

Civil and social death

Criminalisation and the loss of the self

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In this chapter I offer an alternative perspective to the themes of 'dying', 'loss' and bereavement' within criminal justice and explore the relationships which exist between social practices of punishment, and the status or positioning of former lawbreakers who have *been punished*. Firstly, I provide a brief history of punishments in England whose object was to bring about not only the literal death of the condemned person, but also their 'civil death'. Secondly, I connect these historical practices of juridical 'othering' to the 'pains of criminalisation' which exist in the present. These, I argue, are manifestations of 'social death' which are experienced by people with convictions due to the stigma of having a criminal record. Drawing on Erving Goffman, I then suggest that this 'mortification of the self' disrupts pre- and post-conviction social identity in ways which require us to develop wider conceptions of 'loss' and 'bereavement' in criminal justice research.

Death as punishment and 'death' beyond punishment

The social practice of punishment has long been associated with the idea that the convicted party must suffer painful or 'unpleasant consequences' following a breach of the law (Lacey 1988: 7-8) and that, by doing so, lawbreakers expiate their guilt for an offence. Indeed, many post-Enlightenment theories of punishment are predicated on the idea that lawbreakers have incurred a notional 'debt to society' by 'breaching the social contract' between state and citizens which must be 'paid back' by suffering a proportionate punishment (Beccaria 1764/1819). However, a cursory examination of the history of English punishment – and particularly the use of the death penalty - reveals a number of examples which undermine the idea that even the finality of death was sufficient for a convicted party to fully expiate their guilt and be emancipated from their juridical status as irretrievably 'other'.

The hanging, drawing and quartering of those convicted under the Treason Act of 1351 was a prime example of *posthumous* punishment. The destruction of the offender's body was intended not only to reflect the seriousness of attacks on the authority of the monarch in comparison to other 'lesser' capital offences (Bellamy 2004: 13), but also to continue punishment into the afterlife. In many Christian traditions, the burial of an intact corpse facing Eastwards was a necessary precondition for resurrection of the body on the final day of judgement (Abbot 1996: 33). It could, therefore, be argued that this posthumous destruction of the corpse was designed to extend the effects of punishment *beyond* the point of death.

In 1814, the legal reformer and parliamentarian Sir Samuel Romilly, proposed to reduce the penalty for High Treason to death by hanging with the body being merely placed 'at the King's disposal' (Romilly 1820: xlvi). However, an amendment to Romilly's proposal argued that such a reform would leave the punishment for High Treason in a state 'less than the punishment annexed to murder' (*ibid.*). It was therefore resolved that posthumous decollation (beheading) would be retained "'as fit punishment and appropriate stigma" in such cases' (*ibid.*).

The Murder Act of 1752 allowed for the corpses of convicted murderers to be either hung in irons (gibbeting) as a deterrent or used for public dissection so 'that some further terror and peculiar mark of infamy be added to the punishment' (Harrison 1983: 6). Posthumous

dissection, often conducted in public, had the effect of rendering a death sentence for murder as more 'notorious' than that which was commonly available for theft during this period. The sentence of 'death with dissection' was retained until the Offences against the Person Act of 1828 and was only rendered obsolete four years later following the Anatomy Act of 1832 which permitted the donation of bodies for medical research purposes. However, the principle that those who were executed for their crimes could not, even in death, return to a state of equality to other 'innocent' people was also retained by the Act which included a direction that the bodies of executed convicts belonged to the Crown. Consequently, they were to be buried within the prison grounds in unmarked graves (often containing several bodies) rather than returned to family members for private burial. Section 5 of the Capital Punishment Amendment Act of 1868 added the provision that a formal inquest be held following execution, but section 6 retained the requirement that the body be buried within the grounds of the prison where the execution took place – a practice which continued until the abolition of the death penalty for murder in the 1960s.

Capital punishment in England had, therefore, a long tradition of adding further post-mortem indignities to the condemned. However, in addition to suffering execution, those convicted of treason or felonies could also be subjected to a wider range of legal consequences which effectively extended the effects of punishment *beyond death* (Damaska 1968). During the Middle Ages, bills of attainder were often passed 'as an adjunct to a death sentence or following a commuted capital sentence' (Edgely 2010: 405). The consequence of such bills was to pronounce the 'civil death' of the condemned person and to inflict the additional punishment of 'corruption of blood' upon them. In effect, attainder meant that whilst the individual was still *physically* alive they were *legally* dead, even if only for the short period prior to their execution. As a result, an attainted person's property was forfeited to the Crown and they were forbidden from entering into contracts and inheriting property. Also, their wives legally became widows and their children were orphaned. Moreover, any civil or political rights enjoyed by the attainted person were stripped from them. Consequently, they could not give evidence in court or begin legal proceedings against another person. Neither could they sit on a jury or, in later centuries when the franchise had been extended, vote in any elections (Edgely 2010: 405).

Damaska (1968: 354) suggests that the motive behind the infliction of such measures was that of 'degrading the offender'. Significantly, this involved the reduction of noblemen and women to the status of commoners, thus rendering them liable to forms of torture and execution which would otherwise have been forbidden. The corruption of blood which accompanied a bill of attainder also had the effect of stripping the individual of the right to pass on property or any titles to their heirs. Once again, these were forfeited to the Crown and thus another practical effect of such a bill was the termination of the legal entitlements of the attainted person's family (Saunders 1970: 989).

Bills of attainder were typically passed by medieval kings and queens against political enemies or others who posed a threat to the security of the monarch's position. Whilst they were mostly made against men, notable women made subject to bills of attainder included Anne Boleyn and Catherine Howard, who were stripped of their titles and had their marriages to Henry VIII annulled prior to execution. Henry VIII also famously attainted his chief minister Thomas Cromwell on charges of treason in 1540 (Schofield 2008). Later, in events which helped precipitate the English Civil War, a bill of attainder was passed by Parliament against Thomas Wentworth, the 1st Earl of Strafford and one of the King Charles I's leading advisers (Lerner 2002). Whilst not strictly a bill of attainder, a 'bill of pains and penalties' was also

tabled by Gladstone's government as recently as 1869. The bill was intended to deprive Daniel O'Sullivan, the elected mayor of Cork and a magistrate, of his offices in response to comments he had made which were supportive of an assassination attempt on the Duke of Edinburgh made by Irish nationalists. In the event, O'Sullivan was persuaded to resign and the potentially inflammatory effects of his 'attainder' were avoided (MacDonagh 1974).

Sullivan's case perhaps contextualises certain provisions in the Forfeiture Act of 1870. Whilst the Act abolished the automatic forfeiture of goods and property to the Crown following a conviction for felony or treason (thus ending many of the common law consequences of 'civil death') section 2 of the Act stated that anyone convicted of treason shall be disqualified from holding public office, shall lose their right to vote in elections, and shall also lose their pensions. For the most part, these disqualifications remain in force today – albeit they have been subsequently been restated or amended by additional legislation. For example, the removal of state pension rights from serving prisoners was achieved through the National Insurance Act 1911, whilst the ban on prisoners serving more than twelve months from standing in parliamentary elections was introduced by the Representation of the People Act 1981. This legislation sought to prevent Irish republican prisoners from replicating the election success of Bobby Sands in the Fermanagh and South Tyrone by-election in April of that year. Section 3 of the Representation of the People Act 1983 maintains a blanket ban on convicted prisoners from voting in local and national elections in the UK. Despite the European Court of Human Rights (in *Hirst v. UK (No. 2)* - 74025/01 [2005] ECHR 681) ruling that this was incompatible with Article 3 of Protocol 1 of the European Convention (on the 'right to free elections') this prohibition remains in place (see Behan 2014; Drake and Henley 2014).

That the origin of these contemporary civil disqualifications can be traced back to the archaic practice of attainder demonstrates a certain ambiguity about precisely what the limitations or boundaries are to the effects of legal punishments in the present. Just as historically, execution and civil death *as punishment* did not bring about a definitive end to the torment of the condemned, cessation of the formal aspects of a convicted person's sentence offers limited safeguards against the social death which often *follows punishment* in the present.

The pains of criminalisation and their impact on the self

The most recent figures show that there are over 11 million people in the UK with a criminal record on the Police National Computer (Home Office 2017). As I have explored elsewhere (see Henley 2014; 2017a; 2017b) these people are potentially subjected to a wide range of *de jure* prohibitions on participation in full and meaningful citizenship. They are also particularly vulnerable to *de facto* discrimination – that is, whilst there may often be no specific law authorising discrimination against them they are nonetheless regarded as potentially risky, dangerous or 'less eligible' than other citizens and excluded from equal consideration. Thus, if we extent Sykes' (1958) notion of the 'pains of imprisonment' – which suggests that penal confinement is experienced as painful due to the deprivation of liberty, security, autonomy, good and services and heterosexual relationships – it is possible to also conceive also of a number of 'pains of criminalisation' which apply to ex-prisoners and other people with convictions as a result of the stigma associated with criminal records (for further details see Henley 2017a; 2017b; and also the work of the charity Unlock who campaign on such issues). In the UK these 'pains' include, but are by no means limited to the deprivation, restriction or outright denial of:

- *employment* (since people with convictions are over-represented amongst the ranks of the unemployed and are subjected to both *de jure* and *de facto* exclusion from many occupations, exacerbated by widespread criminal background checking);
- *financial services* (because many major mortgage providers will not lend to people with unspent convictions who may also find they are routinely charged far more for insurance products);
- *accommodation* (as private landlords may legitimately refuse a tenancy to anyone declaring an 'unspent' criminal conviction and where several local authorities have introduced restrictions regarding access to social housing);
- *international mobility* (since criminal records can cause difficulties obtaining entry visas for travel outside of the European Union);
- *educational opportunities* (particularly when criminal records acquired in childhood cause difficulties with acceptance onto university or vocational training courses requiring criminal background checks);
- *victimisation* (since unspent convictions have the effect of eliminating the possibility of receiving compensation from the government funded Criminal Injuries Compensation Scheme for those physically or mentally injured as the victim of a violent crime);
- *civic participation* (because previous convictions can place limitations on a person's right to stand for elected office, serve on a jury or, in some cases, sit as a charity trustee).

When regarded in their totality, these pains of criminalisation represent a form of premature *social death* (see Bauman 1992; Králová 2015) which exists as an adjunct to the formal 'unpleasant consequences' (Lacey 1988) or 'hard treatment' (Duff 2001) associated with legal punishment.

It has been common for scholars (particularly in the US) to describe such effects as the 'collateral consequences' of punishment (see Demleitner 1999; Chin 2012; Uggen and Stewart 2015). There are, however, reasons to question whether this term does justice to the personal and social harm which arises when those who have served their sentences and paid their 'debt to society' are then subjected to further discriminatory conduct. Firstly, the term 'collateral' suggests that this discrimination is merely ancillary to the formal judicially-approved sanction. This is problematic because the wide-ranging nature of the discrimination which is possible and the potential frequency with which it is encountered suggests that it is likely to be experienced as inherently punitive in its own right and, potentially, as more severe than the main judicial sanction (see Aresti *et al.* 2010; Earle 2016: 77-94). Thus, it is necessary to think of these pains of criminalisation as *central* to the social process of punishment rather than merely as 'collateral' effects of it. Secondly, the word 'consequences' suggests a certain inevitability about post-sentence discrimination – as though it were merely a natural result of a conviction. This ignores the fact, that such discrimination involves a role of a whole range of social actors (e.g. employers, insurers, landlords and others) becoming involved in an *active social process* of exclusionary or hostile conduct towards those who they discover have previous convictions. Other forms of discrimination such as racism, homophobia or disablism are not, of course, the inevitable consequence of stigmatised characteristics which are either inherent or acquired - but the result of a negative bias or prejudice on the part of those who have decided to treat the stigmatised person less favourably.

Due to the moral condemnation or censure attached to criminal offending (see von Hirsch 1993; Duff 2001) it might, of course, be argued that the stigma attached to a criminal record is

in some way 'deserved'. However, there are good reasons for arguing against such a position. This is because a distinction can be made between the censure of illegal behaviour which accompanies a punitive sanction and what happens to a person because of a decision to disclose the *record of that sanction*, often years later after the punishment has been served and most other people have forgotten about the original conduct (see Larrauri 2014a, on the relationship between disclosure of criminal records and the right to privacy). A further problem arises because, for the most part, the pains of criminalisation outlined above are completely unregulated by constraints of proportionality when compared to formal, legal sanctions.

The idea that post-sentence discrimination can be akin to social death is no exaggeration when one considers that there appear to be no strict limits to the hardships which people with convictions might face post-sentence, other than those offered by the limited protections of the Rehabilitation of Offenders Act 1974. This legislation allows certain convictions to become 'spent' (and thus non-disclosable) for most purposes after a set period of time. However, it does not apply to anyone who has served a prison sentence of four years or more (see Ministry of Justice 2014). Therefore, the pains of criminalisation outlined above have the potential to severely damage life chances because, whilst the practice of civil death represented in bygone laws of attainder has lapsed, the social death of people with convictions arises from exclusionary rules, policies and conducts which are both widespread and, for the most part, unregulated.

Similarities can be drawn here with the status of 'homo sacer' ('the accursed man') imposed upon lawbreakers in Ancient Rome (see Agamben 1998). This status rendered the individual unprotected by law meaning that they could be killed with impunity. They were also excluded from sacrificial rituals meaning that their death held no significance in religious ceremony. Thus, just as the ancient *homo sacer* was left in a state of what Agamben described as 'bare life' – permanently exposed to the possibility of death and unprotected by the law – the modern-day person with convictions remains continually vulnerable to the possibility of *social* death should their conviction be revealed.

The impact of this precarious status on the social identities of people with convictions is potentially profound. Goffman (1961) described a 'mortification of the self' affecting individuals confined to asylums, prisons and other 'total institutions'. This mortification, Goffman explained, involved a 'series of abasements, degradations, humiliations, and profanations of self (p.24). He suggested that the pre-existing identity which an 'inmate' carried with them into an institution was reliant upon 'stable social arrangements in his home world' (*ibid.*) but that these were disrupted by the experience of confinement. One potential effect of this was a reduction of the individual (and their self-concept) to the status of 'non-person' – a process exacerbated by the moral stigmatisation which can 'taint' former mental health patients and ex-prisoners (see Goffman 1963).

Goffman (1963: 13) defined stigma as 'an attribute that is deeply discrediting' and described stigmatisation as involving a conflict between actual social identity (incorporating the attributes which an individual *actually* possesses) and virtual social identity (comprised of characteristics which an individual is *assumed* to possess by others). When a negative social reaction occurs to these assumed characteristics this has the potential to 'spoil' normal identity. In the context of this chapter, the negative reaction will most likely arise as a result of the disclosure or discovery of an individual's criminal record. In some instances of course, people with convictions are able to conceal this stigma, but in others it may be a legal requirement for them to disclose their record, for example in certain job applications. Stigmatisation can

negatively impact those trying to desist from criminal offending since a core part of the desistance process involves leaving behind the 'criminal self' and instead cultivating a pro-social identity (see Maruna 2001; Aresti *et al.* 2010). This identify shift is likely to be frustrated when those at an early stage in the desistance process experience negative social reactions from others with knowledge of their criminal record. However, there are also implications for the longer-term maintenance of a defensible 'sense of self' amongst *all* people with convictions, even many years after their last offences were committed. This is because certain forms of 'standard' and 'enhanced' criminal record checks involve the disclosure of almost all previous convictions and cautions and the use of such checks has expanded significantly in recent years (see Larrauri 2014b). As Earle (2016: 94) has cautioned, this widespread distribution and commodification of such sensitive data in the pursuit of greater public safety:

brings with it a corresponding degree of fetishisation as people are persuaded that criminal records have a power far beyond their actual material potential. They enter the realm of fantasy and nightmare. Digital technologies that facilitate ever more widespread circulation of data achieve very little in the way of reassurance... People with convictions are at risk of being condemned to a new dark age of digital suspicion and exclusion, the identified personal objects of an unidentified social malaise.

There are, therefore, good reasons for being concerned about whether an *intensification* of certain pains of criminalisation might be occurring – particularly the 'denial of employment' since most criminal background checks are conducted on job applicants.

In summary then, criminalisation can give rise to a profound sense of loss amongst people with convictions. This loss is two-fold, comprising both a potential loss of *pre-conviction identity* through the 'mortification of the self' which Goffman (1961) identified, and also a loss of *future identity* due to the broader stigmatisation of people with convictions in their post-sentence lives. Thus, a sense of bereavement and mourning for both the 'past self' which has been lost and the potential 'future self' which cannot be are likely to be experienced by many of those who have passed through the criminal justice system. Therefore, when considering issues of loss and bereavement in criminal justice, we must carefully evaluate not only our responses to those who literally die in the care of the state, but also the 'social death' of those who have already been punished and the very real harms which can arise from the pains of criminalisation.

References

- Abbot, M. (1996) *Life Cycles in England, 1560-1720: Cradle to Grave*. London: Routledge
- Agamben, G. (1998) *Homo sacer: Sovereign power and bare life*. Stanford, CA: Stanford University Press
- Aresti, A.; Eatough, V. and Brooks-Gordon, B. (2010), 'Doing time after time: an Interpretative Phenomenological Analysis of reformed ex-prisoners' experiences of self-change, identity and career opportunities', *Psychology, Crime and Law*, 16, (3): 169-190
- Bauman, Z. (1992) *Mortality, immortality, and other life strategies*. Stanford, CA: Stanford University Press
- Beccaria, C. (1764/1819) *Essay on Crimes and Punishment (2nd American edition)*. Philadelphia, PA: Phillip H. Nicklin Publishers
- Behan, C. (2014) 'Embracing and Resisting Prisoner Enfranchisement: A Comparative Analysis

- of the Republic of Ireland and the United Kingdom', *Irish Probation Journal*, 11: 156-176
- Bellamy, J. (2004) *The Law of Treason in England in the Later Middle Ages*, Cambridge: Cambridge University Press
- Chin, G.J. (2012) 'The New Civil Death: Rethinking Punishment in the Era of Mass Conviction', *University of Pennsylvania Law Review*, 160: 1789-1833
- Damaska, M.R. (1968) 'Adverse legal consequences of conviction and their removal: a comparative study', *The Journal of Criminal Law, Criminology and Police Science*, 59 (3): 347-360
- Demleitner, N.V. (1999) 'Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences', *Stanford Law & Policy Review*, 11 (1): 153-171
- Drake, D.H. and Henley, A.J. (2014) "'Victims' versus 'offenders' in British political discourse: The construction of a false dichotomy", *The Howard Journal of Criminal Justice*, 53 (2): 141-157
- Duff, R.A. (2001) *Punishment, Communication and Community*. Oxford: Oxford University Press
- Earle, R. (2016) *Convict Criminology: Inside and Out*. Bristol: Policy Press
- Edgely, M. (2010) 'Criminals and (second-class) citizenship: Twenty-first century attainer?', *Griffith Law Review*, 19 (3): 403-437
- Goffman, E. (1961) *Asylums: Essays on the social situation of mental patients and other inmates*. London: Penguin
- Goffman, E. (1963) *Stigma: Notes on the management of spoiled identity*. London: Penguin.
- Harrison, R. (1983) *Bentham*, London: Routledge and Kegan Paul
- Henley, A.J. (2014) 'Abolishing the stigma of punishments served', *Criminal Justice Matters*, 97 (1): 22-23
- Henley, A.J. (2017a) *Criminal records and the regulation of redemption: a critical history of legal rehabilitation in England and Wales*, Unpublished PhD Thesis. Keele: Keele University
- Henley, A.J. (2017b) 'Criminal records and conditional citizenship: towards a critical sociology of post-sentence discrimination', in S. Fletcher and H. White (eds.), *Emerging Voices: Critical Social Research by European Group Postgraduate and Early Career Researchers*, pp.119-128. London: European Group Press
- Home Office (2017) 'Freedom of Information Act 2000 Request (Reference 43920)', [online] Available at: <https://www.whatdotheyknow.com/request/406129/response/988997/attach/3/43920%20Dominic%20Headley.pdf> (Accessed 28th July 2017)
- Králová, J. (2015) 'What is social death?', *Contemporary Social Sciences*, 10 (3): 235-248
- Lacey, N. (1988) *State Punishment: Political Principles and Community Values*. London: Routledge
- 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 in Europe', *Punishment and Society*, 16 (1): 50-73
- Lerner, C.S. (2002) 'Impeachment, attainer and a true constitutional crisis: lessons from the Strafford trial', *University of Chicago Law Review*, 69 (4): 2057-2101
- MacDonagh, O. (1974) 'The last bill of pains and penalties: the case of Daniel O'Sullivan, 1869', *Irish Historical Studies*, 19: 136-155
- Maruna, S. (2001) *Making Good: How ex-convicts reform and rebuild their lives*. Washington: American Psychological Association

- Ministry of Justice (2014) 'New Guidance on the Rehabilitation of Offenders Act 1974', [online] Available at: <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974> (Accessed 17th May 2017)
- Romilly, S. (1820) *The Speeches of Sir Samuel Romilly in the House of Commons: In Two Volumes, Volume 1*. London: James Ridgway and Sons
- Saunders, H.D. (1970) 'Civil death – a new look at an ancient doctrine', *William and Mary Law Review*, 11 (4): 988-1003
- Schofield, J. (2008) *The Rise & Fall of Thomas Cromwell: Henry VIII's Most Faithful Servant*. Stroud: The History Press Ltd.
- Sykes, G.M. (1958) *The Society of Captives: A Study of Maximum Security Prison*. Princeton, NJ: Princeton University Press
- Uggen, C. and Stewart, R. (2015) 'Piling On: Collateral Consequences and Community Supervision', *Minnesota Law Review*, 99 (5): 1871–7912
- Von Hirsch, A. (1993) *Censure and Sanctions*. Oxford: Clarendon Press