

Abolishing the stigma of punishments served

Andrew Henley argues that those who have been punished should be free from future discrimination

The Benthamite workhouse principle of 'less eligibility' dates back to the Poor Law Amendment Act 1834 and, since its application to the sphere of criminal justice, has long dictated that prisoners and other lawbreakers should always be last in the queue for access to scant welfare resources because of the moral censure attached to their behaviour. This continues to be problematic for those advocating penal reform with debates about imprisonment often descending into objections to any material improvement in conditions on the basis that they would be unfair to 'hard-working taxpayers' or the supposedly 'law-abiding majority'. An allied but lesser known principle is that of 'non-superiority' which Mannheim (1939) described 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'.

For the most part, abolitionist critiques of criminal justice have tended to focus on the institutions in which punishment occurs or the practices associated with them, rather than on the stigmatising effects which follow punishment. In this essay I argue that, due to the ubiquity of criminal background checks and an ever-present preoccupation with 'risk', the persistence of the 'non-superiority' principle results in many people *who have already been punished by the criminal justice system* being unfairly discriminated against. But, given that the Police National Database contains the details of 15 million UK citizens - including 9.2 million people with

criminal records (Hall, 2011), it is necessary to conceive of practical 'abolitionist alternatives'.

'Non-superiority' in practice

Criminal records can have a wide range of collateral consequences which often extend well beyond any sentence imposed by the courts. This may result in an additional layer of 'punishment' to that which has been officially sanctioned. For instance, people with convictions are significantly over-represented amongst the ranks of the unemployed. A joint report by the Ministry of Justice and the Department for Work and Pensions, revealed that of the 1.21 million people claiming the Job Seekers Allowance, 33 per cent appeared on the Police National Computer. Additionally, 26 per cent of the 4.9 million open claims for out-of-work benefits as at 1 December 2010 in England and Wales were made by those who had received at least one caution or conviction between 2000 to 2010 (Ministry of Justice and the Department for Work and Pensions, 2011). In an era of high unemployment, and the growth of insecure employment with the rise of the 'zero-hour contract', the seldom-questioned 'non-superior' status of former lawbreakers can be seen to legitimise decisions taken by employers to overlook people with convictions in their recruitment practices.

The construction of former lawbreakers as 'undeserving' cases when compared to other job applicants is problematic when they are also vulnerable to prejudices concerning their 'riskiness'. In the risk-centred world of insurance, a criminal record thus becomes a legitimate reason to refuse cover or to

massively increase premiums. Bath and Edgar (2010) found that more than four in five ex-prisoners said that their previous convictions made it harder for them to get insurance and that, even when they were successful, they were charged far more. The inability to obtain motor insurance or business liability insurance can prevent former lawbreakers from finding employment involving driving or from setting up their own company to avoid discriminatory recruitment practices.

The premise that people with convictions are inherently risky has also led to problems with their access to housing. Charities such as Shelter have noted that landlords may be reluctant to offer those with criminal records a tenancy or that they might require a prohibitively high deposit. Lenders may also refuse mortgages to those with convictions although their inability to obtain home insurance renders this a moot point. Since the *Localism Act 2011* extended the powers of local authorities to set their own criteria for access to social housing, certain councils (for example, Harlow Council in Essex) have attempted to render people with certain convictions ineligible. Previously, some councils had suggested that eviction from social housing could be used against those involved in the August 2011 riots – a 'collateral consequence' that would have also affected innocent family members.

The prospects for change might seem limited when those with previous convictions are routinely excluded from various forms of elected office. Following Irish republican prisoner Bobby Sands election as an 'Anti-H Block' candidate, the *Representation of the People Act 1981* rendered ineligible anyone who has served more than 12 months in prison from becoming a member of parliament. Electoral Commission rules exclude from local authority, mayoral and Greater London Authority elections anyone who has served more than three months in prison in the five years before polling day. The restrictions on candidature for the office of Police and Crime Commissioner are even tighter, with those convicted of any

imprisonable offence excluded – even if they were not sent to prison. To those who claim that such restrictions are necessary to protect the integrity of elected offices, I say that an absence of previous convictions is no guarantee of *future* integrity. The 2009 parliamentary expenses scandal, and the imprisonment of a cabinet minister last year for ‘perverting the course of justice’, demonstrates this point rather well.

These exclusions and restrictions raise important questions for criminal justice and social policy. Do we as a society genuinely recognise and reward those who desist from criminal activity? Do we really have faith in the efficacy of criminal justice interventions to fully rehabilitate lawbreakers? Just how representative is our democracy when a significant proportion of the population can never seek elected office? Is there an alternative approach?

The benefits of ‘abolitionist alternatives’

Whilst the longer-standing abolitionist focus on the legitimacy and efficacy of the prison and punitive responses to lawbreaking has regularly come up against the criticism that it is hopelessly idealistic at best or downright dangerous at worst – the fundamental fairness of the ‘punishment of the already punished’ is, to my mind, an eminently contestable issue of *social* rather than criminal justice. Also, given the huge number of people with previous convictions, alternative policies might have a very broad appeal. So what current arrangements exist to protect former lawbreakers from discrimination, and how might they be improved upon?

The *Rehabilitation of Offenders Act 1974* sets the ‘rehabilitation period’ after which criminal records do not normally have to be disclosed for *most* purposes by virtue of their having become ‘spent’. However, numerous exemptions from the Act apply and its ‘rehabilitation periods’ have long been considered excessive. Whilst limited reforms were introduced in the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, those sentenced to more than four years in prison can

still never become legally rehabilitated. Instead, they are cast into a permanent state of civic purgatory where their notional ‘debt to society’ becomes a full-blow ‘moral mortgage’ which can never be paid off. Furthermore, the growth of criminal background checks, which often reveal even ‘spent’ convictions and cautions, represents a significant decentralisation of the power to punish. That is, a decentralisation from the state (where at least certain safeguards exist) and to employers, insurers, housing officers and others who can ‘punish’ former lawbreakers by withholding from them social, economic and other rights which constitute full citizenship. This is troublesome since research suggests the process of criminal desistance involves the construction of a pro-social and law-abiding identity (Maruna, 2001). Full access to employment, housing, financial services and greater civic participation are critical to this positive identity-shift.

One solution might be to extend to people with convictions the protections of existing anti-discrimination legislation such as the *Equality Act 2010*. Currently, the possession of a criminal record is not a ‘protected characteristic’ in the Act. But the problem remains that ‘moral censure’ applies to criminal records whereas it does not (or should not) for other characteristics such as age, disability, gender or sexual orientation which are protected characteristics. Objections might well be raised to the extension of equality laws to those who engage in serious crimes involving sex or violence. But it is worth bearing in mind that such crimes are relatively rare, and in any case a more proportionate system of safeguarding disclosures is still possible. Larrauri (2014) has made some progress in advancing the legal argument in this area by outlining some general principles to regulate the disclosure of previous convictions for employment purposes. These might easily be adapted for the purposes of insurance, housing and other areas where people with convictions experience discrimination. For instance: requests for criminal record information

should in general define specific offences which are relevant and not require blanket disclosure of almost all information as occurs presently; information should only be disclosed when it passes a ‘close nexus’ test to the purposes for which it is applied; and previous convictions should never have ‘conclusive force’, that is, they should not say definitively that you cannot employ, insure or house someone if a record is revealed.

These tighter principles of regulation seem to my mind to offer the basis of a more proportionate, humane and legitimate system of dealing with previous convictions which would go some way to abolishing the persistent ‘non-superior’ status of former lawbreakers. Significantly, they could also play a significant role in a wider decarceration strategy because, whilst they will not address the underlying issues of social marginality and economic disadvantage which often contribute to individuals being criminalised in the first place, they may at least remove a significant barrier to those aiming to escape the ‘revolving doors’ of the criminal justice system. ■

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