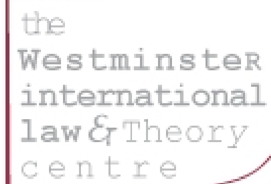

THE USUAL SUSPECTS
ANALYSING THE USE OF PAST CRIMINAL CONVICTIONS IN THE CRIMINAL JUSTICE SYSTEM

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Abstract

There is a misconception that once an offender has been punished for an offence the criminal justice system has no further claim over the individual. Such a conception conflicts with the fact that past criminal record can be used in a wide variety of ways in the aftermath of formal punishment. It continues to follow the individual, turning the de jure sentence into the de facto life sentence. The ex-offender is in many ways seen as a group to be perpetually controlled and managed, and although the use of past criminal record is frequently necessary in order to vindicate public interests, consideration must also be given to the rights of ex-offenders. There must be a balance between public concerns and allowing the individual to be integrated, rehabilitated and essentially move on with their lives. Achieving this balance has become more and more obscure as the justice system focuses its attention on control, the strategy dominating late modern culture.

Introduction

Crime and punishment is a complex issue compounded by the intricacies of the political and social networks of a particular era. The mode of dealing with crime and criminals has evolved, from utilising excessive and expressive punishment, to focusing upon individualised justice and rehabilitation, to ideology that focuses primarily upon the element of control. The control and management of offenders has become the main concern for today's criminal justice system, and many legal and penological policies reflect the move towards emphasising risk minimisation and public protection. Many of those policies focus particularly upon one category of offender: the ex-offender.

There remains a misconception that once an offender has served the penalty for an offence his/her dealings with the law and legal system in relation to that offence is at an end. This is not true. The very nature of crime, conviction and punishment bestows upon an offender a record which, through an intricate and often subtle web of control policies, can be used to bind the individual within the 'carceral' system to such an extent that we must wonder whether there really is any such thing as an 'ex' offender.

The criminal record can be used in a variety of ways. It can be used in police investigations, in bail applications, as evidence at trial, in sentencing and it can be used in the context of accessing employment, housing and other normal social activities. The *de jure* sentence becomes the *de facto* life sentence when past record is used in these forms. Its use raises tension between public policy considerations and the endorsement of individual rights. While accepting that its use is often necessary, we cannot readily accept that this is always the case. Consideration must be given to the rights of the ex-offender and in particular to the importance of proportionality in the justice system. Considering also that the successful re-integration of offenders is one of the most challenging criminal justice issues facing national governments, we must consider that the broader effects of using criminal record could be the marginalisation and exclusion of ex-offenders, thus overshadowing any efforts for them to be successfully integrated and rehabilitated.

This paper will look at some of the areas where the criminal record can be used. It will examine how, in the areas of bail, police investigations, sentencing and post conviction, the law has dealt with the elements of control and achieving a balance between public interests and vindicating personal rights.

It was Michel Foucault who first dealt with the notion of *de facto* surveillance and control of offenders. Thus his perspectives on the perpetual nature of punishment are particularly important to consider in the context of this paper. David Garland has also examined the nature of control in modern society and discovered that "the assumption today is that there is no such thing as an 'ex-offender'- only offenders who have been caught before and will strike again."[1] He also observed how past offending alters the perceived moral character of the individual, that leads to the dissociation of his/her rights. It is in this context that Giorgio Agamben's theory of the politicisation of bare life becomes relevant. Agamben examines the biopolitical nature of the State today

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[1] Garland, D., *The Culture of Control; Crime and Social Order in Contemporary Society*, Oxford University Press, 2001, at p 180-181

and the notion that the state has sovereignty and/or control over the 'life' of the individual. Human rights are attributed to the individual but primarily in the sense of citizenship. It is the citizen and not the individual to whom rights pertain, at least from a political perspective. In this way such rights are liable to be lost when one loses the status of citizen. The offender and more recently the ex-offender can be viewed in this light. Harsh political policies against them are indicative of the idea that they have lost the status of citizen. Often it is society's demand for punishment that leads to this situation. Therein also lies the notion of the scapegoat as proposed by René Girard, which will be looked at later on.

One final significant concept that must be considered is the idea that behind the righteous justice of the law, there is a violence forced upon its violators.[2] Such violence though necessary to an extent (the enforcement and effectiveness of law would not exist without it), tends often to be excessive. Law, enacted in doctrines and legislation, can be violent in numerous ways, and is not merely confined to the typical notion of physical harm or torture. Law can be violent "in the way it uses language and in its representational practices, in the silencing of perspectives and the denial of experience, and in its objectifying epistemology."[3] The manifestation of law's violence often presents itself in the context of low level law such as policing, and disciplining and controlling offenders on release.[4] The violation of rights can also be demonstrative of law's violence.

It is against the background of such theories that I propose to set this examination of the use of past criminal record in the justice system. Reference to them is used to reinforce the argument that the criminal record acts as a *de facto* punishment, under which the individual remains eternally within the control of the State. It is necessary to emphasis that the purpose is not to diminish the importance of public protection or the rights of victims, but rather to highlight the diminishing rights of the ex-offender and the great potential for unfairness in the system that permit his/her past record to be perpetually used against him/her.

Control and the Police

The retention and subsequent use of criminal record meshes well with what Foucault described as the 'carceral archipelago,' the dispersal of penal discipline throughout the social body where the power to control and punish are natural and legitimate.[5] Foucault's documentation of the carceral system gave new meaning to social order and punishment which struck at the 'soul' of an offender. The horrific, yet finite nature of prior punishments (i.e. the death penalty), became completely transformed

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[2] See Sarat, A and Kearns, T.R., (eds.), *Law's Violence*, The Amherst Series in Law, Jurisprudence, and Social Thought, University of Michigan Press, 1993; Cover, R., "Violence and the Word," 95 *Yale Law Journal*, 1601-1629, 1986; Wellman, C., "Violence, Law and Basic Rights," in Brady, J. and Garver, N., (eds.), *Justice, Law and Violence*, Philadelphia: Temple University Press,1991

[3] Sarat, A. and Kearns, T.R., ibid, at p 8-9

[4] Hays, D., "Time, Inequality, and Law's Violence," in Sarat and Kearns, ibid, at p168

[5] See Foucault, M., *Discipline and Punish; The Birth of the Prison*, Translated by Alan Sheridan, Penguin Books, 1977, pp293-308

with the carceral continuity that retained infinite possession over the individual.[6]

Control, which has become the key priority in the crime sector, is effectuated now, as it was when Foucault wrote, through a variety of laws and agencies. It operates at every level of the social body. The Police form the front line infantry in controlling crime and criminals, and the criminal record can be an extremely valuable tool for both generating suspects and continuing the penitentiary technique of surveillance and discipline.[7] Historically an offender left prison "with a passport that they must show everywhere they go."[8] This system has been replaced by the police record, which catalogues an offender's identity and permits "a surveillance that was once *de jure* and which is today *de facto*."[9] When the Police use criminal record, this propels public protection and risk minimisation to the forefront of legal and penal policy, but while it has the desirable advantage of yielding effective and efficient results, there is a downward tilt on due process and personal rights of ex-offenders.[10] A valuable and effective tool it is, but, given that this is a largely unregulated area, there is little restraint upon the ability of the Police to unjustly interfere, on the basis that an individual has a record, with rights such as personal liberty, privacy and the presumption of innocence.[11]

While one might argue that minor interferences with such rights are justified on the basis of public protection we must remember that individuals do not relinquish all their rights as a result of having a conviction. They are still entitled to be treated fairly and proportionality. It should not become a situation of continuously targeting the same individuals, thus perpetuating punishment, control and stigma without just cause.[12]

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[6] Foucault wrote that "the carceral texture of society assures both the real capture of the body and its perpetual observation." Foucault, ibid, at p 304

[7] A criminal record can influence stop and search, arrest and detention, and broader investigative techniques. The use of this factor is, however, discretionary and thus it is difficult to ascertain the true extent of its use by the police.

[8] Barbé-Marbois, F. de, *Rapport sur l'état des prisons du Calvados, de l'Eure, la Manche et la Seine Inférieure*, 1823, at p17. (Referenced in Foucault, ibid at p267).

[9] Foucault, ibid at p 272

[10] Efficiency, meaning the justice system's "capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders,"(Packer, p 10) is the main criteria of the Crime Control Model of the criminal process according to Packer. The use of criminal record fits well within this model, hinged upon the values of speed, finality and an underlying presumption of guilt. Efficiency is not always a good thing however. It shortcuts around reliability in that it is tolerable of error to a certain extent. As opposed to the Due Process Model which insists upon the elimination and prevention of mistakes even at the expense of finality, the primal role of efficiency within the Control Model ensures that rights (esp. personal freedom and privacy) are not as important as repressing crime. See generally Packer, H.L., "Two Models of the Criminal Process" 113 *University of Pennsylvania Law Review* 1, 1-68. 1964

[11] The influence of past record is discretionary. It is widely acknowledged that the Police do not use their powers of discretion indiscriminately. For example there is a difference in treatment between offenders from the lower classes (the 'typical' offender) and white collar criminals. Targeting practices against the travelling community and the visible offenders (vagrants and public order offenders) are recognised in many countries including Ireland. The effects of these targeting practices are usually isolation and marginalisation of these groups. See Mulcahy, A. and O' Mahony, E., 'Policing and Social Marginalisation in Ireland', *Combat Poverty Agency Working Paper* 05/02 (April 2005). McConville et al also observe a number of working rules which include that of targeting those with prior criminal record, referred to as the 'previous' or 'known' working rule. See McConville, M., Sanders, A. and Leng, R., *The Case for the Prosecution*, London: Routledge, 1991. The knowledge can be use (1) as a basis for arrest itself, (2) as the first lead in a case, and (3) to watch the suspect.

[12] We must also in this context consider labelling theory which argues that "deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender.' The deviant is one to whom this label has successfully been applied." Becker, H., *Outsiders: studies in the sociology*

Within the Formal Legal System

A criminal record continues to affect individuals who come within the criminal justice system again for a subsequent offence. If charged with an offence, an individual can be remanded in custody and the existence of past convictions can weigh heavily against an offender applying for bail.[13]

In Ireland prior to 1996, the common law rules provided that bail could only be refused to prevent the accused from evading justice either by absconding or interfering with witnesses or evidence. The Supreme Court in the cases of *AG v O'Callaghan*[14] and *Ryan v DPP*[15] stipulated that the probability of the individual evading justice was the sole reason to justify depriving a legally innocent individual of their liberty before trial. Furthermore both courts viewed with caution the prospect of considering past criminal record in bail applications.
Several highly publicised murders in 1996 and 2006 generated political concern regarding the problem of crime and the rate at which criminals, particularly in relation to organised crime, seemed to be 'getting away with it.' Figures around so-called 'bail bandits' mounted, inciting a need to control the situation fast and furiously. The pressure came bubbling to the surface with the introduction of many new policies that have evoked populist support in how restrictive they are towards suspects.[16]
The perceived 'crime crisis' resulted in the enactment of not one but two conservative legislative frameworks, which removed bail from its liberal common law fixture, and permitted past record to be considered in order to refuse bail to prevent the commission of a serious offence.[17] Provision for such preventative detention already existed in many other common law jurisdictions like the U.S. and Britain[18] and followed suit from International endorsement under Article 5(1) of ECHR. The two Acts- the Bail Acts 1997 and 2007- make it difficult for an individual to attain bail, but rather than being a 'proportionate response,' the levying up of control has been counter-balanced by the diminution of personal rights particularly the right to presumption of innocence and personal liberty.

One must concede that pre-trial detention is frequently necessary for dangerous offenders and past criminal record may be an integral element of refusing bail. The

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of deviance, New York, 1963. Without denying the role of primary deviance in criminality, one could argue that the police function may act as a criminogenic force.

[13] A Home Office analysis of over 4000 Court remand decisions in 1998 revealed that the factors most influencing the decision included, address status, type of offence and past custodial sentence (this being the most significant element of the criminal record). Morgan, P.M. and Henderson, P.F., 'Remand Decision and Offending on Bail: Evaluation of the Bail Process Project' (HORS 184), 1998

[14] *People (AG) v O'Callaghan* [1966] IR 501

[15] *Ryan v DPP* [1989] IR 399

[16] The Bail Act 1997 was introduced as part of a crime package that included the Criminal Justice (Drug Trafficking) Act 1996. The Bail Act 2007 is incorporated as part of the larger Criminal Justice Act 2007 which introduced a multitude of changes into the law.

[17] The Bail Act 1997, section 2 (2) permits bail to be refused if considered necessary to prevent the commission of a serious offence. A number of factors are to be considered in making a decision under section 2 (2) including whether the applicant has past convictions (under ss., 2 (2) (e)). Under the Criminal Justice Act 2007 section 6 (amending 1997 Act by inserting after section 1, 1(A)) statements must be produced before Court that include information as to past record. Furthermore in the context of opinion evidence under section11 the concept of 'known' (to the police) becomes important.

[18] In the U.S. the equivalent act is the Bail Reform Act 1984 and in the U.K. it is the Bail Act 1976 as amended by the Criminal Justice Act 2003.

reality is however that only a very small percentage of those released offend on bail,[19] raising concerns regarding the necessity of stringent provisions that impede a legally innocent individual's right to liberty.

Furthermore the laws do not seem to be having their intended effect of reducing crime on bail and protecting the public. The only apparent effect is an increase in the number of individuals remanded in custody and the imposition of a greater number of conditions and certainly more onerous conditions for those who are granted bail.[20] The ex-offender is by no means alone in terms of restrictive bail measures, but given the change in policy direction in recent years towards the ex-offender, the situation could swiftly become one of targeting the offender with a record, thus allowing past convictions and suspicion to become the definitions of guilt.[21]

René Girard's theory of the scapegoat is somewhat relevant here.[22] From an anthropological perspective, Girard considers that all humans are driven by a desire for that which another wants (mimetic desire) and that usually a triangulation of desire is created, resulting in conflict between the parties. The situation increases to a point where society is at risk and then the scapegoat mechanism comes into play. One person, the scapegoat, is singled out as the cause of society's problem and expelled (or killed). Social order is restored temporarily and the cycle begins again.[23] There is a resonance of this theory in the context of how the ex-offender is dealt with in modern times. The public image of crime and criminals, particularly recidivists, is often that they are to blame for many of society's problems (evident particularly in instances of perceived crime crises). Community unification against the offender is the only solution and harsh punitive policy is the ultimate unifier. The 'scapegoat' in this scenario is often not an innocent party but those who have done wrong and their 'expulsion' is better mirrored in terms of incarceration and/or marginalisation. However, the theory still holds significance and can be used to demonstrate how the 'category of ex-offender' (as opposed to an individual criminal who offends) is viewed by society.[24] The tightening of bail laws is but one example of this.

Staying within the formal legal system, it is important to note that past record can also

[19] While research in Ireland is lacking, research in Britain indicates that only between 10 and 17% of accuseds offend on bail and research in America revealed statistics of 18%: (Morgan, R. and Jones, P., 'Bail or Jail?' in Casale, S. and Stockdale, E., (eds.), *Criminal Justice Under Stress*, London, Blackstone Press, 1992; Reaves, B.A, *Pre-Trial Release of Felony Defendants*, Washington: Bureau of Justice Statistics, 1991

[20] O'Donnell notes that in 1992 there were 101 remand prisoners and in 2003 that number had risen to 522. See O'Donnell, I., 'Putting Prison in its Place', 5 *Judicial Studies Institute Journal* 2, 54-68, 2005, at p 57. The Irish Prison Service Annual Report 2001 noted that there had been a dramatic increase in the number of individuals remanded in custody and reported that in October 2001 there was a daily average of 546 remand prisoners. Of the total number of committals in 2004 there were 3756 remands and this increased in 2006 to 5311 remands (The Irish Prison Service Reports).

[21] It may also be noted that the standard of proof is not that of 'beyond a reasonable doubt' as one would expect. Rather the suggestion is that it is the lower civil law standard of 'on the balance of probabilities' that applies. Both Walsh J in *People (AG) v O'Callaghan* [1966] IR 501 and Keane J in *McGinley v DPP* [1998] 2 IR 408 refer to this standard.

[22] René Girard, *The Scapegoat*, Translated by Yvonne Freccero, The John Hopkins University Press, 1986.

[23] Although the scapegoat is usually an innocent victim (chosen because they fit the 'victim' profile) the theory can apply to offenders also. In ancient Greece the scapegoat was usually a beggar or criminal who was cast out in response to some social crisis; Frazer, Sir James, *The Golden Bough*, Worsworth reference p578

[24] Essentially the idea is that the individual has offended in the past, therefore he/she must be guilty this time, therefore lock him/her up so that no further crimes are committed.

be admitted as evidence at trial. It can be submitted as part of the prosecutions case (misconduct evidence), and be revealed under cross-examination. Often the evidence is adduced to prove that because the accused has offended in the past (especially if those offences are similar) he/she is likely to have committed the offence with which he is being charged. Under the Criminal Justice (Evidence) Act 1924,[25] which relates to cross-examination, past convictions may be introduced when the accused, testifying in his/her defence, either asserts his/her good character or impugns the character of a witness.[26] What is more, a witness testifying may have his/her past convictions revealed to attest to credibility.[27] We must consider whether such provisions are punitive. Do they prevent accuseds and witnesses from testifying for fear of having a record exposed? The concept of the *de facto* life sentence becomes clearer, when past record can be used to inhibit future engagement in the justice process.

Sentencing

"Let penalties be regulated and proportioned."[28] This idea marked the end of vengeful tortuous punishments and signalled the new "lyrical insistence that punishment should be humane."[29] This concept, known as proportionality, can be understood today to mean that punishment is measured to both the seriousness of the offence and the circumstances of the offender, and is invoked to ensure punishment is fair and not excessive.[30] It also incorporates the elements of certainty and finality into the sentencing equation and the notion that an individual is not repeatedly or continuously punished for the same crime. The use of past criminal record in sentencing arguably violates these principles.

There has in recent years been a surge of sentencing policies that focus upon the repeat offender. The existence of past criminal convictions can be used to impose a higher sentence than might otherwise have been given.

The innovative idea of mandatory minimum sentencing for repeat offenders was initiated with vigour in the U.S. (Washington) in 1993 with the introduction of three strikes laws,[31] which essentially requires the imposition of a sentence of life imprisonment on the conviction for a third 'serious' felony.[32] A judge has absolutely no discretion to consider if there are exceptional circumstances justifying a lesser sentence. Mandatory minimum sentencing has also found favour in British sentencing policy under the Criminal Justice Act 2003 which provides for a number of mandatory sentences premised upon past convictions.

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[25] The English equivalent is the Criminal Justice (Evidence Act) 1898. The rules of admissibility in England have been widened under the Criminal Justice Act 2003 (e.g. creating 'false impression' under s., 105).

[26] Criminal Justice (Evidence) Act 1924, s., 1 (f) (ii)

[27] Criminal Procedure Act 1865, s., 6

[28] Foucault, ibid, at p73

[29] Foucault, ibid, at p74

[30] The principle of proportionality is not just applied in terms of punishment but can be invoked to ensure the fair application of any legal rule or standard (e.g. in the application of EU principles).

[31] The Persistent Offender Accountability Act 1994

[32] The category of offences that may be classed as a serious felony is quite broad. In California, for example, petty theft is a felony if there are past convictions.

Ireland has seemingly been influenced by such changes and made its own provisions for mandatory minimum sentencing in the Criminal Justice Act 1999, the Criminal Justice Act 2006 and the Criminal Justice Act 2007. The provisions in the various Acts include, a minimum of 10 years for a second conviction for drug trafficking under the 2006 Act (section 27 3(CCCC)), and a minimum of three-quarters of the maximum sentence for a range of offences including blackmail, false imprisonment and aggravated burglary, under the 2007 Act (section 25).

The idea of mandatory minimum sentencing for recidivists does raise the question of proportionality, a concept deeply rooted in the laws and constitutions of many countries[33] as well as being highly valued in International law. Prior to the introduction of the three strikes rule in the U.S., legal and judicial emphasis was on the concept of proportionate punishment. The Eighth Amendment to the United States Constitution which prohibits the imposition of cruel and unusual punishment was invoked in case law to ensure that past criminal records could not be used to impose completely disproportionate punishments.[34] Now the Eighth Amendment is largely ineffective in securing proportionate punishment as the cases of *Ewing v California*[35] and *Lockyer v Andrade*[36] demonstrate. These cases in particular signify the essence of harsh U.S. policy and the strong hold deterrence and incapacitation have taken as rationales for sentencing recidivists.

Mandatory minimum sentencing also signals the nucleus of political power, that of dominance over the *homo sacer*. The *homo sacer*, is according to Agamben, the bare life that can be killed and yet not sacrificed (p8); the sacred or damned man that society has judged on account of a crime (p71) and against whom political techniques can be focused to create the "docile bod[y] (p3).[37] This individual becomes what is at stake in political strategies (p3) and violence against him/her becomes licit because the ordinary rights of the citizen do not pertain to him/her (p82). The State's right to punish (p106) is inextricably linked with the *homo sacer*, who is both excluded from political life, while forming the basis for State authority (p183-"no life is more political than his"). The *homo sacer* here is the recidivist, who has lost the "quality of legal good that their existence no longer has any value." (p138). This may be expressed at least in terms of a loss of fundamental rights particularly the right to proportionate punishment.

The crucial difference between mandatory sentencing in Ireland and countries like the U.S. and Britain is that in Ireland the offence of conviction is the defining factor (in accordance with 'just deserts' theory), and rather than aggravate the sentence beyond that which is merited by the offence, the criminal record is instead used in accordance with the progressive loss of mitigation theory under common law. The approach thus taken is to determine the appropriate sentence for the offence and then for the judge,

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[33] In Ireland the case of *People (DPP) v M* [1994] 3 I.R. 306 put the doctrine on Constitutional footing. The Canadian Criminal Code (section 718 (1)) provides for punishment proportionate to the gravity of the offence and the degree of responsibility of the offender. In the Eighth Amendment to the U.S. Constitution there is a prohibition on the imposition of cruel and unusual punishment. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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

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

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

[37] Agamben, G., *Homo Sacer: Sovereign Power and Bare Life*, Translated by Daniel Heller-Roazen, Stanford University Press, 1995

using his discretion, to consider whether there are factors meriting reduction of the sentence.[38] If there are past convictions such reduction will probably not take place. How many past offences must exist before mitigation is 'used up' is uncertain. It is probably safe to say that this will depend on the *number* of past convictions, the *type* and *seriousness*, as well as judicial discretion. What is clear however is that the punishment cannot go beyond what is the appropriate sentence for the offence of conviction. In this way the use of criminal record in sentencing remains within proportionality standards.[39] Proportionality is also the determinative quality in terms of the recidivist provisions in legislation and therefore they differ from recidivist premiums in jurisdictions like the U.S.

The primary concern in sentencing recidivist offenders, particularly persistently serious or violent offenders, is naturally the public interest.[40] There is little evidence however to suggest that mandatory sentencing laws are having any significant effect on crime levels in the US.[41] Garland describes them as "very costly and, in crime control terms, of doubtful effectiveness."[42] For the most part it seems to be an attempt to dissipate public disquiet and anguish regarding persistent offenders.[43] The same could be said for other jurisdictions where political perception regarding public security and welfare lies in the incapacitation of offenders or their perpetual surveillance and management. Garland argues that such punitive policies are "motivated by an unstated but well-understood sentiment that views the offenders targeted by such acts (recidivists, career criminals, 'sexually violent predators', drug dealers, paedophiles) as wicked individuals who have lost all legal rights and all moral claims upon us."[44]

Increasingly we see that offenders are being offset against society as a whole for not conforming to societal norms. The isolation of the offender is apparent through punishment within the prison walls and now in the community through control mechanisms. The marginalisation and exclusion of the ex-offender is arguably intensified through laws that focus upon punishing recidivists. One might question whether this in itself is wrong? Such offenders have not conformed to normal social standards, so is it reasonable to punish them harsher for this? This author would argue that it is not reasonable to use past convictions as a way of compelling sentences that are entirely disproportionate to the offence. Governmental penal policies are not contemplated in isolation from the influences of penal policies in other jurisdictions. Such influence is already evident in many of the control policies seeping into the justice approach to crime in Ireland. Therefore caution is necessary in the approach to

[38] *Queen* [1982] Criminal Law Review, 56

[39] This does not erase all concerns however. For one there remains the fact that when criminal record is considered this will most affect offenders from disadvantaged backgrounds and will inevitably exacerbate their record.

[40] In *The State (Stanbridge) v Mahon* [1979] I.R. 314 at 318, Gannon J observed: "The first consideration in determining sentence is the public interest, which is served not merely by punishing the offender and showing deterrent to others but also by affording a compelling inducement and an opportunity to the offender to reform."

[41] See Zimring,Z., Hawkins, G. and Kamin,S., *Punishment and Democracy: Three Strikes and You're Out in California*, Oxford University Press, 2001

[42] Garland, ibid, at p 191

[43] Jones and Newburn suggest that the purpose of the rule lay not in the force of impact it would have on the recidivist population but more in its symbolic value as a way of demonstrating to the people that there was control of repeat offenders and that judges would be seen to severely punish those who refused to conform to societal norms. See Jones, T. and Newburn, T., 'Three Strikes and You're Out: Exploring Symbol and Substance in American and British Crime Control Politics', 46 *British Journal of Criminology* 5, 781-802, 2006

[44] Garland, ibid at p191-192

sentencing to ensure that the offender does not become the 'scapegoat' or the '*homo sacer*' for broader political imperatives and so that the important principle of proportionality is not undermined and distorted in this area.

Post Release Orders

Across many jurisdictions we are witnessing an increase in post release surveillance of the ex-offender that is very much a part of the 'new risk penology' and what Nicolas Rose termed as the 'securitisation of identity.'[45]
Foucault writes that the various means of surveillance of offenders, "presuppose the setting up of a documentary system, the heart of which would be the location and identification of criminals."[46] This is a key element of the post release policies emerging today. Effectiveness in crime control means activating a risk discourse in which information on offenders is vital.[47]

An individual may now be controlled, monitored and identified through the imposition of court orders that take affect upon release from prison. An individual can be subject to monitoring via electronic tagging,[48] to notification requirements and to a variety of other orders that act as a means of movement and behaviour control. Such orders are in addition to an ordinary sentence upon conviction and represent a significant departure from the notion that once a sentence has been served the legal system has no further claim over an offender.

Many categories of offenders have been the subject of post release policies, and one category that immediately springs to mind is that of the sex offender. Public perception and loathing of sex offenders has triggered a political 'fetishism' of control towards this group above all others in the justice system. In the U.S. the language of precaution has catalysed policies of, indefinite incarceration periods for sex offenders, notification requirements, risk assessment in the guise of treatment, and disclosure to the community, which has left the question of personal rights of sex offenders in a precarious and ambiguous position.[49] The U.K. has also turned to the civil law as a means of containing and incapacitating sex offenders, imposing policies such as the sex offender register, sexual offences prevention orders,[50] and supervision orders for released sex offenders. The influence of such policies resonates throughout the Sex Offenders Act 2001 in Ireland which provides for notification requirements, sex offender orders, post release supervision orders and the obligation to disclose on employment applications.

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[45] See Rose, N., 'Government and Control', 40 British Journal of Criminology, 321-339, 2000

[46] Foucault ibid at p281

[47] Such information discourse has also become important in the society-offender relationship with increasing demand for public right of access to information on convicted criminals. See Garland ibid at p180.

[48] Criminal Justice Act 2006. To be used mostly in the context of public order offenders and first time offenders.

[49] Garland questions how offenders could have been so thoroughly deprived of their citizenship and the rights that typically accompany it? He believes it is because "we have become convinced that certain offenders, once they offend, are no longer 'members of the public' and cease to be deserving of the kinds of consideration we typically afford to each other." Garland ibid at p 181/2

[50] Under the Sex Offences Act 2003.

These policies represent the desire to control the offender after the formal punishment has been served. The rights of ex-offenders to move on with their lives after they have served their time is outweighed in political policy by the all consuming need for security. Rehabilitative and re-integrative strategies have been downgraded in favour of risk assessment and management which are now the top priority. The gap between the offender and the community continues to grow in the wake of post release policies that effectuate the 'perpetual surveillance' (Foucault) of the individual and reinforce the idea that 'our' security depends on 'their' control (Garland).

The appeal of post release monitoring has transferred to other categories of offenders such as drug trafficking offenders under the Criminal Justice Act 2006 and a broader range of offenders including those convicted of serious assault, firearms offences, and blackmail under the Criminal Justice Act 2007. Under the Criminal Justice Act 2007 'monitoring orders' and 'protection of persons orders' can be imposed in relation to a limited number of serious offences contained within Schedule 2 of the Act and for a period of up to a maximum of seven years.[51] This is irrespective of the length of the original sentence or the risk posed by the offender.[52] There is a tension here between the protective intent and the effect upon the rights of the ex-offender. Despite the assumption that on release the individual's rights are restored to them, instead their rights are consequentially impugned as a result of such orders. Moreover there is a distinct lack of a balance between the interests of the public and the rights of offenders inherent in the provisions.[53] It has been argued therefore that, while keeping in mind public interest, there is a need to monitor the necessity of imposing these orders in the future. In addition, although they have not yet been challenged in the Irish courts, such orders might be considered as a form of collateral punishment. Under the Criminal Justice Act 2006 notification orders can be imposed for drug trafficking offenders. Part 9 of the Act obliges released drug trafficking offenders to comply with the 'signing on' requirements under this part. The obligations arise automatically from conviction and are not risk-based. Thus individuals are bound to the register regardless of whether they pose a danger in the future.

At this point one might be inclined to agree with Garland, that "in today's political climate, a record of prior offending affects the individual's perceived moral status rather more than it changes their actuarial risk."[54]

The interests of the public here are naturally important and one would find it difficult to argue against measures such as vetting procedures and disclosure requirements for those who would have unrestricted access to children in employment for example. The use of past convictions is often necessary and justifiable, both in the context of an effective criminal justice system and in terms of public protection. However, one

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[51] S., 26 (3)

[52] Essentially the 7 year maximum can be applied regardless of the length of the maximum sentence that can be imposed for the individual offences to which it applies, this max sentence varying considerably from each offence contained in Schedule 2 of the Act.

[53] Rogan observes that the disregard for offender rehabilitation in the provision is in contrast with provision under the Sex Offenders Act 2001 which at least prima facia takes this need into account. She remarks that the complete focus on public protection is difficult to explain given that "public perceptions would be unlikely to be that sexual offenders are more worthy of rehabilitative efforts that those convicted of offences in the Schedule to the Criminal Justice Act 2007." Rogan, M., 'Extending the Reach of the State into the Post-Sentence Period: Section 26 of the Criminal Justice Act 2007 and "Post-Release" Orders', 15 *Dublin University Law Journal* 1, 214, 2008, at p221

[54] Garland ibid at p192

might wonder the extent to which such policies are expressive rather than effective. Do they protect the public or do they act instead as an extra hurdle to successful reintegration into the community? Despite the protective aim of notification requirements for example, there is little evidence in other countries like the U.S. (where registration is most established) to show that they have any effect in protecting the public but instead have some minor effect on apprehending offenders after the crime is committed.[55]

Garland notes that such policies, concerned with the punishing of offenders and protecting the public at all costs, are inherently expressive and concerned with asserting the force of the sovereign power.[56] The released or 'ex' offender becomes the *homo sacer* and what is at stake in political power. Disciplinary control rages against him/her, through the political laws which diminish his/her rights. Rarely does it have to do with formulating effective strategies for protecting the public.

While these post release policies may not invoke much opposition on a substantive level, we must consider their overall and long term consequences. The public has much to gain from the rehabilitation of offenders but the criminal record, through stigma,[57] labelling and coercive control, can frustrate positive initiatives towards integration and rehabilitation. Furthermore despite a distinction being made between punishment and regulation on the basis of legislative intent, the effect of post punishment orders could have a punitive nature.[58] In *Enright v Ireland* (2003) the court upheld the constitutionality of notification requirements for sex offenders, but the Supreme Court in the case of *CC v Ireland*[59] considered that they could be punitive. The fact is that despite the regulatory intent the individual who is subject to such requirements may feel as though he is being punished, depersonalised and inhibited in trying to start a new life. Thus the effectiveness of the principle of proportionality in the justice system must again be questioned.
Most importantly, the need to monitor and control must be balanced with the rights such as privacy, personal liberty and the right to be treated fairly and proportionately.

Accessing Normal Social Activities Post Conviction

In the aftermath of conviction and punishment the individual continues to face multiple disadvantages. Rights such as liberty, the right to move freely within the State and the right to earn a livelihood, are thought to be restored to the individual, but this is not necessarily the case. The 'economy of suspended rights'[60] transcends the formal legal punishments of the justice system, and ancillary measures which

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[55] There is also a concern that the registers may be too heavily relied upon by the police and might lead to miscarriages of justice.
[56] Garland ibid at p191
[57] The policies (especially community notification) have a distinctly stigmatic nature which today has become important as a way of both punishing the offender and alerting the community to his/her danger. In Garlands' words, the deliberate stigmatising of offenders "is once again part of the official penal repertoire."
[58] The ECHR has upheld notification orders: *Ibbotson v UK* (1998) 27 EHRR 332 and *Adamson v UK* (1999) 28 EHRR CD 209. In *Enright v Ireland* [2003] 2 IR 321, Finlay-Geoghegan in the High Court decided the notification requirements under the Sex Offenders Act 2001 were not part of a criminal penalty as the intent of the Oireachtas was not punitive and it was in the interest of common good.
[59] *CC v Ireland* [2006] 4 IR 1
[60] Foucault suggested that the modern system of imprisonment constitutes an economy of suspended rights.

retain the criminal stamp can act as a barrier to enabling the individual from engaging in normal social activities. A criminal conviction can inhibit or restrict access to employment, housing,[61] travel[62] and insurance,[63] to take just a few examples.

In particular the duty to disclose prior record in employment applications poses problems for ex-offenders attempting to avail of legitimate opportunities. Research shows that employers routinely require declaration of criminal record and reveal a marked reluctance to employ an applicant with a conviction to his name.[64] Research in Ireland has shown that only 52% of employers would consider hiring an ex-offender.[65] Studies in the U.S. have revealed that employers would be more likely to hire applicants with little work experience than ex-convicts.[66] The exclusion of ex-offenders from the labour market has also been documented by a Home office report in England.[67] Research in this area has also observed that legitimate employment is a key factor in the rehabilitation of offenders and it has been noted that unemployed ex-offenders are almost twice more likely to re-offend than those who have gained full time or part time employment.[68] Foucault observed that "the conditions to which the free inmates are subjected necessarily condemn them to recidivism: they are under the surveillance of the police; they are assigned to a particular residence, or forbidden others…[and are] unable to find work."[69]

In Ireland the situation is compounded by the fact that at present there is no provision for the expungement of criminal records in Irish law. Most other jurisdictions have developed a spent convictions scheme whereby certain offences would not have to be disclosed for employment purposes, under certain conditions. The Spent Convictions Bill 2007 however does seek to bring Ireland in line with provisions elsewhere for the expungement of adult convictions.[70] Such a change is certainly welcome and would go a long way towards relieving ex-offenders of the shackles of an old conviction.[71]

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[61] Those who are in Local Authority Housing may lose their accommodation on entering prison and will have to reapply, a lengthy process usually. Some City Councils can take on views of committees set up ad hoc with regard to ex-offenders living in their area and ex-offenders can be excluded as a result. See O'Loingsigh, G., 'Getting Out, Staying Out: The experiences of prisoners upon release', *Community Technical Aid Project*, 2004

[62] The right to travel has been recognised as constitutional right in *State (M) v AG* [1979] IR 73. The right is not absolute and freedom to travel can be denied or restricted if public order or the common good require it. Conditions (for issuing of passport) are not governed by statute but remain a matter for executive discretion, and can be subjected to judicial review.

[63] There is a duty to disclose past criminal record in Irish insurance law (Irish case law follows English case *Reynolds & Anderson v Phoenix* [1978] 2 Lloyd's Rep 440) and insurers may rely upon vague exclusionary terms such as 'moral hazard' to justify the disclosure requirements.

[64] Conference Report, Accessing Employment: 2000 and Beyond, Dublin and Hillsborough Castle 1999.

[65] Lawlor, P. and McDonald, E., 'Story of Success: Irish Prisons Connect Project', 1998-2000

[66] Holzer, H.J., *What employers want: Job prospects for less-educated workers*, New York: Russell Sage, 1996. Holzer also reports that 65% of employers would not knowingly hire an ex-offender, regardless of the offence committed.

[67] *Breaking the Cycle- a Report on the review of the Rehabilitation of Offenders Act 1974*, Home Office 2002

[68] The Law Reform Commission, *Report on Spent Convictions*, 2007. See generally *Building bridges to employment for offenders*, HORS 226, 2001; McCullagh, C., "Unemployment and Imprisonment: Examining and Interpreting the Relationship in the Republic of Ireland" 2 *Irish Journal of Sociology* 1, 1-19, 1992; O'Donnell, I., "The Reintegration of Prisoners" 50 *Administration* 2, 2002

[69] Foucault ibid at p 267.

[70] See the Law Reform Commission, *Report on Spent Convictions*, 2007. Provision elsewhere includes the following: the Criminal Records Act 1985 in Canada, the Criminal Records (Clean Slate) Act 2004 in New Zealand, and The Rehabilitation of Offenders Act 1974 in Britain.

[71] Certain conditions necessarily attach to all spent convictions schemes. There is no such thing as absolute expungement. Schemes usually include exclusions on the basis of sentence length, offence type, employment type

There is again an avid need to balance competing rights in this area. Public interest considerations such as informed decision making, the needs of victims and protection of the public in general are important concerns but a balance must be struck between such interests and the ability of ex-offenders to move on with their lives. The ancillary measures attaching to a conviction can be adverse and unfair and unduly prolong the stigma of a conviction. Furthermore the individual is perpetually labelled as an offender and this can promote exclusion and marginalisation of the individual. Foucault observed that in the carceral system "there is no outside. It takes back with one hand what it seems to exclude with the other."[72] The paradox exists today, with the ex-offender remaining eternally within the system while at the same time being marginalised from mainstream social life.

One further problematic and unjust element of this, is the failure to acknowledge that offenders are largely young people who tend to grow out of crime. The Law Reform Commission in Ireland observed that "It is well documented that people grow out of offending behaviour and the offenders of today are likely to settle down to lead law-abiding lives by the time they reach 30 years of age."[73]

It is in light of these ancillary measures attaching to a conviction that we must again question the proportionality standard. We cannot argue that there is no excessive punishment in our legal system when a criminal record can continue indefinitely to affect the individual into the future. The concept of a *de facto* life sentence irrespective of the crime committed encroaches upon the doctrine of proportionate punishment.

Conclusion

It is evident that the concept of a *de jure* sentence is thus little more than a myth that disguises the reality of having a criminal conviction. Punishment extends far beyond the 'formal' sentence, into the social body where the individual continues to face harsh and often unfair disadvantages. While there is logic in retaining criminal record, there must be a measure of fairness and proportionality in its use. There is a need for careful assessment of the circumstances where it is necessary and just to permit past convictions to be utilised. We should not, however, allow the desire to prevent crimes and protect the public to contribute to the erosion of personal rights and civil liberties.

It is essential that there is a balance between control and enabling ex-offenders to move on with their lives. Continuously focusing upon the usual suspects could have the effect of distorting the important concept of proportionality in our justice system. Furthermore by separating 'them' from 'us' we allow ourselves "to forget what penal-welfarism took for granted: namely, that offenders are citizens too and their liberty interests are our liberty interests."[74]

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and require a significant rehabilitation period before expunging the record. See for example the Rehabilitation of Offenders Act 1974 (UK)

[72] Foucault, ibid at p 301

[73] The Law Reform Commission, *Report on Spent Convictions*, 2007, at p30

[74] Garland ibid at p182.

If we know nothing else of law, we know that it is a dynamic process. This is particularly evident in relation to the field of crime and punishment. Legal theorists and philosophical thinkers, like Foucault, Garland and Agamben, have contemplated and revealed in their research fundamental facts regarding the modern criminal justice system's approach to offenders. First, that the control and perpetual surveillance of offenders has become a key ingredient of penal policies, and second, that this is a largely political process, one which plays a 'zero sum' game between the rights of offenders and the public.

Past criminal convictions are becoming more and more significant in today's penal policies, but rather than attempting to find a balance between public protection and offenders rights, harsh policies are increasingly making it more difficult for ex-offenders to move on with their lives and become integrated into mainstream society. Ultimately, the legitimising of control and surveillance has, as Foucault suggested, lowered the level from which it becomes natural and acceptable to be punished.[75] It is through the criminal record that the law and legal system maintains its hold upon offenders long after they have served the penalty for the offence, bringing truth to the assertion that the criminal record 'may well be the severest of all penalties.'[76]

[75] Foucault, ibid at p303.
[76] New Zealand Law Reform Division, *Living Down a Criminal Record: problems and proposals,* Government Publications: Wellington, 1985, at p 8.

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