

Judicial Rehabilitation and the ‘Clean Bill of Health’ in Criminal Justice

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Abstract

Drawing on an important survey of European and Australian policies toward ‘judicial rehabilitation,’ this article makes the following arguments. First, the rehabilitation movement should return to the origins of the word ‘rehabilitation’ and focus at least as much on efforts to remove and relieve ex-prisoner stigma as on treatment and reform efforts. There will be no ‘rehabilitation revolution’ without this. Second, these efforts should involve active, not passive redemption. Rehabilitation processes that require almost a decade or more of ‘crime-free’ behaviour before forgiving an individual for his or her crimes are just and fair, but they miss the point of rehabilitation. Policies should encourage, support and facilitate good behaviour and not just reward it in retrospect. Third, rehabilitation should not just be done, but be ‘seen to be done,’ ideally in a ritualised format. This sends an important message to the individual and wider society. Finally, I argue that it may be better to forgive than forget past crimes. That is, rather than burying past crimes as if they never happened, states should instead acknowledge and formally recognise that people can change, that good people can do bad things, and that all individuals should be able to move on from past convictions.

Keywords: Reintegration – Ritual – Re-entry – Therapeutic Jurisprudence

He drew from his pocket a large sheet of yellow paper, which he unfolded. ‘Here’s my passport. Yellow, as you see. This serves to expel me from every place where I go. ...’ Jean Valjean, discharged convict...has been nineteen years in the galleys: five years for house-breaking and burglary; fourteen years for having attempted to escape on four

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occasions. He is a very dangerous man.' There! Every one has cast me out. Are you willing to receive me?' (Hugo, 1887/1994: 52)

Probably Europe's most famous, fictional ex-prisoner, Jean Valjean suffered punishments unlike those that individuals convicted of similar offences would face in Europe in the early 21st Century. That said, his efforts to reintegrate into society after these brutalizing experiences were probably comparable to the experiences that ex-prisoners across Europe face today. In fact, the way that Valjean eventually reinvents himself in Hugo's wonderful novel (starting his life over and becoming a leading citizen) may even be impossible in today's society. The modern-day Javerts have far better technology on their side for tracking down others' criminal records! Although ex-prisoners no longer carry around yellow passports detailing their offences, a far more sophisticated network of databases has been developed that allows potential employers and state officials access to this information just as rapidly.

This extraordinary collection of essays from across Europe and beyond represents something like an indirect answer to Valjean's classic reintegrative plea 'Are you willing to receive me?' What obstacles do ex-prisoners in contemporary Europe face in efforts to reintegrate and what mechanisms are available to help them overcome these? In particular, is there scope in these jurisdictions for formal, legal 're-biographing' (Maruna, 2001) or 'reintegration rituals' (Maruna, 2011) through which individuals might be formally forgiven for their offences and allowed to escape the stigma of their criminal past? Each article's author addresses this question from a different cultural context, providing what is likely the most in-depth, comparative portrait of reintegration opportunities in Europe and beyond assembled to date².

As each of the authors were asked, in particular, to reflect on ideas I have raised in my previous work (see Maruna, 2001, 2011), I was asked to contribute something of a 'conclusion' to this Special Issue. Rather than individually reviewing and addressing each of these valuable contributions, however, I instead attempt to do justice to this hugely useful collection by following some of the theoretical implications the issue as a whole triggers for me as a reader. In particular, I make the following four arguments based on my close reading of these important additions to an emerging literature on redemptive criminal justice policies:

- A) Treatment (or reform) efforts that do not address the collateral consequences of conviction (e.g., the social stigma and considerable handicaps of a criminal record) do not deserve to go by the name 'rehabilitation' and will surely fail - 'rehabilitation revolution' or not.
- B) 'Passive' rehabilitation policies, that require years of 'crime-free' behaviour before recognising the person's reform may be normatively just, but they miss the point of rehabilitation laws and they take far too long (usually 7 to 10 years) to make a meaningful difference in a person's reintegration. 'Active' rehabilitation policies on the

² Despite some early research in this area, Pinard (2010) argues that 'no one has yet undertaken a comprehensive comparative approach' to understanding the collateral consequences that ex-prisoners face.

other hand provide a tangible incentive for individuals to desist from crime, as well as considerable support in doing so.

- C) Like justice itself, active rehabilitation processes should not just be done but also be ‘seen to be done.’ If reintegration is to be meaningful (and effective in removing stigma) it presumably requires comparable levels of symbolism and ritual as punishment itself.
- D) Finally, it may, in some contexts, be better to forgive than to forget. That is, rather than expunging convictions from one’s criminal record as if the past did not happen, it might be better to instead formally ‘certify’ the person’s rehabilitation. In both cases, all civic, social and economic barriers would be lifted and collateral consequences alleviated, but in the second case, states would also publicly acknowledge that people can change and should be forgiven for the past.

Summary of Key Findings from the EJP’s European/Australian Survey

Before proceeding, however, it might be useful to review the key overall findings from the Special Issue as I read them:

- 1) *Overall, ex-prisoners in Europe and Australia appear to face a policy environment that is far more forgiving than the one faced by ex-prisoners in the United States.*

Although ex-prisoners in each of the countries surveyed in this Issue faced substantial collateral consequences after completing their sentences, none faced anything like the policy environment in the United States, where anyone with access to a computer and the internet can download a remarkable amount of information about neighbours, friends and strangers who might have been arrested or convicted of a crime in most states. Christopher Uggen (2000; Uggen, Manza & Behrens, 2003) estimates that as many as 47 million Americans have a criminal history file on record and could therefore be impacted by these various disclosures. Additionally, individuals with criminal records in the US can also be restricted from gaining licences for a remarkable range of jobs, including work as embalmers, billiard room employees, septic tank cleaners, plumbers, eyeglass dispensers, barbers and real estate agents (Pager, 2007). The situation is far different in the rest of the world (consistent with the overall harshness of the American criminal justice system, comparatively, see Whitman, 2003)

In the US, discrimination against ex-prisoners is not only facilitated *de facto* but officially sanctioned, and these *de jure* consequences have increased “in number scope and severity since the 1980s” (Pinard, 2010). Indeed, in the past three decades, the US Congress “took collateral consequences to a new level of irrationality, making a single criminal conviction grounds for automatic exclusion from a whole range of welfare benefits” at the Federal level (Love, 2003: 112). American citizens with even a single conviction for drug offences and other charges can be denied housing assistance, food stamps, education loans, and the right to vote (see e.g., Allard, 2002).

Former prisoners in the United States also have much more difficulty obtaining relief from those consequences.

‘In addition to imposing fewer and less severe collateral consequences up front, other countries are also more forgiving than the United States with individuals with criminal records on the back end: They more fully allow individuals to recover from their legal transgressions... [by providing] meaningful legal opportunities for individuals with criminal records to reintegrate into society.’ (Pinard, 2010: 506)

Around a dozen American states do offer ‘a hodge-podge of inaccessible and over-lapping provisions’ for expungement of criminal records, but these are ‘riddled with qualifications and exceptions, and of uncertain effect’ (Love, 2003: 113). Typically these are for first offenders however, and ‘there is no central source that describes the policies in these states or the steps that an ex-offender has to take to expunge his or her criminal records’ (Ruddell & Winfree, 2006: 463).

Pinard (2010: 463) argues that these policies are ‘extensions of historic and contemporary criminal justice policies that target racial minorities or that systematically ignore the disproportionate impact of these policies on racial minorities’ in the United States. That is, they are part of a long history in the country of using allegedly colour-blind techniques such as poll taxes, literacy tests, grandfather clauses as means of prohibiting the full civic, economic and social participation of African-Americans in the post-slavery era (Alexander, 2010; Wacquant, 2005).

In her fascinating ‘short detour’ on Garland’s (2001) *Culture of Control* analysis, Larrauri (2011) develops this further in this Special Issue, with a point-by-point comparison between the US and Europe. One crucial difference between the two is the issue of free speech and privacy. Whereas, countries like Spain have considerable protections for those people convicted of crimes (newspaper coverage of criminal cases typically use only the accused’s initials to protect the privacy of the person and his or her family), the United States has a long history of freedom of information (including ‘naming and shaming’ that dates back to the Salem witch trials).

2) *On the other hand, the policy environment in almost all of the countries surveyed appears to be moving in the US direction.*

According to each of the authors in this Special Issue there is a difference between theory and practice in terms of privacy provisions in Europe and Australia. That is, legal provisions aimed at protecting ex-prisoners against discrimination exist on the books in several jurisdictions, but may not always be followed in actual practice. Likewise, surveys of employers in these different jurisdictions also suggest surprisingly supportive attitudes toward employing former prisoners; however, again, there is suspicion that these attitudes may not translate into actual practice (see e.g., Pager, 2007). Finally, even official laws and legal protections are eroding in several of the countries surveyed in this Issue (although not in France where the movement has been towards more protections for the most part).

Overall, my read of the contributions in this Special Issue is that – although the situation in Europe and Australia is certainly much better than that of the United States – the future for these other countries may be toward increased Americanisation in this domain. Indeed, until fairly

recently, the situation in the United States was not a million miles away from the situation in most European countries. Although people with criminal records did not have equivalent privacy protections in place in law, at least, in practice, employers had to go to considerable effort in order to locate particular court records for an individual.

Across the world, 'public policy seems to be moving inexorably toward making criminal records more widely available' (Jacobs, 2006: 419). In Germany, more than nine million criminal record disclosures are issued every year (Morgenstern, 2011). Criminal Records Bureau checks in the UK have soared from 1.4 million in 2002-2003 to over 3.8 million in 2008-2009 (Padfield, 2011). Applications for 'conduct certificates' in the Netherlands jumped from around 255,000 in 2005 to 460,000 in 2009 (Boone, 2011). In Australia, the national criminal record agency processed around 2.7 million criminal history checks in 2009-2010 - 'a particularly striking number given that the total population of Australia is only around 20 million people' (Naylor, 2011: ...). Of all the countries surveyed in this Special Issue, Spain appears to be the one with the most protection for former prisoners' identities (that is, it is the country with the least developed system of record-keeping and sharing of conviction information). Yet, even Spain may be changing in this regard. As Larrauri (2011) acknowledges, it is rather naive to believe that the majority of the record 2 million disclosures made in 2009 resulted from a dramatic surge in applications for hunting licenses!

Once this information starts to be made available in this way, it may not be 'a genie that can be readily put back into Aladdin's lamp' (Freeman, 2008: 408). Wikileaks, anyone? How about Con-leaks? The World Wide Web has a far stronger tradition of free speech and freedom of information (no matter how accurate) than the USA ever had. The internet scholar Clay Shirky argues that, "The idea of a widely shared but secure secret is over" (Gellman, 2010: 72).

- 3) *All of the countries surveyed provided some opportunities for those with criminal records to be officially forgiven and for their records to be expunged or sealed. However, in almost every case, these policies tended to be 'automatic' rather than 'merit-based'.*

Herzog-Evans (2011) provides a hugely useful distinction in her essays for this Special Issue between merit-based and automatic policies for criminal record expungement. In the model, a person is 'rehabilitated by the mere passage of time' (Boone, 2011). After 7 to 10 years, or perhaps by turning a certain age (e.g., one's 80th birthday in the Netherlands), a person's criminal record is automatically expunged. A merit-based policy, on the other hand, considers claims for rehabilitation on their specific merits and does not require any particular length of time to prove rehabilitation. The vast majority of the European and Australian expungement policies outlined in this special issue were automatic in nature. There are advantages and disadvantages to this. The advantage is that one need not go through a burdensome or difficult application process to earn this privilege in an automatic system. The disadvantage is that the automatic policies described are far too slow to promote rehabilitation in any meaningful way (see discussion below). As Herzog-Evans (2011) argues, policies like the French 'Hundred Years Rule' (expunging the criminal records of those individuals over 100 years old) or the 'Forty Years Rule' (allowing but not requiring files to be cleared after 40 years or more) obviously do

very little to promote rehabilitation or public safety, and are more a matter of administrative convenience and perhaps respect for the elderly.

4) In the different countries surveyed, there were scattered examples of what might be thought of as reintegration rituals inside or outside the courtroom setting.

In France, Herzog-Evans (2011) writes, the courts are used ‘to reinforce the importance, solemnity, and seriousness of judicial rehabilitation’. Outside of the remarkable French examples identified by Herzog-Evans, however, there were relatively few examples of contemporary practices that might meet the criteria for being ‘reintegration rituals’ as outlined in Maruna (2011), and those examples that do exist were not widely utilized. Even in France, the rituals that Herzog-Evans (2011) describes are exceedingly rare with little more than a dozen rituals per year that would meet the full criteria for ‘judicial rehabilitation’³. As a result, some of the contributors understandably conclude that there is little or no hope for anything like the proposal in Maruna (2011) catching on in the current, increasingly punitive and risk-averse international climate. Padfield (2011), for instance, points out that judges in England currently have no power to hasten the time required for the (passive) Rehabilitation of Offenders Act, and concludes therefore that ‘any likelihood of a formal form of judicial rehabilitation in the sense of record erasure seems inconceivable’.

Nonetheless, almost every contribution to this Special Issue identifies some practices that do meet many if not all of the characteristics of these rituals. Although not as explicit and formal as the French examples, other countries appear to have examples of reintegration rituals that occur almost by default. Naylor (2011), for instance, finds that in Australia, if a person with a relevant criminal conviction is seeking work in an occupation that involves working with children, she or he is able to go through an adversarial Tribunal process through the Department of Justice involving witness evidence, statements of support, psychological assessment, issues of remorse, subsequent good works and community involvement (Naylor, 2011). Although this process is limited to those individuals with criminal convictions applying to work in settings involving children, the ‘defending your life’ format contains many of the elements of what might be considered a full-scale redemption ritual. That is, the successful appeal involves an unmistakably formal and ritualized redemption of the person’s reputation.

In the Netherlands, likewise, individuals who are denied a good conduct certificate (the awarding of which is itself a process that meets many of the elements of the reintegrative ritual) can challenge the decision directly in the courts (Boone, 2011). In doing so, they seek to make a case to a judge that they are desisting from crime and worthy of a fresh start. Even in jurisdictions where no such judicial rehabilitation is possible, like Britain, there are often ritual-like practices that routinely serve a similar function. Padfield (2011) for instance argues that it is likely that judges and magistrates ‘regularly commend offenders for the steps they have taken to desist from crime in the time since arrest and before sentence.’ This may be especially true in cases of

³ This is not because the process is ineffective, but rather because of competition from a plethora of other expunging mechanisms available to individuals with criminal records, in particular since new legislation in 1994 (Herzog-Evans, 2011).

deferred or suspended sentencing. [Unfortunately, when a sentence is suspended in the UK, and the defendant does not reoffend, he or she is not called back before the court, and so never receives an official or ritualised ‘congratulations’ or ‘keep up the good work’]. In addition, the United Kingdom does have a number of problem-solving courts based on therapeutic jurisprudence principles that feature sentencer involvement in monitoring steps toward desistance, but the proposal in the Halliday (2001) Report and elsewhere to expand this practice more widely (see esp. Maruna & LeBel, 2002) has not been heeded. Finally, contributors also noted the growth in restorative justice processes and ideology (see esp. Naylor, 2011) as holding the potential for future reintegrative rituals.

Putting the ‘Rehabilitation’ Back into the Rehabilitation Movement

This collection could not be better timed for United Kingdom-based readers like myself as the Conservative-Liberal Democrat Coalition Government in the UK is promising something they are calling a ‘Rehabilitation Revolution’. Many of us are questioning just what is meant by the term ‘revolution’ in this context (see Maruna, 2010). Is a ‘revolution’ really the same thing as moderate, if sensible, reforms at the margins of criminal justice practice? Yet, the present collection of essays raises another, equally important question in my mind. Just what is ‘rehabilitation?’ Comparative, cross-national research has numerous advantages for policy analysis, but one sometimes overlooked role is its value in shining new light on the everyday language and concepts in a field. It is fascinating (and telling), for instance, to read in Morgenstern (2011) that in German, ‘rehabilitation’ (Rehabilitierung) typically refers to individuals who, for political reasons, have been wrongfully convicted or otherwise suffered from injustices in the legal process.

The word ‘rehabilitation,’ in English, has in recent years become synonymous with cognitive therapy, changing offenders’ thinking, something bizarre called ‘treatment’ with set levels of ‘dosage’ tested in random control trials, something that comes in a ‘programme.’ This is an unfortunate misuse of the term and is not consistent with the original meaning of the word in English. Writing 25 years ago, for instance, Forsyth (1987) was careful to distinguish ‘rehabilitation’ from ‘reform’. He argued that the latter concept involves efforts to change an individual’s character or values, whereas the former refers to the restoration of the person’s reputation and full citizenship.

The two need not be in competition. Indeed, one might think that reform and rehabilitation should logically go hand-in-hand. Yet, as Boone (2011) insightfully points out in her discussion of the rehabilitation movement in the Netherlands, this hardly seems to be the case. Consider the following examples: Thirty five years ago, Aryeh Neier argued that computer systems were becoming ‘record prisons’ and acting as ‘leper’s bells’ on people with criminal convictions:

‘Arrest and conviction records often create social lepers who must exist as best they can on the fringes of society. The dissemination of records places a series of obstacles in the path of persons who wish to enter society’s mainstream and end the half-life of the world of crimes. Is it any wonder, then, that recidivism rates should be so high? How can we seriously hope to reduce crime if we disseminate records which have the unintended effect of making it impossible for people to stop being criminals?’ (cited in Harnsberger, 1979: 397)

The following year, Neier published *Crime and Punishment: A Radical Solution* (1976), in which he argued for the abandonment of rehabilitation as a penal goal and the end of parole! Indeed, it is a distinct irony that some of the loudest opponents of the ‘rehabilitative ideal’ (e.g., reform efforts) characterised by a commitment to offender treatment in prison and probation (e.g., von Hirsch, 1993; Irwin, 1974) are at the same time some among the most vocal supporters of strategies for ending the collateral consequences of criminal records (see von Hirsch & Wasik, 1997; Irwin, 2009).

Yet, if that combination of positions is slightly inconsistent, then the position of contemporary rehabilitation proponents is utterly incoherent. What is the point of ‘challenging criminal thinking’ or providing prisoners with suitable job training if upon their release they will be prohibited from finding legitimate employment because of their criminal records? Yet, the contemporary rehabilitation movement appears primarily concerned with reform and is almost silent on this issue of ‘restoration of reputation’ (i.e. the proper definition of rehabilitation). Each author in this Special Issue points out that there has been remarkably little empirical literature, internationally, about the effects (either in terms of recidivism or else softer identity measures such as self-esteem or self-efficacy) of sealing or expunging criminal convictions (but see Ruddell & Winfree, 2006) on recidivism⁴. Admittedly, estimating the effects of such policies is fraught with methodological difficulties. It is far easier to measure and compare the effects of a 12-week, modular programme to a control group. Yet, deciding to evaluate the latter rather than the former on grounds of ease is a bit like the drunk looking for his car keys under the lamppost not because he thought they were there, but because that was the spot with the best light. This imbalance in research focus appears to be a considerable blind spot for a movement that claims to be motivated purely by research evidence (‘what works’) and utilitarian goals.

This has not always been the case. For most of the 20th Century, the movement for ‘rehabilitation’ centred around stigma-removal processes that could facilitate the reintegration promised by reform efforts. In 1919, Morgenstern (2011) tells us, the reform-oriented government of the Weimar Republic adopted something called ‘Straftilgungsgesetz’ or the Conviction Redemption Act. She translates the legislation as follows:

‘Who, after completion of a sentence, precisely *because* of this completion only finds closed doors; who, despite honest efforts, is over and again punished with public disregard and is hampered in his struggle for life because he once failed and has been punished, finally must lose hope and motivation to find his way into reputable civil life and will be recoiled to the path to crime’ (Morgenstern, 2011).

⁴ Because the interest in expungement policies has primarily been from lawyers and legal scholars, most of the analysis on the issue has taken the form of normative, rights-based argumentation, and there is a remarkable dearth of information about the empirical effects of expungement policy on recidivism and public safety (but see e.g., Bushway, 2004). On the other hand, offender treatment programmes primarily interest psychologists and other empirical social scientists, so we have mountains of evaluation work on their effectiveness, but very little on their normative justification (but see Ward and Maruna, 2007).

In 1950, the United States Congress likewise passed the Federal Youth Corrections Act, a law that would be almost unthinkable today. Under the Act, overturned in the 1980s, if a young adult (18-26 years old) was released from a federal prison or probation sentence prior to the expiration of the maximum sentence (i.e. is deemed 'rehabilitated' by the authorities), his or her conviction was 'automatically set aside' and the young person was provided 'a certificate to that effect' to allow the person to move on with the rest of his or her life. The UK's Rehabilitation of Offenders Act clearly understood this definition of 'rehabilitation' when it was drafted in 1974, too (see Padfield, 2011). The Act provided that after specified periods of time, criminal records would become 'spent,' and the individual shall 'be treated as a *rehabilitated* person' (emphasis mine).

The need for this sort of redemption in society is obvious from a utilitarian standpoint: 'There has to be a way to restore people to good standing so that they'll be motivated to return to cooperation with all of the other cooperators in the population' (McCullough, 2008: 109). Without the chance of redemption, 'every failure results in guilt from which there is no exit.' (Smith, 1971: 206). Hannah Arendt (1958: 213) talks about this as the 'burden of irreversibility' in *The Human Condition*:

'Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victim of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.'

The impact of this sorcerer's spell on recidivism has a substantial and long-standing research basis in criminology, of course, in labelling theory. In a study of 95,919 men and women who were either adjudicated or had adjudication withheld, Chiricos and colleagues (2007) found that those who were formally labeled were significantly more likely to recidivate within two years than those who were not. Similar findings have emerged in longitudinal cohort studies (see e.g., Bernburg, Krohn & Rivera 2006; Farrington 1977; McAra & McVie, 2011).

Drawing on Randall Collins (1979) classic, *The Credential Society*, Pager (2007: 4) argues that the 'criminal credential' of a conviction record 'constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic and political domains' and is therefore 'an official and legitimate means of evaluating and classifying individuals' (5). The econometric modelling research suggests that imprisonment is associated with a 10 percent drop in wages and a flatter earnings trajectory than those of individuals with similar skills and backgrounds (Western, 2002). In the first few years after prison, released prisoners in the United States tend to earn around \$6,000 to \$10,000 US in legitimate income (see Bushway, Stoll & Weiman, 2007) -- far from a living wage. Indeed, two-thirds of ex-prisoners will likely remain unemployed for up to three years after their release from prison (Saxonhouse, 2004). As criminological research has long established the common-sense link between successful employment and desistance from crime (e.g., Sampson & Laub, 1993; Uggen, 2000) – and between higher wages and the reduced likelihood of criminality (Western & Petit, 2000) – such findings suggest that high rates of criminal recidivism are something of a self-fulfilling prophesy. Jacobs (2006) captures this nicely, when he writes 'The criminal justice system feeds on itself. The more people who are arrested, prosecuted, convicted, and especially

incarcerated, the larger is the criminally stigmatized underclass screened out of legitimate opportunities' (387).

In addition to these practical/instrumental concerns, there are also clear normative justifications for ending punishment. Von Hirsch & Wasik (1997: 605) argue that 'A fair system of punishment is one in which the offender is subjected to specified penal restrictions, which bear a reasonable relation to the gravity of the crime, and which are operative only for a specified time.' Dostoevsky famously remarked that the 'degree of civilization in a society can be judged by entering its prisons.' Devah Pager (2007: 144) builds on this insight arguing that 'In an era of mass incarceration, an equally relevant measure may be the success rate of those returning home'. Likewise, Fletcher (1999: 1907) writes:

'There is no point to the metaphor of paying one's debt to society unless the serving of punishment actually cancels out the fact of having committed the crime. The idea that you pay the debt and be treated as a debtor (felon) forever verges on the macabre' (Fletcher, 1999: 1907).

In other words, today's Jean Valjeans require more than just cognitive skills, and if we are to have a 'rehabilitation revolution', we need more than better 'programmes.' We need a 'rehabilitation credential' to counter their criminal stigma.

Active, not Passive Redemption

Most of the international expungement policies described in this Special Issue tend to be 'automatic' rather than 'merit-based'. One is deemed rehabilitated only after the fact, through the 'sheer passage of time' (Boone, 2011), and can do little to speed up this process. In a previous publication (Maruna, 2009), I have described these as a form of 'passive' rather than 'active' redemption. Whereas in 'passive' models, a person is redeemed through the passive avoidance of crime, in 'active' models, redemption is 'earned' through positive actions (Bazemore, 1998). Although they are certainly just, passive redemption policies are almost worthless for rehabilitative purposes.

To better understand this distinction, imagine, for instance, that you get drunk and publicly insult someone at a probation conference. You could redeem yourself by not insulting the person in the next seven or eight times you see them. Eventually, by behaving professionally over a long period of time, you can disabuse even those with very thin skin that you are a complete jerk. That is the passive model. On the other hand, you could also expedite this whole process considerably by apologizing, making some gesture of reparation (offering to help edit a manuscript, buying them a drink). This would be the 'active' approach. Both processes get to the same result (proving to others that you are not an irredeemable bully), but the passive strategy takes a good deal longer than the active strategy.

It is also less useful as a result in terms of rehabilitation. As has long been recognized, reintegration is a 'two-way street' involving not just changes and adjustments on the part of the person returning from prison, but also on the part of the community and society welcoming him or her home. As such, there is something of a 'catch-22' in passive models that require an

individual to successfully desist from crime for a substantial period of time before being forgiven. After all, it can be awfully difficult to successfully desist if one cannot get a decent, straight job, qualify for loans or housing assistance, or even rent accommodation because of a criminal conviction (see e.g., Archer & Williams, 2006; Gerlach, 2006; Holzer, Raphael & Stoll, 2006; Lucken & Ponte, 2008; Thacher, 2008; Travis, 2002). Although former prisoners no longer face ‘civil death,’ it is difficult to avoid the conclusion that with the growing number of obstacles before them the ‘released offender confronts a situation at release that virtually ensures his failure’ (McArthur, 1974: 1).

Likewise, if someone already *has* managed to desist from crime for a half-decade or more, they most likely have already *been* fully reintegrated and are comfortably employed. In such cases, the opportunity to expunge one’s criminal conviction may be symbolically meaningful as a retrospective reward, but this has little impact on recidivism. In fact, recent criminological research (e.g., Blumstein and Nakamura, 2009; Kurlychek, Brame & Bushway, 2006) shows compellingly that a person who has been crime free for 7 or 8 years has about the same chances of committing a new crime that the ordinary person who has never offended. It is difficult, then, to see why policy makers should focus on this population if the goal is crime reduction.

In France, however, Herzog-Evans (2011) writes, it is possible for an ex-offender to ‘speed up’ the redemption process and apply for an earlier deletion of convictions from the register. To qualify for this, the key question, according to Herzog-Evans (2011), is ‘Does the claimant deserve it?’ As the laws do not require the individual to demonstrate a decade or more of successful desistance under his or her belt already, they provide a ‘goal’ for individuals in the early stages of release, who want to reintegrate into society (want to find employment, be given a second chance) to strive for. One of the key findings in the desistance literature is that in order to go to the considerable efforts required to desist, a person needs a modicum of hope (see esp. LeBel et al. 2008), a sense of an alternative future with different possibilities (Paternoster & Bushway, 2010). Holding out the carrot of expungement or pardon for every ex-prisoner would act as this ‘carrot’ or incentive. Moreover, as Herzog-Evans (2011) shows in her discussion of French initiatives in this regard, expungement can be ‘utilitarian’ if the bar is set high but not unreasonably so. Herzog-Evans says that former prisoners in France need not be ‘perfect citizens’ so long as they can demonstrate that they have complied with their sentence, pay the necessary damages, acknowledge and apologise for the offence, and made efforts to stop offending. The French system, then, both encourages and rewards rehabilitation (Gough, 1966). Now that is revolutionary.

Ritual, Ritual, Ritual

The other problem with passive redemption processes is that they lack the symbolic power and impact of the stigmatising processes of arrest and conviction. Therefore, although they may effectively conceal or expunge the criminal conviction from an official database, they may do little to reduce the social and psychological effects of the criminal stigmatization. For instance, in Spain, not only are there are no rituals to signify the individual’s successful reintegration back into civil society, but ‘worryingly, in all likelihood, the offender may not even be aware that his conviction record has been - or could have been - cancelled,’ according to Larrauri (2011). This

is a great shame and a missed opportunity for meeting ‘the community’s need for a ritual of reconciliation’ (Love, 2003: 129). As Demleitner (1999: 162) writes:

‘While the effect of such [expungement] measures would be crucial, the process by which an ex-offender is welcomed back into the larger community also may be of consequence. Like many applicants for citizenship who prefer the official swearing-in ceremony conducted by a federal judge over the quicker but less ceremonious administrative naturalization process, ex-offenders should have access to a ceremony marking their official reintegration into the community and the end of their exclusion and degradation.’

In France, such rituals can and do take place in the same courts that sentence individuals to prison. This judicial role ‘carries with it a certain imprimatur of official respectability that automatic restoration and administrative procedures do not have.’ (Love, 2003: 127). As Herzog-Evans (2011) astutely points out, courts also have a distinct advantage over almost any other institution in society: ‘they can state what the truth is.’ This ‘judicial truth’ (‘vérité judiciaire’) or ‘legal magic’ carries real weight. Only courts have the ability to deliver the lifelong stigma of the criminal conviction and transform a person into a ‘felon,’ and only courts have the ability to remove or replace that label with a new one. Moreover, in France, Herzog-Evans (2011) suggests that judicial rehabilitation in France is not intended for the erasing of single sanctions, but rather concerns a person’s entire criminal history. ‘Judicial rehabilitation must concern their entire life and behaviour, and all their past offences must be put on the table.’ Just as a degradation ceremony succeeds in condemning the whole self of the person (Garfinkel, 1957), the reintegration ritual acts to restore the person’s reputation as ultimately good (Braithwaite & Mugford, 1994).

Herzog-Evans (2010) argues that ‘The criminological and emotional effects of judicial rehabilitation may be just as powerful as its legal consequences.’ The rituals certainly appear to be highly emotive occasions as demonstrated in previous research (Danet, Grunvald, Herzog-Evans, and Le Gall, 2008. Herzog-Evans, 2008). Judges and lawyers report that participants in the process often ‘have a trembling voice and cry when the ruling is voiced’ with an effect that ‘resembles citizenship ceremonies’: ‘There is a shared feeling of extreme satisfaction, elation even, both for the Court (which is also ‘making good’ on such occasions) and the ex-offender’ (Herzog-Evans, 2011).

There are, of course, real risks to such processes as identified by the contributors to this Special Issue. Larrauri (2011), for instance, sees the potential value of certification for some individuals, recognizing the symbolic value of a ‘piece of paper’ guaranteeing one’s offences have been legally forgiven; however, she remains (rightly) sceptical of the role of ritual in this certification process. Spain has a strong tradition of valuing privacy and downplaying the free speech in regard to criminal convictions. Even journalists typically report criminal cases in the newspapers with only the accused’s initials, rather than full names, except in high profile cases. A reintegration ritual would threaten this state of privacy, and needlessly put hard-won anonymity protections at risk. Larrauri (2011) concludes that ‘silence’ may prove a ‘more discreet and effective practice.’

It is hard to argue with the value of discretion and ‘silence’ in light of the strong findings regarding stigma and labelling in the criminological literature (see above). Nonetheless, it is hard

to see how reintegration rituals would threaten anonymity any more than conviction rituals in societies where both co-exist. If journalists are barred from publicizing individual names during criminal trials, then similar protections would surely be available for reintegration processes. After all, the former would be of much greater curiosity to the media than the latter anyhow, unless the Spanish press is somehow radically different to the media elsewhere. In English-speaking jurisdictions, newspapers love scandal, falls from grace, and human failings – the nastier, the better (Sparks, 1992). ‘Good news’ stories about recovery and reconciliation, on the other hand, are popular for the endings of Hollywood films (Nellis, 2009), but are too complicated for headline news (see also Naylor, 2011, on problem-solving courts in Australia flying under the media radar).

In countries like Spain where criminal records are not made public, presumably reintegration rituals could also be held in confidence without any public glare. On the other hand, in England, not only are all criminal court decisions in the public domain, the police and prosecution ‘may try to ensure that journalists are in court so that convictions and sentences get the maximum publicity’ (Padfield, 2011). In such jurisdictions, justice is said to need ‘not only to be done, but to be seen to be done’ (Naylor, 2011), and it is in such climates, and particularly with regard to high-profile individuals, that reintegration rituals may need a ‘public’ component in order to be effective.

Ritualism exists in all aspects of human society (weddings, funerals, parties, academic conferences) and exists for a reason (see Maruna, 2011). Research on former prisoners suggests that desistance requires an on-going process of ‘care and feeding.’ Ritualised and symbolic recognition of this process can make it ‘real’ in the eyes of the person working to desist and, crucially, those around him or her. Although of course removing the stigma of a criminal conviction is not ‘a cure-all to the social and economic barriers of reentry’, Ruddell and Winfree (2006: 454) argue that ‘the ability to grant offenders a pardon may be an important step in restoring a person’s self-perceptions as a nonoffender and, in turn, may actually increase public safety...by reducing recidivism within this population’:

‘Although being pardoned does not erase all the stigma of a criminal conviction, the act of pardoning provides a symbolic amends for one’s criminal behavior: recognition from the state that one has ‘reformed’ and gives the offender something to lose (his or her law-abiding status) by re-offending.’ (465)

Additionally, Ruddell and Winfree (2006: 465) argue that ‘these distinctions may lead to new and presumably more positive perceptions about the self’.

Conclusion: Forgiving, but not Forgetting

The current policy in most European contexts and Australia is also passive in the sense that it is primarily privacy-based – stemming from the ‘right to be forgotten’ (or *droit à l’oubli* in French) (Herzog-Evans, 2011). These policies try to promote reintegration by protecting ex-prisoners from having to reveal their criminal histories. In this way, the approach is somewhat parallel to the (in)famous American military policy on homosexual soldiers (recently overturned): ‘Don’t ask, don’t tell.’ If employers do not have access to criminal records

information and individuals are not legally obligated to disclose it, they will likely fare better after imprisonment.

The most dramatic form of this ‘don’t tell’ policy, of course, are the policies, like the UK’s Rehabilitation of Offenders Act that allow an individual with a criminal past to answer the question ‘have you ever been convicted of a crime?’ by saying ‘no’ even when it is a lie. The conviction is meant to be buried ‘in the graveyard of the forgotten past’ (*In re Gault*, 387 U.S. 1 [1967]), and the individual is in some cases legally ‘deemed not to have been convicted’ (Love, 2003: 104). For instance, under the British Rehabilitation of Offenders Act, once a conviction becomes ‘spent’, even ‘police or court officers cannot disclose it’ (Padfield, 2011).

Previously, I referred to such policies as a form of ‘re-biographing’ or an opportunity for a desisting former offender to ‘rewrite his or her history to make it more in line with his or her present, reformed identity’ (Maruna, 2001: 164). I found this an ingenious and invaluable policy solution to a deeply difficult problem of labelling and stigma. Others, however, have found this idea more than a little dangerous. By far, the loudest critic of expungement laws, outside of employers’ lobby groups, has been the legal scholar T. Markus Funk (1996). Citing Lord Coke’s dictum of ‘peona mori protest, culpa perennis erit’ (although punishment ends, guilt endures forever) Funk argues that laws that conceal previous convictions from the courts and wider public are dangerously misleading attempts to rewrite the truth. Beyond the usual conservative ‘apples and oranges’ view of the world, Funk even describes individuals with criminal records as ‘lemons’ (drawing on a phrase used to describe faulty used vehicles) and argues that society needs all the information possible to protect themselves from such people. Likewise, a conservative US judge once wrote ‘If Hispanics do not wish to be discriminated against because they have been convicted of theft, then they stop stealing’ (cited in Pager, 2007: 34).

Even criminologists who are highly critical of the collateral consequences that ex-prisoners face, however, frequently have difficulty with this notion of re-biographing the past. Jacobs (2006: 411) for instance, writes:

‘Expungement is a highly problematic policy. In effect, it seeks to rewrite history, establishing that something did not happen although it really did. The problem is compounded if the expungement policy allows or requires lying to support the false history. Should the previously convicted defendant be told to lie if he is asked whether he had ever been convicted of crime? Even if he is asked by a federal agent or under oath?’ (411).

According to Jacobs (2006), licensing boards, employers and even landlords in the US often request disclosure of those convictions that have been expunged. Remarkably, he reports that the New York State judicial committee that oversees bar admissions (to become a lawyer in the state) requires applicants to divulge both arrests and convictions ‘even if expunged’ as well. ‘If the bar committee feels no compunction about requiring would-be lawyers to reveal expunged convictions, it is likely that other regulators and employers would ask’ (411-412). Moreover, as Jacobs points out, expungement procedures cannot help explain the sometimes long gaps in an ex-prisoner’s work history. When asked ‘What have you been doing the last three years?’ Jacobs

argues, 'It's hard to believe that the law of expungement would permit or encourage the job-seeker to tell a lie or fabricate a curriculum vitae.' (412).

Love (2003: 103) also struggles with the 'ticklish problem of candor' and worries about policies that 'indulge the fiction that the conviction had somehow never taken place' (Love, 2003: 108), yet her concerns are based on more than ethical and practical concerns. Because it is premised on a fiction, she argues, 'expungement fails to afford an opportunity for the offender to be reconciled to the community' (Love, 2003: 121) and 'helps society to evade its obligation to change its views toward former offenders' (Kogon & Loughery, 1970: 378). Kogon and Loughery (1970: 391) are particularly strong in making this point in their remarkable 40 year-old article referring to criminal record expungement as 'the Big Lie':

'It is a profound mistake to mix in with redemptive legislation any provision concealing [criminal] records. To help the ex-offender by restoring rights and removing disabilities is an absolute necessity. Alteration or destruction of the record, however, only protects the body politic from confrontation regarding its own aberrant attitudes and the necessity to change. It basically corrupts the fundamental correctional objective of rehabilitating offenders.'

For these reasons, I have also started to believe that a 'certificate of rehabilitation' (Love, 2003) or 'pardon' (Ruddell and Winfree, 2006) is probably preferable (in legal cultures like the US and UK at least) than legal re-biographing. Rather than having one's criminal past buried or 'knifed off,' such policies instead formally and legally declare the person to be 'rehabilitated,' whilst still providing relief from all legal penalties and disqualifications. The certificate would function as a 'letter of recommendation' (Lucken & Ponte, 2008) that can be used with licensing agencies, employers and state officials. When asked if he or she has ever been convicted of a crime, the individual does not respond 'no', but rather 'yes, but the conviction has been expunged and I have received a certificate of rehabilitation'. The policy, therefore works 'not by trying to conceal the fact of conviction, but by advertising the evidence of rehabilitation' (Love, 2003: 103).

The primary problem with such merit-based policies is that they often involve a labyrinth of bureaucracy making them 'biased in favour of the wealthy and politically connected, and inaccessible as a practical matter to those without means' (Love, 2003: 116). President Bill Clinton's infamous pardon of the billionaire tax evader Marc Rich in his last days of office is an extreme example of the sorts of individuals thought to be most likely to receive such privileges -- at least at the Presidential level in the US. In fact, some evidence for this argument might be found in the low take-up rate of application-based system of pardons in Canada. In Canada, former prisoners are eligible to apply for pardons after remaining crime-free over a specified waiting period, and almost all applicants are successful, yet only a tiny fraction actually apply. Ruddell and Winfree (2008) estimate the take-up at less than 5 percent of those convicted between 1996 and 2002.

This problem could be overcome, however, by simply building the certification process (or pardon) directly into all rehabilitative work carried out by the state. That is, ordinary probation processes might routinely involve certification of some sort. The conclusion of a probationary

period after prison, for instance, might logically involve a return to the courtroom for the ritualised certification of a ‘clean bill of health’ after the sentence’s completion. All debts would be officially paid in full and the individual would be allowed to move on with the rest of his or her life with no further collateral consequences or restrictions.

Likewise, the Harvard labour economist Richard Freeman (2008) – writing from the fortunate vantage point of someone who is not steeped in the pessimism and failure of criminal justice efforts to rehabilitate prisoners – argues in favour of a sort of ‘honour roll’ system for prisoners similar to what was advocated in Maruna (2001). Rather than ‘serving solely as a negative signal’ this information would provide ‘a positive signal to employers about those likely to have been rehabilitated’ (Freeman, 2008: 411):

‘[Under the current system] an employer finds out if X was incarcerated for a crime but not if X was a model prisoner, viewed by the prison authorities and others as ‘rehabilitated’ and unlikely to recidivate. If public records on inmates included information on their behavior in jail or prison – for instance, whether they broke rules or engaged in violence or took programs to raise their skills – this would help some prisoners surmount the negative information about their criminal behavior and incarceration. Specifically, using objective data and judgment, prison authorities could develop a scoring system for the extent to which they viewed inmates as successfully rehabilitated and provide the scores over the Internet as part of the publicly available information on the individual. A prisoner given a score of, say, 10 would be regarded as having a high likelihood of remaining out of trouble on release. ... Combining statistical modeling with the expertise of prison authorities could produce better predictors of likely reoffending... [and] differentiate those on a rehabilitative track from others. ... [This would give prisoners] an incentive to invest in good behavior and activities that would gain them a high score and a better chance of legitimate employment after release’ (Freeman, 2008: 410).

In some ways, only someone outside of criminology and the world of criminal justice could come up with an idea that is this brilliant, but also this naive⁵. The problem, of course, is that few inside or outside the criminal justice system trust the ability of experts to determine who is or is not ‘rehabilitated’ (or even who is less likely to stay out of trouble on release). In a risk-averse culture (and every contemporary criminal justice system has become, by nature, highly risk averse) who wants to take the responsibility for declaring a prisoner to have a ‘clean bill of health’? Parole boards and prison administrators fear letting anyone out of prison at all except under the strictest conditions, and the idea of publicly putting one’s reputation to a prediction that a former prisoner is a ‘good risk’ appears unlikely.

Yet, without this vote of confidence, where will the ex-prisoner’s own confidence come from? If employers assume she or he will fail, if ‘society’ assumes it, and even the criminal justice system itself presumes it, then it is asking a great deal for the individual to somehow overcome all such

⁵ Jacobs (2006) has likewise advocated a “credible government-run work program” that could “certify that a particular ex-offender had performed successfully for a period, say a year.” This way the individual could build a “positive curriculum vitae” that might counter his or her criminal credential.

expectations. Surely, this is the ultimate in self-fulfilling prophecies. The great irony of the ‘risk society’, then, is that our hyper-vigilant, risk-averse policy culture actually makes society less safe by actively discouraging rehabilitation all under the banner of justice. Viva la revolution!

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