

Criminal records and conditional citizenship: towards a critical sociology of post-sentence discrimination

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The critical sociology of punishment has a long-established tradition of exploring issues such as: the differential application of penal sanctions across class, race and gender divisions; the harms associated with confinement in penal and semi-penal institutions; and the expansion of the carceral continuum into community settings. More recently, North American scholarship has explored the extent to which criminalization may generate a number of 'collateral consequences' for those previously subjected to punishment. However, this term arguably fails to convey what is at stake when those who have served their sentences are denied access to the full range of rights and entitlements associated with meaningful citizenship. Indeed, for many people with convictions, the discrimination which they face in their *post*-sentence lives may be experienced as equally or even more painful than the original sanctions for lawbreaking. Moreover, given the often precarious status of those targeted for punishment in many advanced capitalist economies, this discrimination against convicted population is likely to intensify and exacerbate pre-existing marginality. This requires that post-sentence disadvantage should be considered as *central* to the social process of punishment and not merely 'collateral' to it.

In this short chapter, I provide a brief exploration of some the issues arising from criminal records within England and Wales. In doing so, I hope to demonstrate the potential for a broader sociological agenda concerned with discrimination against people with convictions during their post-sentence lives. That is, a field of enquiry which does not merely 'chart' different forms of discrimination against people with convictions, but which also: (1) explores the rationalities which underpin it; (2) examines the lived experience of those subjected to it; and therefore (3) opens up various forms of discrimination to critical scrutiny and contestation.

Criminal records, 'less eligibility' and 'non-superiority'

Over 10.5 million people in Britain have a previous criminal conviction (Unlock 2014). The 'criminal records' pertaining to these convictions can cause multiple disadvantages for people in their post-sentence life (Henley 2014). These disadvantages can stem from both *de jure* exclusions where the law prohibits or disqualifies people with certain convictions from, for example, undertaking specified jobs (Thomas 2007), serving on juries (HM Courts Service 2015) or running for various public offices (Electoral Commission 2013a; 2013b; 2013c). However, the less favourable treatment of people with convictions is more often the result of *de facto* discrimination stemming from the policies and practices of both state and private-sector actors. For instance, some employers may not be willing to consider people with convictions when recruiting, even if there is no specific law requiring them to consider criminal records as part of the process (Working Links 2010; Larrauri 2014). Moreover, many providers of insurance policies, mortgages and other financial products might treat a criminal conviction as evidence of an enhanced 'risk' and either refuse to offer their services or charge an enhanced premium for doing so (Unlock 2013). Similarly, private landlords may be reluctant to let a property to a person who declares a previous conviction (Shelter 2012). This amorphous range of *de jure* exclusions and *de facto* forms of discrimination has obvious potential to restrict the life chances of former lawbreakers in a number of spheres.

Historically, the Benthamite principle of 'less eligibility' associated with both systems of poor relief and, subsequently, with penal confinement, dictated that those either in workhouses or prisons were required to be held in conditions not more favourable than those available to the lowest ranks of the (non-offending) working population (see Sieh 1989). This persistent ideology has continued into contemporary political discourses, with strong objections raised to improvements in the treatment of prisoners or other lawbreakers on the grounds that they would cause offence to the purportedly 'law-abiding majority' or to victims of crime (Drake and Henley 2014). However, Mannheim (1939) described how the less-eligibility principle also applied to the treatment of convicted people *post-sentence* by suggesting that they were often subject to a standard of 'non-superiority'. This he defined as 'the requirement that the condition of the criminal *when he has paid the penalty for his crime* should be at least not superior to that of the lowest classes of the non-criminal population' (p.57, emphasis added).

In the present-day, the effects of this 'non-superiority' are seen most obviously within the labour market where those with convictions are placed at a distinct disadvantage (in 2011 of the 1.21 million people claiming Job Seekers Allowance, 33 per cent appeared on the Police National Computer, MOJ/DWP 2011). When 'structural unemployment' and 'labour market flexibility' are central tenets of neoliberal globalized economies (Standing 2009) it is easy to see how these disadvantages are readily sustained. As outlined above, non-superiority also applies to access to positions of responsibility within civil society. For example, the opportunity to perform jury service or to run for public office is, in many circumstances, denied to people with convictions. However, the non-superiority principle has also been applied to the distribution of scant welfare goods. Indeed, in some US states various forms of social security (e.g. food stamps) are denied to those with specified drug felony convictions (see Wacquant 2009; American Bar Association 2013; The Sentencing Project 2015). In the UK these restrictions have, to date, been less dramatic. However, Garland (1985) amongst others has identified a close historical nexus between domestic penal and welfare strategies and, in recent years, attempts have been made to exert quasi-punitive effects through the 'welfare state'. For instance, Harlow Council in Essex has attempted to introduce measures which would deny social housing to people with specified convictions (BBC News 2013). Also, in many cases, previous convictions have the effect of either reducing or withholding completely the possibility of receiving state-funded compensation from those who sustain injuries as victims of crime (Criminal Injuries Compensation Authority 2012).

Partial rehabilitation and discriminatory biopolitics

My doctoral research (Henley 2016) explored the emergence and erosion of the Rehabilitation of Offenders Act 1974 (ROA) as a legal mechanism designed to mitigate various forms of exclusion and discrimination which can potentially affect people with old criminal records. The ROA allows convictions resulting in sentences of less than four years' imprisonment to become 'spent' after a specified period of time. Once a conviction becomes spent it need not be declared for *most* purposes. However, those who have received sentences of more than four years' imprisonment or an indeterminate term are permanently excluded from the provisions of the ROA. Therefore, these individuals remain vulnerable to possible discrimination based on their criminal records for life. In 2014 alone, some 7,010 people received a conviction which can *never* become spent (Ministry of Justice 2015). Furthermore, a significant (and growing) number of occupations are now subject to 'enhanced' criminal background checks which reveal *all* convictions and cautions (even those which are 'spent') thus rendering the ROA ineffective in

many cases. Over four million background checks of this nature are conducted for employment purposes each year (Larrauri 2014). his issue of ‘unspent’ convictions, the ubiquity of criminal background checks and the resultant potential for discrimination and exclusion of convicted individuals *post-sentence* raises serious questions about whether the effects of state punishment ever truly end and if ‘rehabilitation’ is currently given effective articulation in law.

My research theorizes these issues by drawing on the work of Michel Foucault on governmentality and biopolitics (Foucault 2007; 2008). It considers whether the emergence of criminal records databases since the 19th Century and systems of disclosure in the 20th Century (Thomas 2007) has (partly by contingency and partly by design) facilitated the development of a *moral technology for the regulation of life chances*. I suggest that discriminatory ‘ways of acting’ (such as criminal background checks and statutory exclusions) are underpinned by neoliberal political rationalities which regard members of society who have contravened the law as having made a rational choice to do so. They thus render the convicted population vulnerable to the exercise of a regulatory power which ‘disallows life’ (Foucault 1978: 138) by exposing former lawbreakers to less favourable treatment and potentially condemning them to permanent membership of an emerging global ‘precariat’ (Standing 2011). By contrast, this exclusionary biopolitics has the effect of improving the relative life chances of ‘good citizens’ by ensuring that they have a strategic advantage over people with convictions in the competition for employment and in other opportunities for self-improvement. Thus, previous convictions operate not just as markers of potential ‘risk’ or danger as many scholars have noted (see *inter alia* Castel 1991; Hudson 2003; O’Malley 2010; Mythen 2014), but also as *indices of relative desert*, through which government can, through various legal and policy instruments, guide the conduct of non-state actors towards the convicted members of the population and their associates. This may be achieved by adjusting the period of time it takes for a conviction to become ‘spent’ under rehabilitation legislation or, for instance, by expanding or restricting the circumstances under which certain convictions can be considered. This administration of the boundaries of redemptive possibility can occur in response to either shifting penal sensibilities or due to conditions of economic ‘necessity’ (i.e. by restricting access to employment to those regarded as ‘good citizens’).

Citizenship: from universality to conditionality

In Marshall’s (1950) classic essay, citizenship was conceived of as a status bestowed on those who are *full members* of a community. For Marshall, citizenship involved an evolution of rights: from *civil* rights in the eighteenth century (e.g. the right to life and liberty, due process and equality before the law); *political* rights in the nineteenth century (e.g. the right to vote, stand in elections, participate in political life and civil society); and *social* rights in the twentieth century (e.g. the right to an adequate standard of living and social protection). After the Second World War, frameworks for rights emerged such as the Universal Declaration of Human Rights in 1948 and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights in 1966. Whilst these frameworks and theoretical approaches sought to assert the principle of *universal* rights, the actual enjoyment of rights has tended to be experienced as a facet of *national* citizenship. Indeed, Bobbio (1990) has described how national identity has involved a ‘melting’ of the notion of rights with modern citizenship. That is, of citizenship entailing one’s belonging to an entity such as a sovereign nation and one’s entitlement to rights being a function of that belonging. The conditionality of one’s enjoyment of rights upon national citizenship has clear implications for migrants and refugees. In his work on the emerging

'precariat' class, Standing (2011: 14) deploys the notion of the *denizen* to convey the idea of a person who 'for one reason or another, has a more limited range of rights than citizens do'. He also notes how, in Roman times, the idea of the denizen 'applied to foreigners given residency rights and rights to ply their trade, but not full citizenship rights' (*ibid.*). However, Standing also suggests that, whilst *most* modern denizens are still migrants, 'one other category stands out – the large layer of people who have been criminalised, the convicted' (*ibid.*).

My future research agenda takes up the challenge of charting the status of 'criminalised denizens' in modern society. As already alluded to, their partial enjoyment of rights occurs within the context not only of an elevated concern with 'risk' but also an increasingly politicised law and order discourse which implicitly constructs 'offenders' as having actively forfeited their rights by virtue of their lawbreaking (see Drake and Henley 2014). This ideological shift advances the view that somehow granting rights too liberally will be to the detriment of 'victims' or the 'law-abiding', further polarising our understanding of what it means to be a citizen (*ibid.*). Kivisto and Faist have suggested that citizenship '*confers an identity* on individuals by binding them to and defining them as members of a political community' (2007: 49; emphasis added). However, processes of criminalisation have the effect of weakening this bind and the convicted individual's membership of the community because a restriction of liberty and suspension of 'full' citizenship has traditionally been justified on the basis that lawbreaking 'breaches the social contract'. Consequently, lawbreakers are placed within the ambit of what Foucault (1977: 11) once termed 'an economy of suspended rights' involving, for instance, a restriction of normal engagement with civil society. What remains ambiguous, however, is precisely when and how this 'suspension' of rights comes to an end and when 'normal' citizenship, if indeed it was ever present in the first place, can be resumed and on what terms.

In *A Theory of Justice*, Rawls (2009 [1971]) reworked traditional social contract philosophy to resolve the problem of distributive justice (that is, of how to achieve a socially just distribution of goods in a society). Within his theory, Rawls derived two principles of justice: the liberty principle and the difference principle. The liberty principle supported an 'equal right to the most extensive basic liberty compatible with a similar liberty for others' (p.53) such as, for instance, the right to run for public office. The difference principle, on the other hand, proposed that social and economic inequalities could only be justifiable to the extent that they are to the benefit of the least advantaged. Within this framework, the achievement of a Rawlsian conception of 'Justice as Fairness' for the sizeable convicted population is problematic when it so clearly conflicts with the utilitarian principles of 'less eligibility' and 'non-superiority' described earlier. That is, the possession of a criminal record in modern society poses difficult questions about the extent to which meaningful citizenship can be enjoyed precisely because the denial of full citizenship is no longer given effect merely for the duration of an individual's sentence, but through the as yet uncharted and expanding array of exclusions and forms of discrimination which continue into *post-sentence* life.

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About the author

Research

I am currently employed as a Lecturer in Criminology in the School of Social Science and Public Policy at Keele University in Staffordshire, UK. Prior to this I worked at Keele as a Graduate Teaching Assistant whilst conducting my doctoral studies under the supervision of Dr Mary Corcoran and Professor Ronnie Lippens. My PhD, entitled 'Criminal records and the regulation of redemption: a critical history of legal rehabilitation in England and Wales', was submitted in September 2016. Before joining Keele, I undertook an MA in Social Sciences at the Open University.

My research interests are primarily in the areas of punishment and social control. In particular, I am interested in the impact of criminal records and post-sentence control measures on the life chances and human rights of people with convictions. Whilst I have previously used quantitative analysis in some of my published work on Multi-Agency Public Protection Arrangements, my doctoral thesis and other research is predominantly qualitative and archival, drawing theoretical inspiration from the works of Michel Foucault on discourse, power and governmentality.

Activism, Organisational Work and/or Professional Membership

My research agenda is also inspired by my involvement with the award-winning charity Unlock which supports people with convictions with information, advice and advocacy to help them overcome the disadvantage which can arise from the stigma associated with criminal records. My first involvement with Unlock was as a volunteer researcher for its online Information Hub whilst I was studying for my Master's degree. I later became a member of the Board of Trustees in July 2013 and assumed the role of Chair in October 2016. Further information about Unlock and its work can be found online at www.unlock.org.uk.

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