms, A. E., Burney, E., & Wikstrom, P. O. (1999a). *Criminal Deterrence: An Analysis of Recent Research*. Oxford: Hart Publishing.

Von Hirsch, A., Bottoms, A. E., Burney, E., & Wikstrom, P. O. (1999b). *Criminal Deterrence and Sentencing Severity*. Oxford: Hart Publishing.

Walker, N. (Ed.). (1996). *Dangerous People*. London: Blackstone.

Walklate, S. (2001). *Gender, Crime and Crime Justice*. Devon: Willan.

Walsh, D. (2002). *Criminal Procedure*. Dublin: Thomson Round Hall.

White, J. (2000a). The Confessional State-Police Interrogation in the Irish Republic: Part 2. *Irish Criminal Law Journal, 10*(1), 2–6.

White, J. (2000b). The Confessional State-Police Interrogation in the Irish Republic: Part I. *Irish Criminal Law Journal, 10*(1), 17–20.

White Paper. (1990). *Crime, Justice and Protecting the Public: The Governments Proposals for Legislation*. Cm 965. London: HMSO.

White Paper on Crime. (2010). *Consultation Process, Discussion Document 1: Crime Prevention and Community Safety*. Dublin: Department of Justice and Equality.

Williams, K., Papadopoulou, V., & Booth, N. (2012). *Prisoners' Childhood and Family Backgrounds*. London: Ministry of Justice.

Willis, C. (1983). *The Use, Effectiveness and Impact of Police Stop and Search Powers*. London: Home Office.

Wilson, J. Q. (1968). *Varieties of Police Behaviour: The Management of Law and Order in Eight Communities*. Harvard: Harvard University Press.

Young, D. (1986). *Introduction, On Crimes and Punishments*. Indianapolis: Hackett.

Young, J. (1999a). *The Exclusive Society*. London: Sage Publications.

Young, J. (1999b). Cannibalism and Bulimia: Patterns of Social Control in Late Modernity. *Theoretical Criminology, 3*(4), 387–407.

Young, J. (2003). Merton with Energy, Katz with Structure: The Sociology of Vindictiveness and the Criminology of Transgression. *Theoretical Criminology, 7*(3), 389–414.

Zedner, L. (2004). *Criminal Justice*. Oxford: Oxford University Press.

Zedner, L. (2010). Security, the State, and the Citizen: The Changing Architecture of Crime Control. *New Criminal Law Review, 13*, 379–403.

Zgoba, K. (2017). Memorialization Laws in the United Kingdom: A Response to Fear or an Increased Occurrence? *American Journal of Criminal Justice, 42*(3), 628–643.

Zgoba, K., & Ragbir, D. (2016). Sex Offender Registration and Notification Act (SORNA). *Sexual Violence*, 33–49.

Zgoba, K., Miner, M., Levenson, J., Knight, R., Letourneau, E., & Thornton, D. (2015). The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems. *Sexual Abuse: A Journal of Research and Treatment, 28*(8), 722–740.

Zimring, F. E., Hawkins, G., & Kamin, S. (2001). *Punishment and Democracy: Three Strikes and You're Out in California*. Oxford: Oxford University Press.

Zuckerman, A. A. S. (1992). Miscarriage of Justice—A Root Treatment. *Criminal Law Review*, 323–345.

Index[1]

[1] Note: Page numbers followed by 'n' refer to notes.

M. Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction*,
https://doi.org/10.1057/978-1-137-59662-8