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Criminal records and the regulation of redemption: a critical history of legal rehabilitation in England and Wales

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PhD in Criminology

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ABSTRACT

The collation and use of criminal records by the state has conventionally been regarded as essential for the prevention and detection of crime, the administration of justice and the maximisation of public safety. For instance: the police may check the criminal records of suspects to determine whether they are 'known offenders'; those working in the judicial sphere may investigate the prior 'form' of witnesses and defendants to adduce 'bad character' or determine an appropriate sentence; and educational authorities and social services departments may conduct criminal background checks to determine the 'suitability' of individuals to work with or foster children. Whilst not disputing that these official functions provided the original justification for the state's development of criminal record repositories during the nineteenth and twentieth centuries, this thesis argues that other unofficial and quasi-penological functions are now served in the present by the collation, retention and dissemination of criminal background information.

This contention is examined through a critical history of legal rehabilitation in England and Wales as introduced under the Rehabilitation of Offenders Act 1974. This legislation determines if, when and under what circumstances a previous criminal record can be deemed 'relevant' for a number of purposes. Effectively, it regulates the extent to which a wide range of social actors can permissibly treat people with convictions less favourably than those in society without any criminal background. The thesis argues that legal rehabilitation as a social practice determines the boundaries of redemptive possibility in late-modern society by enacting a discriminatory biopolitics which uses criminal records as a moral apparatus to regulate life chances. Underpinned by neoliberal and authoritarian governmentalities, this biopolitics distinguishes a 'law-abiding citizenry' - constructed as deserving of access to social goods - from a 'denizen class' of convicted people whose 'punishment' is perpetuated through exposure to various exclusionary conducts.

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LIST OF FREQUENTLY USED ABBREVIATIONS

MOJ	Ministry of Justice
NACRO	National Association for the Care and Resettlement of Offenders
PWCs	People with convictions
ROA	Rehabilitation of Offenders Act 1974
ROB	Rehabilitation of Offenders Bill

PRIMARY SOURCES CONSULTED

In order to distinguish between the use of materials from primary sources and information sourced from other texts, the use of footnote referencing is deployed rather than in-text Harvard referencing. References to Hansard are included within the text with the full citation in parentheses (as shown below).

Archives visited or otherwise consulted:	*Cited as:*
The Papers of Lord Gardiner, GARD, GBR/0014/GARD/GARD13, Churchill Archives Centre, Churchill College, Cambridge	GARD13
Paul Sieghart Memorial Archive, Section IV: Rights and English Law, A: The Rehabilitation of Offenders Act 1974 (Boxes 81-83), The Albert Sloman Library, University of Essex	SIEGHART
Papers of Justice (British Section of the International Commission of Jurists), Ref: U DJU/8 (Joint Bodies 1959-1991), Files 13-14, Hull University Archives, Hull History Centre	U DJU/8/13-14
The Times Digital Archive - 1785-2006, via Keele University Library	TDA

Court cases/rulings/directives cited (listed chronologically):

Lambert v. Co-operative Insurance [1975] 2 Lloyd's Rep 485

Practice Direction (Crime: Spent Convictions) [1975] 1 WLR 1065

European Union Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995

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T & Anor, R (on the application of) v Secretary of State for the Home Department & Anor [2014] UKSC 35

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T.Q. v. Criminal Injuries Compensation Authority [2015] Tribunal Procedure (First Tier Tribunal) (Social Entitlement Chamber) Rules 2008 (Application No. X/13/721098)

List of Hansard debates (listed chronologically):

HC Deb, 12th August 1852, vol. 129, c.1685

HC Deb, 5th July 1966 vol. 731 c.267

HC Deb, 24th June 1969, vol. 785 c.1235

HC Deb, 7th May 1970, vol. 801, c.38

HL Deb, 1st February 1973, vol. 338 cc.708-25

HL Deb, 8th March 1973, vol. 339 cc.1305-82

HC Deb, 25th January 1974, vol. 867 cc.2110-40

HC Deb, 28th March 1974, vol. 871 cc.605-6

HC Deb, 3rd May 1974, vol. 872 cc.1542-8

HC Standing Committee C, 12th June 1974, First Sitting

HC Standing Committee C, 19th June 1974, Second Sitting

HC Deb, 28th June 1974, vol. 875 cc.1939-42

HL Deb, 15th July 1974, vol. 353, cc.873-933

HL Deb, 19th July 1974, vol. 353, cc.1330-408

HL Deb, 24th July 1974, vol. 353, cc.1806-52

HL Deb, 26th July 1974, vol. 353, cc.1995-2035

HC Deb, 30th July 1974, vol. 878, cc.748-57

HC Deb, 19th June 1975, vol. 361, cc.1068-76

HC Deb, 23rd June 1975, vol. 894, cc.169-97

HC Deb, 29th April 1977, vol. 930, cc.1736-98

HC Deb, 2nd December 1977, vol. 940 c.445

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Introduction

Over 10.5 million people in the UK have some form of criminal record. People with convictions (henceforth 'PWCs') therefore make up a substantial portion of the population. This thesis concerns the extent to which criminal records as a form of data have implications for the life chances of these individuals, long after their punishment has ended. The collation and use of criminal records by the state has conventionally been regarded as essential for the prevention and detection of crime, the administration of justice and the maximisation of public safety. For instance: the police may check criminal records of suspects to determine whether they are 'known offenders'; those working in the judiciary may investigate the prior 'form' of witnesses and defendants to adduce 'bad character' or determine an appropriate sentence; and educational authorities and social services departments may conduct criminal background checks (CBCs) to determine the 'suitability' of individuals to work with or foster children. Whilst not disputing that these official functions provided the original justification for the state's development of criminal record repositories during the nineteenth and twentieth centuries, this thesis argues that other unofficial and quasi-penological functions are now served in the present by the collation, retention and dissemination of criminal background information.

The thesis explores this contention and makes an original contribution to knowledge by examining, in detail and for the first time, the process through which a form of *legal rehabilitation* in England and Wales was conceived, contested and brought into effect in the form of the Rehabilitation of Offenders Act 1974 (the ROA). This important piece of legislation was brought into being largely through the efforts of a committee of penal reformers chaired by former Lord Chancellor, Gerald Gardiner. The committee comprised members of the organisations JUSTICE (the British Section of the International Commission of Jurists), NACRO (formerly the National Association for the Care and Resettlement of Offenders, now Nacro – 'a social justice charity') and the Howard League for Penal Reform.

The ROA determines if, when and under what circumstances a previous criminal record can be deemed 'relevant' for a number of purposes. It does so by rendering certain convictions 'spent' after a specified period of time and making PWCs 'rehabilitated persons' in law. Once a conviction becomes spent, a rehabilitated person does not need to disclose the criminal record in a wide range of circumstances such as applying for most jobs, taking out an insurance policy or other financial service, or when appearing in civil court proceedings.

Effectively, the ROA regulates the extent to which PWCs can be treated less favourably than un-convicted people. Whilst a wide range of exceptions apply to its provisions, without the Act PWCs would be vulnerable to possible lifelong discrimination due to the moral censure attached to their prior offending. The thesis therefore recognises that the ROA has made a very significant difference to a huge number of people's lives. However, it also provides a reading of the ROA which rejects the idea that it can be understood *solely* as a piece of humanitarian legislation which reduced discrimination against those who have previously broken the criminal law.

Whilst accepting that a reduction in post-sentence discrimination has been brought about by the Act, it is also true that an unintended consequence of the legislation is the unwitting re-imagination of people whose convictions are *not spent* as 'un-rehabilitated' in the eyes of the law. In many cases, particularly where custodial sentences are involved, criminal convictions take some years to become spent and, regardless of the efforts made by individual lawbreakers to reform themselves, they are caught in a state of 'civic purgatory' whilst they wait to become a 'rehabilitated person' under the Act. In the case of people sentenced to more than four years imprisonment, or to an indeterminate custodial term, their convictions can *never* become spent and they become irredeemable in the eyes of the law. This raises profound questions about the social status of a sizeable number of people in the population

and whether they can ever enjoy the full range of social, economic and civil rights associated with meaningful citizenship.

The three chapters which make up **Part One** of the thesis are concerned with **'Problematising Legal Rehabilitation'** as a form of social practice. *Chapter one* provides an historical overview of the development of criminal record repositories and systems of disclosure in England and Wales. It explains how, from the early Victorian methods of record-keeping through to the modern Police National Computer (PNC) these systems were designed predominantly for purposes of law enforcement. However, the chapter also explains how, in recent years, new technologies for the controlled disclosure of criminal record data have emerged, particularly for employment purposes. The chapter then examines a number of different 'models' or frameworks for the regulation of non-police access to criminal records before describing, in some detail, the content and effect of the ROA. Criticisms of the ROA are also explored in the chapter, as well as issues such as the 'Google effect' which subvert the purposes of the Act.

Chapter two explores precisely what is at stake for people with a criminal record when their criminal records have not yet, or will never, become 'spent' under the ROA. It begins by taking issue with the commonly used terminology of 'collateral consequences' related to criminal convictions, arguing that post-sentence discrimination against PWCs is neither inevitable or necessary but that, in fact, it requires an active construction of social harm against people who have already paid the penalty handed down by the criminal justice system. The chapter then outlines a number of 'pains of criminalisation' which affect PWCs in England and Wales. These include the denial of employment, financial services, accommodation and civic participation. The chapter then considers possible reasons why these 'pains' might exist by drawing on sociological theory.

Chapter three outlines the methodological approach taken by the remainder of the thesis by discussing the work of the philosopher Michel Foucault. The chapter discusses the centrality of discourse to Foucault's work, demonstrating how it acts as a medium through which particular social meanings are conveyed and power relations brought to bear. It then outlines Foucault's genealogical method of writing critical histories of the present, with particular reference to the Foucauldian rejection of notions of social 'progress' in systems of punishment. The chapter also outlines Foucault's reconceptualization of power, making clear the distinction between its sovereign, disciplinary and biopolitical forms before turning to the concept of governmentality as framework for analysing the exercise of power at level of populations.

The three chapters which constitute **Part Two** of the thesis are concerned with **'Contextualising Legal Rehabilitation'** in England and Wales by providing an historical 'back story' to the ROA. *Chapter four* considers a fundamental, long-standing and unresolved issue to which the ROA would ultimately provide only a limited response - that is, the question of penal expiry. It considers whether, in the long history of English penality, sufficient clarity has ever been provided about precisely when legal punishments definitively end, so that punished individuals can return from the subject position of 'criminal' or 'lawbreaker' back to a status of at least notional equality with others. The chapter demonstrates how historical attempts to emancipate individuals from punishment have been frustrated, particularly within Britain's overseas penal colonies, but also back at home through the 'ticket of leave' system for ex-convicts. The emergence of the workhouse principle of 'less eligibility' and its extension to the status of prisoners and other lawbreakers is then considered, as is Hermann Mannheim's largely ignored contention that a 'non-superiority' principle is applied to PWCs after they have paid the penalty for their crime.

Chapter five overlaps the historical account presented in chapter four by discussing the

historical emergence of a number of 'transformative penalities'. These are the various modes of punishment which have aimed to effect behavioural, moral or psychological change in convicted lawbreakers, and where the justifications for these approaches have not been solely retributive or incapacitative. The chapter also describes how the ideology of rehabilitation which underpinned the post-war penal system in England and Wales went into decline precisely at the point when the ROA was conceived and passed into law. It is then argued that various transformative penalities and their concern with the 'correction', 'reform' or 'rehabilitation' of lawbreakers render convicted people knowable as particular kinds of subject. This marks them out for future forms of less-favourable treatment at the hands of both state and non-state actors.

Chapter six places the passage of the ROA in its broader social, economic and political contexts. It discusses the period from the emergence of the modern 'welfare state' after the Second World War through to the 'permissive society' of the 1960s and the liberalising legislation associated with this period. The chapter also examines briefly the biographies of Lord Longford, Roy Jenkins and Lord Gardiner as 'elite' but pivotal figures in the post-war era of penal reform. However, the chapter also examines the fracturing of the post-war political consensus in the early 1970s which paved the way for a more authoritarian approach to issues of law and order under the premiership of Margaret Thatcher.

The remainder of the thesis in **Part Three** is concerned with **'The Making and Unmaking of Legal Rehabilitation'**. *Chapter seven* begins by summarising a number of key inquiries and reports into the difficulties faced by ex-prisoners which each fell short of addressing the problems which arose because of criminal records and the need to disclose them. The chapter then draws upon original archival work to demonstrate how the 'problem of old convictions' first came to be recognised by members of JUSTICE, N.A.C.R.O. and the Howard League. It considers correspondence between Tom Sargant, the Secretary of JUSTICE and

several PWCs experiencing criminal records based discrimination. The chapter then examines the deliberations of the Joint Working Party on Old Convictions (the 'Gardiner Committee'), drawing on its minutes and papers to consider how the plans for a rehabilitation law in England and Wales were agreed.

Chapter eight focusses in detail on the Gardiner Committee's report 'Living It Down: The Problem of Old Convictions' and, in particular, the discursive construction of a new legal subject - the 'rehabilitated person' – who was the intended beneficiary of a proposed rehabilitation law. The chapter also examines how the report made the case for such a law to be introduced in England and Wales and why the 'spent model' of legal rehabilitation was preferred to other methods such as the actual deletion of criminal records after a set period of time. The restrictions placed upon who might potentially become a rehabilitated person and the conservative nature of the Committee's proposals are also discussed, as is some of the contemporaneous commentary on the report.

Chapter nine charts the progress of the Rehabilitation of Offenders Bill (the ROB) through the UK parliament. It draws upon Hansard records and coverage of the Bill in the media as well as correspondence between supporters of the Bill, parliamentarians and others. The chapter begins by considering the first unsuccessful attempt to pass the Bill which was cut short by the general election of February 1974. It then turns to the difficult progress of the Bill leading up to its Royal Assent during the 'short parliament' of 1974. This includes an examination of the inevitable compromises which were made following a very active opposition to the Bill from certain sections of the media. The chapter concludes with a 'postscript' to the passage of the ROA which briefly discusses the 'erosion' of the Act through the addition of numerous exemptions from its application. However, in a prelude to the final chapter, the criminological narrative that the ROA was an intrinsically 'liberal' measure is rejected.

Chapter ten provides a radically different reading of the ROA by arguing that, through the subjectification of the 'rehabilitated person' as a knowable socio-legal entity, the Act unwittingly helped to establish a discriminatory biopolitics in which criminal records disclosure has become a moral apparatus for the regulation of life chances. Underpinned by a hybrid of neoliberal and authoritarian governmentalities which stress competition, 'zero tolerance' and personal responsibility, this biopolitics distinguishes a 'law-abiding citizenry' - constructed as 'deserving' of access to social goods and opportunities - from a 'denizen class' of PWCs who are, by contrast, constructed as 'failed subjects'. The 'punishment' of this 'failed' section of the population is perpetuated through their exposure to a range of exclusionary conducts. This has the reverse effect of optimising the life chances of un-convicted 'good citizens' who are constructed, for example, as preferable candidates for employment or as better lending or insurance risks. Thus, longer-standing ideas such as 'less eligibility' and 'non-superiority' take on new meanings which contribute to the further marginalisation of those with criminal records. It is argued that through the careful administration of 'rehabilitation periods' and exemptions to the application of the ROA, the state delimits the boundaries of redemptive possibility for PWCs and thus 'disallows life' as it deems appropriate.

PART ONE: PROBLEMATISING LEGAL REHABILITATION

1. Criminal records, legal rehabilitation and the 1974 Act

Legal rehabilitation involves the question of 'when, how and to what extent a criminal record and the stigma that it represents can ever be set aside, sealed or surpassed' (McNeill 2012: 27). This chapter discusses some of the practicalities associated with the problem of legal rehabilitation and its implementation. Firstly, the chapter discusses the historical development of systems for the retention and disclosure of criminal records in England and Wales. Secondly, it considers several models of legal rehabilitation which seek to mitigate potential discrimination against people with convictions (PWCs) by restricting access to information about criminal records and regulating the circumstances in which those records can be lawfully considered by third parties. Thirdly, the chapter considers in some detail the content and effect of the Rehabilitation of Offenders Act 1974 (the ROA) as the mechanism of legal rehabilitation in England and Wales – including its limitations. Finally, the chapter deals with some of the long-standing critiques of this Act and recent attempts to reform it.

The historical development of criminal records in England and Wales

Early systems of record keeping

Under the 'Bow Street Runners' of Henry Fielding and later the 'Thames River Police' of Patrick Colquhoun, registers of crimes committed and the individuals responsible for them came to be seen as integral to effective policing (Thomas 2007: 14). These registers were, however, often created by the initiative of local police forces and it would be some decades before a nationwide system of record-keeping emerged. During the 1860s concerns grew over a spate of 'garrottings' and the alleged crimes of 'ticket-of-leave' men (convicts released on 'licence'), as did public fear of a 'criminal class' who existed in the Victorian underworld (Elmsley 2005: 173). One response to this was the Habitual Criminals Act 1869 which placed a duty upon prison governors and regional chief constables to send information concerning convictions to central repositories in both London and Dublin (Thomas 2007: 11). This Act also introduced a system of formal supervision for those regarded as 'habitual' lawbreakers

and empowered the police to revoke tickets-of-leave where a discharged convicted was 'living by dishonest means, about to commit another crime or *appeared to be waiting for an opportunity to commit a crime*' (Thomas 2007: 11; emphasis added). These measures were refined and extended by the Prevention of Crimes Act 1871 which ushered in a new 'Habitual Criminals Register' and reintroduced a monthly reporting requirement for 'habituals' (previously dropped in the 1869 Act).

Another new measure introduced during this period was the 'Register of Distinctive Marks'. Since the 'marks' recorded included not just burns, scars and tattoos but congenital defects and moles or warts (Cole 2001: 27-29) this register arguably foreshadowed the emergence of criminal anthropology during the late 19th Century. Alphonse Bertillon, in addition to inventing the 'mug shot', came to develop methods for the measurement of anthropometric features for the identification of 'criminals'. His approach built upon Lombroso's (1876) claim that physiognomic features and other 'stigmata' could be used to detect 'criminal atavism'. Whilst Lombroso's work was not translated into English for many years and 'criminology in Britain did not emerge out of the Lombrosian tradition' (Garland 1988: 2) these 'insights' did run parallel to the development of eugenics in Britain under Francis Galton who corresponded on methods for fingerprint identification of 'criminals' with future Metropolitan Police Commissioner Edward Henry. Bertillon was also instrumental in the development of fingerprinting methods and eventually came to favour these over other anthropometric techniques of criminal identification. Fingerprint records of arrestees have supplemented criminal record repositories ever since, although more recently these have been supplemented by DNA databases.

From the Criminal Records Office to the Police National Computer

The formal establishment of a Criminal Records Office (CRO) came in 1913 after the register of 'habitual criminals' was merged with the Metropolitan Police Fingerprints Office and the Convict Supervision Office. The supervision of ex-offenders by the police was terminated by

Home Secretary Winston Churchill in 1910 when it was deemed an ineffective crime control strategy. However, during the interwar period the CROs role of registering 'known offenders' was further developed as was the recording of information to aid police officers in the identification of suspects. This included the establishment of the Crime Index (which classified lawbreakers by offence category and any 'distinctive marks'); a Single Fingerprint Index (mostly of those convicted of breaking and entering offences); the Photograph Collections (arranged according to *modus operandi*) and a Wanted Index (incorporating reports on criminal suspects filed by police forces across the country) (Thomas 2007: 14-16).

The contemporary system of maintaining criminal records was first envisaged in 1969 when the UK Government announced plans for a Police National Computer Unit at Hendon (Coleman and McCahill 2011: 73). These plans seemed to gain further momentum when '[i]n the early 1970s the CRO opened its doors to the American academic James Rule to report on its activities' (Thomas 2007: 22) and '[c]omputerisation was seen by Rule as being the way forward' (p.24). This drive towards greater efficiency in the processing of criminal record data culminated in the launch of the Police National Computer (PNC) in 1974.

The PNC started on a fairly small scale with an index of stolen vehicles. However, this expanded over subsequent years to include the Fingerprints Index in 1976 and then the Criminal Names Index (of PWCs) in 1977 (Norris 2007: 144). By the end of 1977, the UK Government reported that 3.8 million 'people convicted of more serious offences' had been placed on the PNC (HC Deb, 2 December 1977 vol. 940 col. 445). In subsequent years records were added of wanted and missing persons (in 1978), disqualified drivers (in 1980) and later those convicted of sexual offences (in 1997) (Norris 2007: 144). The PNC currently includes both 'criminal' and 'nominal' records of individuals. The Association of Chief Police Officers' (ACPO) have stated that:

> When a nominal record is created or updated on the PNC by virtue of an individual being the subject of a Conviction, Penalty Notice for Disorder, Acquittal or CJ Arrestee [person arrested on suspicion of an offence but released with no further action], the record will contain relevant personal data together with the details of the offence which resulted in the record creation. The record will be retained on PNC until that person is deemed to have attained 100 years of age. (ACPO 2006: 3)

For clarity, 'relevant personal data' may include not just information such as the name, date of birth and National Insurance number of the data subject, but also their fingerprint and DNA records.[1] On 17th October 2014 the PNC included details of 10,520,929 individuals in the UK with criminal records (convictions) amongst a total of 11,547,847 nominal records.[2]

New technologies of disclosure

From its early days in 1974, when just 47 terminals existed, the PNC is now linked to over 30,000 terminals across the country and is fully integrated with other databases including the Driver and Vehicle Licencing Authority (DVLA), the National Automated Fingerprint Identification System (NAFIS) and the Violent and Sexual Offender Register (ViSOR) (Coleman and McCahill 2011: 73). Thus the PNC has progressed 'from being an electronic filing cabinet to a fully-fledged intelligence tool in its own right' (Norris 2007: 144). This required significant upgrading of the technological infrastructure within which the original PNC operated. The impetus for this modernisation came largely from the establishment of the Police Information Technology Organisation (PITO) in 1997 with its brief to improve not only the hardware and software used by police but also the capacity of the PNC to allow

[1] Following the ruling in of the European Court of Human Rights in *S. and Marper v. UK [2008]* some restrictions have now been placed upon the retention of fingerprints and DNA via the Protection of Freedoms Act 2012. These cover un-convicted persons and some juveniles convicted of minor offences.

[2] Unlock (2014a) via Home Office Freedom of Information release CR33517.

exchange of information across all of the agencies involved in the criminal justice system (*ibid.*).[3]

The year 1997 was also significant for the passage of the Police Act. Part V of this legislation provided for the establishment of the Criminal Records Bureau (CRB) which was to oversee the disclosure of criminal records, mostly for employment purposes. The CRB was formally established in July 2000 in partnership with Capita Group PLC, initially for a ten year contract worth £400 million (Thomas 2007: 137). It became operational on 1st March 2002. The Police Act enabled the CRB to make disclosures of criminal records to those bodies which had registered with it. 'Registered bodies' are permitted to ask 'exempted questions' about criminal records, including convictions and cautions which are 'spent' under the ROA 1974 (explained later). Such bodies include not only schools, hospitals and care homes but a much wider range of professional organisations.

Criminal background checks and the 'Soham effect'

Where exemptions from the ROA apply a 'standard check' reveals all spent and unspent convictions, cautions, reprimands and final warnings. An 'enhanced check' reveals all of the information provided by a standard check 'plus any additional information held by local police that's reasonably considered relevant to the workforce being applied for (adult, child or 'other' workforce)' (HM Government 2013; DBS 2016). This information might even include records of arrests without charges and acquittals (see Larrauri 2014b; Marshall and Thomas 2015). Once it became operational, the CRB saw a steady year-on-year increase in the number of criminal record disclosures with these peaking in 2009 (see Table 1).

[3] In 2007 the work of PITO was subsumed into the National Policing Improvement Agency (NPIA) although that organisation has also since been disbanded in favour of the National Crime Agency (NCA) and plans for a privatised but police-led 'Police ICT Company' (PICT). However, despite being officially launched in July 2012, PICT was not operational until early 2015. It has been described by its Chair as following 'a much more commercially driven and strategic approach' in the service of Police and Crime Commissioners (*Computer Weekly*, 6 February 2015).

Table 1: Numbers of criminal records checks completed by the CRB in England and Wales (post-Soham)

2002	1,183,877
2003	2,155,401
2004	2,577,459
2005	2,736,652
2006	3,182,902
2007	3,382,715
2008	3,810,614
2009	4,269,924
2010	4,219,319
2011	4,020,446

Source: Larrauri (2014a) based on information derived from a Home Office Freedom of Information request (CRB 21567–CRB Applications)

The growth in criminal record checks during this period was also spurred by what might be termed the 'Soham effect'. On August 4th 2002, two 10-year-old girls, Holly Wells and Jessica Chapman, were murdered by Ian Huntley – a caretaker at the local Soham Village College in Cambridgeshire. After Huntley's eventual conviction, it emerged that he had previously been suspected and questioned of a number of sexual offences and that various authorities had been aware of the allegations against him. None of the alleged offences had resulted in a conviction and just one resulted in a criminal charge of rape which was later dropped. Huntley had also been charged but not convicted for a burglary in 1996 and this charge had remained on file. Under the rules for disclosure of police and criminal records at the time, Huntley was still permitted to work in a school, due to the absence of any convictions (see Bichard 2004).

These events prompted an inquiry and report (Bichard 2004) into the vetting system which had allowed Huntley to obtain his position at a college despite a number of complaints about him reaching the local social services department. In addition, there were concerns that Humberside Police(who covered the area where Huntley's earlier alleged offences had occurred) had taken the position that their retention of data concerning allegations which did not lead to a conviction was in contravention of the Data Protection Act 1998, an interpretation contradicted by other police forces and the Inquiry (*ibid*. pp77-103). Amongst the recommendations of Bichard's final report was that '[a]ll posts, including those in schools,

that involve working with children, and vulnerable adults, should be subject to the Enhanced Disclosure regime' (*ibid.* p144). Bichard also proposed that stricter regulations and training should be in place for the purposes of safeguarding these groups, including a registration scheme for people who worked with them. His proposals were legislated for in the Safeguarding Vulnerable Groups Act 2006 which, in addition to clarifying the circumstances under which Enhanced Disclosures should be made, paved the way for the establishment of the Independent Safeguarding Authority (ISA) and its Vetting and Barring Scheme (VBS).

The ISA was responsible for the maintenance of 'barred lists' of those prohibited from working with either 'children' or 'vulnerable adults' and also for the development of a registration scheme for those routinely employed (whether in a paid or voluntary capacity) to work with these groups. This drew criticism from some quarters when it was suggested that as many as 11.3 million people would be required to register with the ISA[4]. In response, the UK coalition government reduced the scale of the VBS through Part 5 of the Protection of Freedoms Act 2012. This allowed for the 'portability' of criminal records checks (meaning that individuals would not require a new check for every separate 'regulated activity' in which they engaged) and a reduction in the number of occupations from which certain individuals were 'barred'. The Act also merged the functions of the ISA with those of the CRB (following the end of Capita PLC's contract) to form the new Disclosure and Barring Service (DBS). Key partners to the government in the operation of the DBS include the private sector firms Tata Consultancy Services and Fujitsu (DBS 2014).

[4] 'A quarter of adults to face 'anti-paedophile' tests' (*The Telegraph*, 25 June 2008); 'Parents who ferry children to clubs face criminal record checks' (*The Guardian,* 11 September 2009).

Regulating access to criminal records

The disclosure of criminal records as described above may, of course, have negative consequences for PWCs, rendering them vulnerable to discrimination – particularly with regards to employment. It is for this reason that various models of 'legal rehabilitation' exist which restrict or regulate access to criminal records by third parties such as employers or otherwise reduce the burden of disclosure in certain circumstances, particularly for occupations not exempt from the ROA. This section provides an overview of several legal rehabilitation models, namely: the 'anti-discrimination' model; the 'spent' model; the prohibition of blanket bans; the 'confidentiality' model; and the 'sentencing' model (see Larrauri 2014a for further details).

The anti-discrimination model

In the UK, anti-discrimination statutes such as the Equality Act 2010 prohibit discrimination based upon certain 'protected characteristics'. These include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation. However, a prior criminal record *does not* count as a 'protected characteristic' for the purposes of the Equality Act. This is because criminal records are not a reflection of the intrinsic characteristics of a person. Rather they are formal records of unlawful behaviour that people are deemed to have *chosen* to engage in and of any sanctions which followed. Thus, there are no legal restrictions on discrimination based upon criminal records in the UK except where past convictions are 'spent' and then only in specified circumstances.

Currently, the Ministry of Justice (MOJ) (2014a: 13) merely *recommends* that, when considering criminal records for recruitment purposes, it is 'best practice' (though not a strict and rigidly enforced legal requirement) for employers to consider: 'a. the person's age at the time of the offence; b. how long ago the offence took place; c. whether it was an isolated offence or part of a pattern of offending; d. the nature of the offence; e. its relevance to the

post or position in question; and f. what else is known about the person's conduct before and since the offence.' They also note that the DBS Code of Practice 'requires registered employers to have a fair and clear policy towards ex-offenders and not to discriminate automatically on the basis of an unprotected conviction or caution' (*ibid.*). However, there appear to be few, if any, instances of employers having their registration with the DBS suspended for failing to adhere to this requirement.[5]

Larrauri (2014a: 57) suggests that an anti-discrimination statute would require a legal recognition that PWCs were a disadvantaged group in the labour market. Under such a statute, a lawful decision to exclude a person based upon a criminal record would require the burden to be placed upon employers to identify 'inherent requirements' relating to *specific jobs* where exclusion from employment could be justified by 'business necessity'. That is, exclusions would need to be based upon the reduction or elimination of an identifiable risk to workplace or public safety. This would require a 'close nexus' to be established between the nature of an applicant's criminal record and the job in question (for instance, motoring offences and working as a courier).

The spent model

The spent model permits PWCs to not disclose a criminal record for most purposes after a specified 'buffer period' has passed. This means that, if asked whether they have any previous convictions, they may treat the question as not pertaining to 'spent' convictions which are protected by law. Buffer periods often last for several years and are justified by the argument that a convicted person might remain at risk of further offending for a period of time after having served their sentence. However, research demonstrates that eventually the risk of reoffending amongst PWCs declines and eventually becomes similar to or even less than the risk of un-convicted people offending for the first time. Typically, criminal records

[5] Personal communication with Christopher Stacey, Co-Director, Unlock.

lose their 'predictive validity' after about seven years (see Blumstein and Nakamura 2009; Bushway *et al.* 2011; Soothill and Francis 2009).

The spent model is that which was adopted in England and Wales in the ROA, the provisions of which are described in detail later in the chapter. Therefore the 'spent model' is not discussed in much depth here. However, a number of limitations exist with this approach to legal rehabilitation. These include that: (a) sentences over a certain length (or indeterminate sentences) often cannot become spent; (b) many exemptions to the principle of a 'spent conviction' exist in a range of circumstances; (c) the model accepts too readily that PWCs will be discriminated against whilst they wait for their conviction to become spent; (d) legal rehabilitation becomes a 'passive' rather than 'active' process (meaning that PWCs must simply wait to be 'officially' rehabilitated rather than having their progress since their sentence recognized by a judicial authority when desistance from offending actually occurs); and finally, (e) the process encourages people to 'rewrite their pasts' and effectively 'licenses them to lie' when asked if they have convictions. An alternative would be for such questions to be legally prohibited or for legislation to empower PWCs to tell the truth safe in the knowledge that discrimination against them would be unlawful (as in the anti-discrimination model).

The confidentiality model

This model is predicated on the idea that criminal records should be regarded as part of an individual's 'private life' as protected by article 8 of the European Convention on Human Rights (ECHR) on 'the right to respect for private and family life'. This provides that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It might seem perverse to argue that information concerning criminal convictions is private when (with the exception of cases involving juvenile defendants) court proceedings are usually conducted in public and are often reported in the media. However, a distinction can be made between trials and sentencing hearings (which usually occur in public) and the storage and retention of the conviction record which results from those proceedings (to which the public do not usually have access). For example, whilst the public in England and Wales are able to enter courtrooms to witness criminal proceedings they are not granted access to the Police National Computer (PNC) where criminal records are stored.

In *M.M. v. The United Kingdom [2012]*, the European Court of Human Rights (ECtHR) confirmed that '[as] it recedes into the past, [a conviction] becomes a part of the person's private life which must be respected' (see Larrauri 2014b). Furthermore, the *European Union Directive 95/46/EC* (on the protection of individuals with regard to the processing of personal data and on the free movement of such data) considers criminal convictions to be sensitive personal data. Therefore, Larrauri has argued that the requirement for an individual to undergo a criminal background check (CBC) for employment purposes should 'not be considered permissible unless there was a specific law authorising it or a clear 'business necessity'' because 'criminal convictions are considered protected personal data and therefore entitled to the aegis of data protection laws' (2014a: 58-59).

This proposed model for dealing with criminal records has gained traction in recent years after the European Court of Justice established the 'right to be forgotten' (in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González [2014]*). This ruling states that an Internet search engine must consider requests from individuals to remove links to information which concerns them where search results are 'inaccurate …[or] inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes' (para. 92).

Prohibiting blanket bans

Throughout Europe, many positions within public administrations are subject to blanket bans on PWCs (Larrauri 2014a: 54). Such bans exist regardless of whether convictions become 'spent' or not and often involve occupations which are exempted from rehabilitation laws. Certain bans might exist on a *de jure* basis such as the restriction on some PWCs being elected to public offices. Similar exclusions often apply within the civil service and positions concerned with the administration of justice or the safeguarding of 'national security' (through 'advanced vetting' procedures). These bans often arise through the perception that they will protect the 'integrity' of particular offices although, of course, 'an absence of previous convictions is no guarantee of *future* integrity' (Henley 2014: 23; emphasis in original). The 2009 parliamentary expenses scandal and the imprisonment of a cabinet minister in 2013 for 'perverting the course of justice' illustrate this exact point.

Other 'bans' exist more informally and on a *de facto* basis by being culturally or institutionally embedded within the recruitment practices of certain professions or organisations. Institutions within the medical, teaching or legal professions might, for instance, restrict professional accreditation (or even access to the training courses leading to it) to those with 'clean records' even though there are no laws applying a 'conclusive force' to previous

convictions (i.e. no rule saying definitively that PWCs cannot be trained or employed for that profession). For example, PWCs are not *legally* excluded from becoming barristers but in practice the Bar Council may be unlikely to admit PWCs to its ranks even where clear evidence of rehabilitation exists. Similarly, there is no law which automatically bans all PWCs from becoming teachers or doctors, except where statutory bars on working with children or vulnerable adults are imposed. However, in practice *any* information revealed by a CBC often prevents people from even training for these professions.[6]

Larrauri (2014a) suggests that the problem with automatic exclusions is that they are *over*-inclusive in some circumstances (blanket bans do not reflect different rates of reconviction across offence groups or base their reasoning on the merits of individual cases) and *under*-inclusive in others (for example 'a domestic violence conviction might say nothing … about the alcohol problem that poses a real risk for a bus driving position', p.60). Problems can also arise from 'the fact that the indicator chosen [a criminal record] is a poor proxy for the harm to be avoided' (*ibid.*), meaning that the absence or existence of a prior criminal record does not necessarily predict *future* conduct. Larrauri argues that these problems might require:

> carefully drafted laws that can adequately balance all the rights involved. This law should: a) be limited to *convictions*; b) define the *specific offences* that are relevant; c) relate to offences and sentences of a certain *gravity*; d) pass the '*close nexus' test* for that specific position; e) have *no conclusive force*; and f) only take into account *unspent* criminal records. (2014: 60; emphasis in original)

[6] The extent of this problem emerged again through personal conversations with Christopher Stacey, Co-director of Unlock. See also the judgment in *T & Anor, R (on the application of) v Secretary of State for the Home Department & Anor [2014] UKSC 35, para. 4.*

The sentencing model

Larrauri (2014: 60-61) has argued that where a demonstrable risk of harm exists in relation to a conviction *and* where this potential harm extends beyond the sentence, then the criminal law should attempt to address that risk by using occupational disqualification orders. A precedent exists in the Criminal Justice and Court Services Act 2000 where such an order may be added by the court when sentencing someone to twelve months or more in custody for specified offences against children. However, these orders would provide an *alternative approach* to the routine use of CBCs revealing *all* previous convictions and cautions to prospective employers and not an *extra layer* to such checks. As Larrauri explains:

> The main principle of the sentencing model is that the participation of society in the process of employment exclusion has to be authorised by a *law* (in certain employments) and only in cases where there is an occupational disqualification order imposed by a *court* (and not a generic criminal record). (2014: 61; emphasis in original)

The rationale behind the sentencing model is that employment exclusion based upon criminal records would be more strictly regulated by the constraints of proportionality which apply to other penal sanctions. Furthermore, disqualification orders could only be imposed by a judge based upon an individualised assessment of risk and would give PWCs advance notice of the employment restrictions placed upon them.

Recent developments: banning the box

A recent development aimed at reducing discrimination against PWCs has been the emergence of campaigns seeking to 'ban the box' (see Business in the Community 2015). That is, to remove from job application forms the tick box where prospective employees are asked to declare any previous convictions up-front. Instead, the process of criminal record

disclosure (if it is deemed necessary at all) is delayed until later in the recruitment process when the employer can reasonably foresee hiring the person. The rationale behind this campaign is that many employers will automatically disregard job applications where a conviction is declared before they have fully considered the suitability and skills of the candidate. This movement made significant progress in the United States in November 2015 when President Obama announced a new order to federal government agencies to remove the criminal record declaration tick box from all application forms (see Melber 2015). In February 2016, the former UK Prime Minister David Cameron followed suit and 'banned the box' for recruitment processes in the majority of civil service positions (with the exception of some security-vetted roles; see Business in the Community 2016).

The content and effect of the ROA

Legal rehabilitation of people with conviction in the UK uses the 'spent model' and was provided for by the ROA which came into effect on 1st July 1975 in both England and Wales and Scotland[7]. The Act was adopted later in Northern Ireland via the Rehabilitation of Offenders (Northern Ireland) Order 1978. Due to a number of amendments and redrafts to the original Bill, the ROA emerged as 'an extremely clumsy piece of legislation' (Breed 1987: 16) which 'the average ex-offender, and not a few lawyers, had little chance of understanding' (Mears 2008: 163). Nonetheless, the sub-sections which follow convey the effect which the ROA actually had (or was intended to have) in law.

Sections 1 to 3 of the ROA

Section 1 of the Act provides that 'where an individual has been convicted, whether before or after the commencement of [the] Act, of any offence or offences…then, after the rehabilitation period so applicable…that individual shall be treated as a rehabilitated person…and that

[7] The title of this thesis refers to England and Wales due to its status as a distinct legal jurisdiction and the fact that recent amendments to the ROA have not, at the time of writing, been applied to Scotland or Northern Ireland where matters of criminal justice are devolved.

conviction shall…be treated as spent' (ROA 1974 s1). Thus, the ROA is retrospective and applies to historical convictions received before it came into effect. Section 1 also clarifies that certain sentences in respect of a conviction are excluded from rehabilitation (s1.1a; explained later) and that the 'rehabilitation period' for an earlier unspent conviction could be extended indefinitely by any new convictions for offences receiving a sentence excluded from rehabilitation (s1.1b).

Section 1 also determines that 'a person shall not become a rehabilitated person…unless he has served or otherwise undergone or complied with any sentence imposed on him' (s1.2), thus excluding from rehabilitation people who have either escaped from custody or absconded from their probation supervision. However, this exception from rehabilitation does not extend to 'failure to pay a fine…or breach of a condition of recognizance or of a bond of caution to keep the peace or be of good behaviour' (i.e. 'bind overs', s1.2a) or to breaches of the conditions of a suspended sentence (s1.2b and c).

The meaning of a 'sentence' is also clarified in Section 1 as 'any order made by a court in dealing with a person in respect of his conviction of any offence or offences' (s1.3) although this does not include committal orders for either defaulting on the payment of fines (s1.3a) or failing to comply with the terms of a suspended sentence order (s1.3b). Section 1 also establishes that the Act includes convictions received outside of Britain (s1.4a) and findings in both criminal or care proceedings relating to children.

Section 2 of the ROA concerns the rehabilitation of people dealt with in military disciplinary proceedings (court martials), confirming that these are regarded as 'convictions' for the purposes of the Act and any punishments awarded are to be treated as 'sentences'. Therefore, the Act covers the commission (or attempted commission) of civil and other offences under the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. This section was necessary since the armed forces in the UK have a separate and distinct legal

system that governs the conduct of its members. Thus, the ROA incorporated a range of (largely abolished) military punishments such as 'cashiering' (reduction in rank), 'discharge with ignominy' and 'dismissal with disgrace' (in s1.4b). This section also confirms that the ROA also applies in respect of military proceedings which occur outside of Britain as per civilian cases.

Section 3 of the Act makes special allowance for the proceedings of children's hearings under the Social Work (Scotland) Act 1968 where the grounds for referral to such a hearing involve the commission of an offence. Children's hearings perform a combination of justice and welfare functions in Scottish law and therefore this section was necessary to determine that any finding of such a hearing should be treated as a 'conviction' and that the subsequent disposal of the case should be treated as a 'sentence' under the ROA.

The effect of rehabilitation

Section 4 of the ROA describes the 'effect of rehabilitation' as follows:

> …a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction (s4.1)

Thus, once the requisite 'rehabilitation period' has passed, the law is supposed to treat the rehabilitated person as though their conviction, caution or other court disposal had never happened. This does not, however, mean that the person received a 'clean slate' since the actual criminal record is still retained by the police. Instead, the ROA seeks to regulate the circumstances in which a criminal record might be lawfully considered. For instance, under

subsection 4.1 spent convictions became inadmissible in proceedings before judicial authorities in Britain and people before such proceedings (as plaintiffs, defendants or witnesses) have the right to not disclose any spent convictions in cross-examination. However, this right does not apply to criminal proceedings, or military disciplinary proceedings, or hearings concerning the adoption, fostering, care or custody of children (under s7.2).

Judicial authorities are also given permission to admit evidence of spent convictions if justice cannot otherwise be done (s7.3). This means that if the truthfulness of evidence can only be established by, for example, making the court aware that a person was in prison at the time they claimed to have witnessed an event or signed a contract, then this information is admissible even if the conviction to which the imprisonment related was spent. To reiterate, the restrictions the ROA places on the admissibility of evidence concerning spent convictions applies to *civil* and not to *criminal* proceedings. Members of the judiciary and legal advocates working in criminal courts were originally provided with a Practice Direction under which it was 'recommended that both court and counsel should give effect to the general intention of Parliament by never referring to a spent conviction [of a defendant or a witness] when such reference can be reasonably avoided'.[8] More recently, the Criminal Justice Act 2003 introduced fundamental changes to the admissibility of evidence relating to the 'bad character' of defendants, witnesses and others. This meant that, in certain circumstances, previous convictions could be introduced during a trial to support the claim that a defendant had a propensity to commit like-offences or that a witness may be prone to untruthfulness (see Law Commission 2001).

Subsection 4.2 of the ROA provides that a rehabilitated person can treat questions about previous convictions from *non-judicial* parties (e.g. employers, landlords or financial service providers) as not pertaining to spent convictions. Specifically, the subsection states that

[8] *Practice Direction (Crime: Spent Convictions) [1975] 1 WLR 1065*, para 4.

such questions 'shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, *and the answer thereto may be framed accordingly*' (s4.2a; emphasis added) (i.e. they may answer 'no' if asked if they have any previous convictions). The ancillary circumstances referred to included 'the offence or offences which were the subject of that conviction' (ROA s4.5a); 'the conduct constituting that offence or those offences' (s4.5b); and any legal or other proceedings related to these (s4.5c) (therefore they may answer 'no' if asked if they have 'ever committed a crime' or 'ever been arrested').

Whilst not imposing any sort of direct penalty for discrimination based on a spent conviction, subsection 4.2 protects people who chose not to declare spent convictions by declaring that they should 'not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction' (s4.2b). Furthermore, subsection 4.3 removed the obligation to disclose a spent conviction (or the convictions of another) in most circumstances (s4.3a) and, significantly, provides that 'any failure to disclose a spent conviction…shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment' (s4.3b). Therefore, whilst discrimination against people with spent convictions is not technically made punishable, any person dismissed by an employer upon discovery of their spent conviction is able to take their own legal action or request an employment tribunal at which the employer cannot rely on any spent convictions as grounds for dismissal.

Significantly, subsection 4.4 also provides that the Secretary of State can, by order, 'make such provision as seems to him appropriate for excluding or modifying the application [of subsection 4.2a and b]' and also 'provide for such exceptions from the provisions of [subsection 4.3]…as seem to him appropriate'. This clause creates the scope for specified professions and circumstances to be exempted from the ROA and when the Act first came into force the *Rehabilitation of Offenders Act 1974 (Exemption) Order 1975* also took effect. This

created a long list of occupations for which consideration of spent convictions was still permissible. Substantial additions to this list of exemptions have since been added.

Rehabilitation periods, their application and limitations

Section 5 of the ROA specified the different rehabilitation periods for particular sentences but began (in s5.1) by excluding a number of different sentences from rehabilitation under the Act. In 1974 these were: imprisonment for life; any sentence of imprisonment or 'corrective training' (e.g. Borstal or detention centre) for any term longer than 30 months; sentences of preventive detention; and sentences for detention during Her Majesty's pleasure, life imprisonment or any term over 30 months (for children and young people convicted of serious offences). Section 5 is somewhat complex due to the vast array of sentences and disposals available under the law and reflects the differences between the law in England and Wales and in Scotland, the punishments available to civilian and military courts and the treatment of adults and young people under the law. Table 2 (below) displays a selection of some of the more common sentences and disposals which were available to courts in 1974 alongside their respective rehabilitation periods in the *original* version of the ROA.

The ROA was subsequently adapted over the years to take account of new types of sentences. For instance, unit fines and the Community Punishment and Rehabilitation Order (under the Criminal Justice Act 1991) resulted in rehabilitation periods of five years as did the later Community Orders which replaced them (under the Criminal Justice Act 2003). Suspended Sentence Orders (under the CJA 2003) were treated as though the period of imprisonment had actually been imposed and thus the relevant rehabilitation period for the equivalent custodial sentence was applied. Section 5.11 also gives powers to the Secretary of State (by Statutory Instrument under s10) to either substitute different periods or terms of rehabilitation (via s5.11a - a power which has never been used) or to substitute a different age under which rehabilitation periods could be halved in respect of young people (via s5.11b). These powers have never been used although 17-year-olds were later able to benefit

from the shorter rehabilitation periods (through provisions made in s68c of the Criminal Justice Act 1991).

Table 2: Selected sentences and disposals and their respective rehabilitation periods under the Rehabilitation of Offenders Act 1974 (as originally enacted)

Rehabilitation period	**Sentence or disposal** *Sentences marked with an asterisk (*) resulted in a reduction by half of the rehabilitation period when applied to a person aged under 17*
Never spent	Imprisonment for life Imprisonment/corrective training for a term exceeding 30 months A sentence of preventive detention Detention during Her Majesty's pleasure
Ten years	Any sentence of imprisonment, detention or corrective training for a term exceeding six months but not exceeding 30 months* A sentence of cashiering, discharge with ignominy or dismissal with disgrace from Her Majesty's service*
Seven years	A sentence of imprisonment for a term not exceeding six months* A sentence of dismissal from Her Majesty's service* A sentence of Borstal training
Five years	Any sentence of detention in respect of a conviction in service disciplinary proceedings* A fine or other sentence eligible for rehabilitation under the Act (excluding where shorter rehabilitation periods are specified)* Hospital order under Mental Health Act 1959 or Mental Health (Scotland) Act 1960 (with or without an order restricting discharge) (the rehabilitation period is *either* five years from date of conviction *or* two years after the date on which the hospital order ceases or ceased to have effect, whichever is the longest)
Three years (young people only)	A sentence or order of detention or custody in a remand home for a term not exceeding six months under section 53 of the Children and Young Persons Act 1933 *or* section 57 of the Young Persons (Scotland) Act 1937 *or* section 4 of the Criminal Justice Act 1961 *or* section 7 of the Criminal Justice (Scotland) Act 1963
One year (from date of conviction or after order ceases to have effect, whichever is the longest)	Conditional discharge or bind over Probation order Any other order (for care, supervision, residential training or attendance at an approved school or attendance centre) in relation to a young person *or* an order under section 58 of the Young Persons (Scotland) Act 1937
Six months	Absolute discharge Discharge under a children's hearing under Social Work (Scotland) Act 1968
Duration the order has effect	An order made in respect of a conviction imposing on the person convicted any disqualification, disability, prohibition or other penalty.

Section 6 of the ROA clarifies a number of technical issues regarding the rehabilitation periods applicable to different convictions. For example, concurrent sentences handed down are treated on the basis of the longest of the sentences (s6.2) provided that none of them are excluded from the provisions of the Act. Consecutive sentences of imprisonment (under s5.9b) are treated as a single term (e.g. two consecutive six-month sentences are treated as a single twelve-month term and attract the relevant rehabilitation period). Also under section 6, breach of a probation order, or of the terms of a conditional discharge, can result in the rehabilitation period for that order or discharge being extended. In these circumstances the rehabilitation period increases to match that applicable to any sentence passed in respect of the conviction constituting the breach (s6.3). Moreover, if during the rehabilitation period applicable to a conviction the person is convicted of a further offence (not excluded from rehabilitation) then that rehabilitation period is also extended to match the period applicable to the new sentence.

Section 7 states that the 'effect of rehabilitation' does not affect the possibility of any conviction or sentence being quashed, commuted or becoming subject to the royal prerogative of mercy (a 'pardon') (s7.1a). Neither does rehabilitation under the ROA prevent enforcement proceedings or activities for either the collection of a fine (s7.1b) or the breach of any ancillary order made in respect of an individual whose convictions have otherwise become spent (s7.1c and d). This originally applied, for instance, to the consideration of so-called 'schedule one offences' (under the Children and Young Persons Act 1933) committed by those applying to work with children (see Thomas 2007: 20). However, this subsection later came to apply to measures such as Anti-Social Behaviour Orders (see Matthews et al. 2007) and Sexual Offences Prevention Orders (see Hudson and Henley 2015) introduced in later years. As already stated, section 7 also ensures that the effect of rehabilitation does not extend to either civilian or military *criminal* proceedings (s7.2a and b), or to adoption, care or

children's hearings proceedings (s7.2 c to e) and that spent convictions remain admissible in judicial proceedings in certain circumstances where justice cannot otherwise be done (s7.3). As per section 4, section 7 also gives powers to the Secretary of State to create (by statutory instrument) further exceptions from the effect of rehabilitation in other proceedings (except those under Section 8).

Defamation actions and unauthorized disclosure

As discussed later (in chapter nine), section 8 became the most controversial part of the ROA and dominated much of the parliamentary and media debate about the Act during its passage into law. Under this section, publication or mention of spent convictions or any sentence attached to them is technically actionable under defamation law provided that this occurred after the commencement of the Act (s8.1). However, any defendant in a defamation action can still rely on standard defences to defamation (such as 'justification', fair comment, and absolute or qualified privilege) provided that the publication or mention of a spent conviction is not made with 'malice' (s.8.3 to 8.5). Moreover, the effect of rehabilitation under the ROA does not affect the rights of the press to report details of any convictions prior to them becoming spent (s8.2). This means that the press can report on criminal court proceedings, including verdicts and sentences. However, it also means that newspapers can lawfully publish 'revelations' about an individual's 'criminal past' right up to the date on which any conviction becomes spent. Furthermore, section 8 of the ROA is not retrospective and so does not apply to old news archives. Neither does it apply to law reports or accounts of other judicial proceedings used 'for bona fide educational, scientific or professional purposes, or given in the course of any lecture, class or discussion given or held for any of those purposes' (s8.7).

Section 9 is designed to punish the unlawful disclosure of spent convictions. It provides that anybody who has access to any 'official record' containing 'specified information' concerning

spent convictions is guilty of an offence if they disclose it to any other person, other than in the course of their duties. For the purposes of section 9:

> "official record" means a record kept for the purposes of its functions by any court, police force, Government department, local or other public authority in Great Britain, or a record kept, in Great Britain or elsewhere, for the purposes of any of Her Majesty's forces, being in either case a record containing information about persons convicted of offences' [and] "specified information" means information imputing that a named or otherwise identifiable rehabilitated living person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which is the subject of a spent conviction. (s9.1)

Unlawful disclosure was originally made punishable upon summary conviction by a fine of up to £200 (s9.6). However, section 9 of the ROA also establishes the defence (in s9.3) of being able to show that either the information was either: (a) disclosed to the rehabilitated person themselves (or to another at the express request of the rehabilitated person); or (b) of making the disclosure to someone who they believed was the rehabilitated person (or to another person who they reasonably believed to be acting with the permission of the rehabilitated person). A further offence was created under subsection 9.4 of '[obtaining] any specified information from any official record by means of any fraud, dishonesty or bribe'. This was punishable upon summary conviction by a fine of up to £400 or to a term of imprisonment of up to six months (s9.7). These fines have subsequently been replaced by standard scale fines (£2,500 up to an unlimited fine where corruption is involved).

Table 3: Examples of occupations, activities and other circumstances included within the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975

General Care and Teaching

All persons working with children
All persons working with vulnerable adults
A person living at a premises where child-minding or day care services are provided or who regularly works at such premises at the time when those services are provided
A person who lives in the same household as a person whose suitability is being assessed for a position working with children and who lives on the same premises as where that work would normally take place
Adoption purposes
Foster caring purpose

Law

Barrister (or advocate in Scotland)
Solicitor
Registered foreign lawyer
Legal executive
Judicial appointment
Director of Public Prosecutions
Any employment in the Crown Prosecution Service
Procurators Fiscal
District Court Prosecutors
Any employment in the Procurator Fiscal/District Court Prosecutor/Crown Office
Justices' chief executives
Justices' clerks and their executives
Clerks and officers of the High Court
Police Constables or police cadets, persons appointed as police cadets to undergo training with a view to becoming constables
Persons employed for the purposes of, or to assist the constables of, a police force established under any enactment; naval, military and air force police
Employment within the precincts of, a prison, remand centre, detention centre, Borstal institution or young offenders institution, and members of the boards of visitors (England and Wales) or of visiting committees (Scotland)
Traffic Wardens
Probation Officers
Any employment in the Serious Fraud Office
Any office or employment or other work in the National Crime Squad/National Crime Intelligence Service
Any office or employment for Her Majesty's Custom and Excise
Any office or employment or other work concerned with the supervision of electronic communications with or between children for the purpose of child protection

Healthcare

Medical practitioner
Dentist
Dental hygienist
Dental auxiliary
Nurse
Ophthalmic optician
Pharmaceutical chemist
Jobs listed in the Professions Supplementary to Medicine Act 1960
Registered osteopath
Registered chiropractor
Chartered psychologist
Any employment or work involved in the provision of health services which enables the post holder to have access to persons in receipt of such services in the course of their normal duties

Finance

Chartered Accountant
Certified Accountant
Actuary
Director, controller or manager of an insurance company
Employment providing investment, insurance or other financial service
Director or officer of a Building Society
All positions for which the Financial Services Authority or the competent authority for listing are entitled to ask exempted question to fulfil their obligations under the Financial Services and Markets Act 2000
Mortgage Advisor

Other occupations

Firearms dealer
Occupations concerned in applications to the Gaming Board for a licence, certificate or registration
Veterinary surgeon
Occupations in respect of the Explosives Act 1875
Occupations within the National Assistance Act 1948, carrying on an establishment
Occupations as required by s.1 of the Abortion Act 1967
Inspectors and staff working for the RSPCA who, as part of their duties, may carry out humane killing of animals
For National Lottery licensing purposes
For the purpose of licensing hackney carriage or private hire vehicle a Basic Disclosure is available for employment and voluntary positions not covered by a Standard or Enhanced Disclosure.

Sources: Adapted from Civil and Corporate Security (2005); Thomas (2007: 98-100) and Disclosure and Barring Service (2015)

Section 9 again creates powers for the Secretary of State to create exceptions to the rules regarding unlawful disclosure via statutory instrument whilst section 10 consolidates these powers to vary or revoke certain provisions of the Act, provided that they 'had been laid before, and approved by resolution of, each House of Parliament' (s10.2). Finally, section 11 of the Act concerns the 'citation, commencement and extent' of the Act which meant that the Act came into effect on 1st July 1975 and that it did not originally apply to Northern Ireland (although it was later introduced there via the Rehabilitation of Offenders (Northern Ireland) Order 1978). As stated above, the commencement of the ROA in England and Wales occurred alongside an extensive Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 which listed the professions and roles excluded from the effect of rehabilitation. This list has subsequently expanded (see Table 3 above).

Critiques and 'reforms' of the ROA

As enacted, the ROA contained a number of weaknesses which have subsequently undermined its effectiveness. Whilst it had helped to establish a new and important legal principle that PWCs should be able to 'live down' their past offending it was, arguably, less effective in establishing ways of actually *enforcing* this principle. For example, whilst section 4 makes it unlawful to discriminate against an individual based upon a spent conviction, it does not establish any form of sanction or punishment for doing so. Instead, the burden is placed upon the rehabilitated person to prove in a civil court action that discrimination has occurred (for instance in a recruitment decision) and that it was based upon a spent conviction. The weakness of this approach is similar to that inherent in certain 'anti-discrimination' statutes (e.g. the Equality Act 2010) in that those guilty of discriminatory behavior may easily be able to counter any claim using a number of alternative grounds. For example, a job candidate could be deemed to 'lack experience' or to have 'underperformed at interview' when in reality they were discriminated against based on their race or gender. In any case, the ROA did not so much outlaw discrimination against people with spent

convictions as regulate the circumstances in which previous convictions could legitimately be considered.

Whilst the ROA does prohibit both the disclosure and solicitation of 'specified information' concerning spent convictions in a number of circumstances (in section 9), once again the deterrent punitive effect of the Act is somewhat lacking. This is precisely because in the vast majority of cases of unlawful disclosure which the Act seeks to prevent, the only people party to this disclosure would be either a corrupt public official with access to the PNC and the recipient of the information who had solicited the disclosure in the first place. Whilst this was already problematic in the early 1970s when criminal records were based mostly on paper records, the process of computerization has arguably exacerbated rather than solved the problem since the number of PNC terminals through which criminal records can now be accessed has grown considerably, massively expanding the ease of access to sensitive information amongst police officers and civilian staff.

The 'punishment' of defamation concerning spent convictions (in section 8) is also significantly weakened by the obligation placed upon plaintiffs in any legal action to prove 'malice' (intent to injure) on the part of a defendant. This is to say nothing of the costs involved. As Breed suggested:

> Legal opinion holds that it is almost impossible to prove malice in law. Usually it has to be proved that there is spite or ill-will towards the victim…Malice is difficult to prove because most of [the] people handling the information [about the conviction] would not have known the ex-offender and would have no interest in him or any other individual concerned. (Breed 1987: 81)

Moreover, the number of 'emasculating' clauses incorporated into the Act which provided the government with powers to amend or vary the scope of rehabilitation via statutory instrument has led to a considerable extension in the number of 'exempted professions' for which spent convictions may lawfully be considered during recruitment processes (as shown in Table 3). To these more technical issues are added the more general shortcomings of the 'spent' model of legal rehabilitation discussed earlier, particularly the permanent exclusion of indeterminate sentences or sentences over a certain length from legal rehabilitation in section 5.

The 'Breaking the Circle' review

Despite these issues, the ROA remained largely unchanged (save for the addition of more exemptions from its protections) for nearly forty years. A review into the workings of the ROA concluded that it was failing significantly in its original objective of allowing PWCs to 'live down' their pasts and be free from unjust discrimination. The report *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act* (Home Office 2002) commented that:

> The original objectives of the ROA are still valid…[but it] is no longer considered to be wholly effective. It is not achieving the right balance between resettlement and protection…It is also confusing. Offenders do not understand how it applies to their particular circumstances. It is not explained in court as part of the sentencing process and, although such information is sometimes made available to individuals in custody or under supervision in the community, more often than not it is never explained at all. It is not just people with previous convictions who are confused. Many employers know little or nothing about the ROA…Given its lack of proportionality and clarity, it is inevitable that the ROA is failing to achieve the protection for ex-offenders to which the Gardiner Committee aspired. (Home Office 2002: 5-6).

A range of recommendations made in this report were later accepted by the then Labour government. These included significant reductions in the length of time that it took convictions to become spent and the principle that disclosure periods 'should apply to *all ex-offenders who have served their sentence*' with '[t]he new arrangements…applied retrospectively to bring [all ex-offenders] within the protection of the scheme *without delay*.' (Home Office 2003: 8; emphasis added).

For adults the new disclosure periods proposed by the government were: the length of the sentence plus *one year* for those given a non-custodial sentence; the length of the sentence (including time served on licence in the community) plus *two years* for determinate custodial sentences of less than four years; and a similar arrangement but with a 'buffer period' of *four years* for determinate custodial sentences of four years or more (Home Office 2003: 10). It was also proposed that for those aged under 18 at the time of conviction, these periods should be halved as per the existing rehabilitation periods contained in the original ROA. However, the political will to implement these reforms was lost after the Soham murders. As stated earlier, the establishment of a public inquiry into this case (Bichard 2004) and the passage of the Safeguarding Vulnerable Groups Act 2006 would actually *expand* the circumstances in which CBCs were required. This expansion of checks was facilitated by the earlier launch of the CRB in 2002. The result of all this was that by the time the Labour government left office in May 2010 no action had been taken to reduce the burden of disclosure regarding criminal records and, if anything, the potential for PWCs to fully 'live down' their past indiscretions had been diminished further still.

The LASPO 'reforms' and their impact

Following the May 2010 general election, the Conservative/Liberal Democrat coalition government's green paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (see MOJ 2010; 2011) – purportedly the blueprint for a 'rehabilitation

revolution' – included a commitment to reform the ROA 1974 (see MOJ 2010: 33-34). However, only very limited amendments to the rehabilitation periods in the ROA were introduced through the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (see Table 4 below). These became effective on 10th March 2014 and were applied retrospectively[9]. Whilst they included an extension of the provisions of the ROA to everyone sentenced to less than four years in custody, and a reduction in rehabilitation periods for almost all other people, all of the problems highlighted earlier regarding the 'spent model' still remained and the reforms have not yet been adopted in Scotland, where consideration of these matters is still (at the time of writing) ongoing.

Table 4: Amendments to the ROA 1974 introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Sentence/disposal	'Buffer period' under LASPO Act amendments[10]
All indeterminate, extended determinate sentences and custodial sentences exceeding 4 years	Never spent
Custodial sentences over 30 months and up to and including 4 years	Sentence length plus 7 years
Custodial sentences over 6 month and up to and including 30 months	Sentence length plus 4 years
Custodial sentences up to and including 6 months	Sentence length plus 2 years
Community orders	The length of the order plus 1 year
Fines	1 year from the point of imposition
Absolute discharge	Spent immediately

[9] 'As under the current ROA, these rehabilitation periods would be halved for offenders who are under the age of 18 at the point of conviction with one exception (to ensure that the total rehabilitation period for short custodial sentences is appropriate and proportionate when compared to youth rehabilitation orders), that custodial sentences over 0 months and up to and including 6 months in custody would not become spent until 18 months after the end of the sentence for offenders who are under 18 at the point of conviction.' (MOJ 2012d: 14)

[10] 'As under the current ROA, these rehabilitation periods would be halved for offenders who are under the age of 18 at the point of conviction with one exception (to ensure that the total rehabilitation period for short custodial sentences is appropriate and proportionate when compared to youth rehabilitation orders), that custodial sentences over 0 months and up to and including 6 months in custody would not become spent until 18 months after the end of the sentence for offenders who are under 18 at the point of conviction.' (Ministry of Justice 2012d: 14)

Based on the proportion of 'positive' CBCs conducted by the DBS, the charity Unlock (2014b) has estimated that even after these reforms, approximately 735,000 people in the working age population of England and Wales still have convictions which are unspent. Moreover, given that the majority of DBS checks are conducted for recruitment purposes (Larrauri 2014a; 2014b) it is also a reasonable assumption that PWCs might tend to avoid applying for jobs where they know that such a check forms part of the recruitment process. Therefore, it is likely that Unlock's figure is an *underestimate* of the total number of people with unspent convictions. Moreover, sentencing statistics reveal that in 2014 alone some 7,010 people received a custodial sentence of four years or more meaning that their conviction can *never* become 'spent' under the current terms of the ROA (MOJ 2015b – a similar number are sentenced to such a term each year).

Europeanization and the 'Google effect'

In general, rehabilitation law in England and Wales (and the US; see Jacobs and Larrauri 2012; Jacobs 2015) seems to offer less scope for PWCs to fully reintegrate into society when compared to continental European countries (see Larrauri 2011; Stacey 2015). For instance:

> French law does not only acknowledge during a judicial court hearing, that a person has actually desisted; it also helps considerably by limiting the amount of information that is available on the basis of criminal records and the people who can actually access those files; it even contains a large number of legal techniques designed to facilitate/or not to restrain the desisting process. (Herzog-Evans 2011: 5-6)

However, in recent years, Europe-wide systems for the disclosure for criminal records have emerged, driven by the growth of transnational crimes and growing concerns that people are moving across the European Union for employment purposes without employers being able

to make checks on their background (see Stefanou and Xanthaki 2008). This has led to the development of a European Framework Agreement on the exchange of criminal records operating in the UK since April 2012 via the European Criminal Records Information System (ECRIS). ACPO (2012) have extolled the virtues of such a system, suggesting that: '[t]he benefits of exchanging criminal record information… [include]…reducing the opportunity for offenders *to escape their criminal past* simply by moving from one EU country to another' (2012; emphasis added). It remains to be seen what effect the recent decision of the UK to leave the EU will have on the exchange of criminal records.

A further issue concerning the effectiveness of the ROA (and other rehabilitation laws) is that it is unclear how the continued presence of online news reports containing information about spent convictions might be remedied in law. The 'Google effect' (see Calvert and Bruno 2010) effectively renders sections 8 and 9 of the ROA obsolete and ensures that many criminal records are instantly accessible to anyone with an Internet-enabled device and the name of the person about whom they wish to enquire. However, the European Court of Human Rights (ECtHR) confirmed (in *M.M. v. The United Kingdom [2012] ECtHR* (Application No. 24029/07) that 'a[s] it recedes into the past, [a conviction] becomes a part of the person's private life which must be respected'. As already stated, *European Union Directive 95/46/EC* clearly considers criminal convictions to be sensitive personal data and the European Court of Justice (in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* [2014]) has established a tentative 'right to be forgotten'. Therefore, there is at least some prospect that the 'confidentiality model' outlined earlier may mitigate some of the negative effects associated with online news reporting of convictions. However, as already noted, the withdrawal of the UK from the EU will take it outside of the jurisdiction of the European Court of Justice and may have implications for whether and how this ruling is complied with.

Conclusion

As stated at the start of this chapter, McNeill (2012: 27) suggests that legal rehabilitation involves the question of 'when, how and to what extent a criminal record and the stigma that it represents can ever be set aside, sealed or surpassed' (McNeill 2012: 27). However, given the close description of the workings of the ROA provided in this chapter, it might be appropriate to add to this definition insofar as it applies to England and Wales. It is important to also recognise that, in this jurisdiction, legal rehabilitation is a regulatory measure which works by restricting the conduct of members of society towards PWCs who, as the intended beneficiaries of such regulation, are *certain* (but by no means *all*) PWCs who, following lengthy avoidance of recidivism, are deemed to have 'lived down' their past offending. Whilst the Act does not place any other positive obligation on its beneficiaries with respect to their 'rehabilitation' (other than living a 'conviction free' life), it is intended to work by mitigating the potential discrimination which they may face in a *specified* (but not *infinite*) range of circumstances. Therefore, for the purposes of this thesis, legal rehabilitation is approached as: (a) a juridical mechanism; which (b) seeks to regulate when the law and members of society in general; might (c) permissibly treat some individuals less favourably; based on (d) those individuals having had specified penal sanctions applied against them and recorded by the state.

It is somewhat ironic that the introduction of legal rehabilitation through the ROA coincided with the launch of the Police National Computer. This was because the PNC was, in effect, a new technology enabling the dissemination of criminal records to a degree never before seen, albeit this was initially only meant to be for 'policing purposes'. The proliferation of CBCs in later years, facilitated by the existence of this technological infrastructure, would come to severely undermine the principles of the ROA. Indeed, the growth of disclosures can be seen as undermining the legal rehabilitation of those with previous convictions, even when those convictions are spent. This was particularly so in the wake of the Soham murders and in the wider context of a late-modern 'precautionary culture' (Furedi 2009) characterised by an

increasing intolerance towards 'risk' (see Beck 1992; O'Malley 2010; Mythen *et al*. 2013). Given that these checks are normally conducted for employment purposes, it is interesting that the frequency with which they were conducted continued to grow unabated throughout the 2007-2009 global financial crisis and years of low economic growth which followed.

Amendments in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 may have extended the limited protections of the ROA to a broader range of PWCs. However, despite these technical adjustments to the boundaries of possible redemption, many of the existing flaws from the original legislation remain unresolved and certain individuals remain *permanently* excluded from the possibility of legal rehabilitation. In this context the possession of *any* form of criminal record in England and Wales might be viewed as a contemporary 'mark of Cain' which severely restricts not only the employment prospects of PWCs, but also their broader life chances (see *inter alia* Mears 2008; Aresti *et al*. 2010; Working Links 2010; Thomas and Hebenton 2013; Henley 2014; Grace 2014). This thesis sets out to examine this problem by examining through a Foucauldian theoretical framework the history of the conception, contestation and passage of the ROA. However, before proceeding with this analysis, it is worth considering precisely what it as stake with regards to criminal records-based discrimination.

2. The pains of criminalisation

In his foreword to the book *The Social Consequences of Conviction* (Martin and Webster 1971: *v*), Sir Leon Radzinowicz repeated the oft-cited aphorism that 'the real sentence begins on the day of release'. Whilst this book considered, from a largely statistical and positivist perspective, how convicted individuals fared in the spheres of employment, family and social relationships and how these were linked to subsequent reconviction, it had relatively little to say about the role of criminal records and the stigma which they represented. The same can also be said for a number of reports which preceded Martin and Webster's academic study and which also considered the situation of ex-prisoners (see chapter seven).

Despite the fact that over 10.5 million people in the UK have a criminal record (Unlock 2014a) and official recognition that a previous conviction can have dramatic negative impacts upon a person's life chances (see *inter alia* Social Exclusion Unit 2002; Home Office 2002; MOJ & DWP 2011) the topic of criminal stigma has remained something of a lacuna in British criminological research. Moreover, *relatively* limited attention has been paid to the ROA as the main attempt to mitigate this stigma (though see Breed 1987; Mears 2002; Home Office 2002; Thomas 2007; Padfield 2011; Thomas and Hebenton 2013; McGuinness et al. 2013; Larrauri 2014b; Earle 2016). This chapter begins to address this lacuna by turning to a discussion of precisely what is at stake when an individual is either waiting for a criminal record to become 'spent' or has served a sentence which falls permanently outside of the scope of the ROA. This will involve an examination of the problem of *post-sentence discrimination* and the social harms or 'pains' caused by it. For the purposes of clarification, the term 'post-sentence discrimination' refers here to the less-favourable treatment of PWCs which derives from social knowledge of their criminal record.

The problem of post-sentence discrimination is explored as follows. Firstly, the chapter argues against adopting the terminology of 'collateral consequences' which has surrounded

much research into criminal records. Instead, it is suggested that post-sentence discrimination should be thought of in terms of the 'pains of criminalisation' which are experienced by PWCs as punitive sanctions in their own right. The chapter then provides examples from England and Wales of how criminal convictions negatively impact on spheres of life such as employment, accommodation, access to financial services and participation in civil society to demonstrate how PWCs are vulnerable to discrimination and informal social controls which extend beyond the scope of formal punishment. The second half of the chapter then draws upon sociological theory to account for why these pains of criminalisation might exist by considering the functionalist theory of Durkheim, interactionist perspectives on 'labelling' and 'stigma' and Sumner's (1990; 1997) work on 'censures'.

Rethinking 'collateral consequences' as 'pains of criminalisation'

The ROA and legal rehabilitation in general is concerned with mitigating the lasting effects of 'state' or 'legal' punishment. Lacey defines legal punishment as:

> (1) the principled infliction by a state-constituted institution, (2) of what are generally regarded as unpleasant consequences, (3) on individuals or groups publicly adjudicated to have breached the law, (4) as a response to that breach of the law, or with the motive of enforcing the law, and not intended solely as a means of compensation (1988: 7-8).

Legal punishment can be broadly characterised as fulfilling both retributivist and reductivist agendas. Punishment can be *retributive* when the application of unpleasant consequences for violation of the law is intended to satisfy either notions of desert (i.e. that a lawbreaker's actions merit a punitive response) or the retaliatory principle of *lex talionis* (or 'an eye for an eye', Lacey 1988: 17). Alternatively, punishment may be *reductivist* when the aim is to reduce the likelihood of repeat offending through a combination of deterrence, incapacitation and

'rehabilitative' interventions (Cavadino and Dignan 2007: 37-46). These approaches also coalesce with *expressivist* ideals which seek to justify punishment not merely as the imposition by the state of an unpleasant consequence upon an offender, but also as a 'statement of denunciation' (Brooks 2012: 101). It is claimed that this denunciative function primarily operates by conveying to lawbreakers the public disapproval of acts contrary to the criminal law and the normative values from which this law is derived (Duff 2001). However, Lacey suggests that denunciation may also play a role in maintaining respect for the rule of law and in satisfying the grievances of victims of crime, thus averting potential acts of vigilantism (1988: 34-5).

Whilst this discussion on philosophical and moral justifications for punishment is an important one, it is not necessary to develop an argument here about what constitutes the most appropriate 'mix' of retributive, reductionist and expressive elements when *sentencing* lawbreakers (for this, see *inter alia* von Hirsch 1993; Easton and Piper 2009; Ashworth 2010). Competing penal rationales certainly guide judges and magistrates in their sentencing of lawbreakers. Indeed, they are intended to provide a moral justification for the length of any punitive sanction imposed and decisions about whether, for instance, a custodial sentence is required. But whilst sentencing decisions often have due regard for the desire to deter, censure or incapacitate lawbreakers, they do not generally have regard for the lasting consequences of the punishment imposed - in particular the discrimination which can arise from a criminal conviction *post-sentence*.

In the present, post-sentence discrimination manifests itself as an amorphous and, in England and Wales at least, uncharted array of laws, policies and practices which discriminate against PWCs or exclude them from equal consideration to others. These are often referred to as the 'collateral consequences of conviction', largely by socio-legal scholars in the United States where their impact has arguably been greater (see *inter alia* Allen and Simonsen 1995;

American Bar Association 2013; Collateral Consequences Resource Center 2015). However, this terminology of 'collateral consequences' does not, perhaps, fully convey the significance of what is at stake when members of society with a previous conviction are subjected to less favourable treatment than other citizens *after their sentence is concluded*.

Firstly, the word 'consequences' frames our understanding of discriminatory conduct as though it might *automatically* follows a conviction. However, it more often arises through a *de facto tendency* to treat PWCs less favourably rather than a *de jure requirement* to do so (see, for instance, Working Links 2010). This discrimination is usually at the hands of actors who are external to the criminal justice process, but it occurs precisely *because of* social knowledge an individual's status as a convicted person and the 'accompanying sentiment of disapproval' (von Hirsch 1993: 9) which stems from this negative casting. As explained in chapter one, sentencing decisions made by courts in England and Wales influence the *duration* of post-sentence discrimination by determining whether or not an individual is able to benefit from the ROA and its limited protections. However, the inclination to treat post-sentence discrimination as somewhat *inevitable* by describing it as 'consequence' detracts criminological analysis away from the complex social processes of meaning-making which construct PWCs as 'undeserving', 'risky' or even 'dangerous' individuals who subsequently become justifiable targets for discriminatory attitudes and behaviours.

Secondly, the alternative meaning of the word 'collateral' – as something secondary or subordinate – fails to adequately convey the fact that PWCs often regard their negative social casting and exclusion from full citizenship *after the sentence is served* as equally if not more painful than any punishment handed down to them by the court (see Maruna 2001, 2011; Ross and Richards 2009; Aresti *et al*. 2010; Earle 2016). Therefore, whilst post-sentence discrimination retains a largely *de facto* character and does not, in most instances, constitute part of a lawbreaker's formal punishment authorized by law, there is a strong case for saying

that it is nonetheless *experienced* as punitive - and thus as *painful* – by those subjected to it and that it is not merely 'collateral' to the formal act of punishment.

A zemiological and abolitionist perspective

To address the harms which can arise through the construction of PWCs as suitable targets for exclusionary conduct, it is important to recognise discriminatory conducts as active social processes. Indeed, in rejecting the terminology of 'collateral consequences' it is important to recognise that the 'pain' of exclusion is *actively inflicted* by other social actors, however informally and unwittingly, and that this results in diminishing life chances for PWCs (which may in turn cause *further* emotional pain). In recognising this problem, this chapter can be read as a contribution to the zemiological literature which focusses not merely on the social construct of 'crime' but on a wider range of 'social harms'. On this precise point, Hillyard and Tombs argue that:

> the inflicting of pain by the state through the criminal justice system is a process that involves a number of discreet [sic], but mutually reinforcing, stages: defining, classifying, broadcasting, disposing and punishing the individual concerned. Furthermore, these very processes create wider social harms – which may bear little relationship to the original offence and pain caused – such as the loss of a job and diminution of future employment prospects, loss of a home, a child or a family life, and ostracism by society – and these harms tend to fall disproportionately on relatively vulnerable members of our society (2007: 14)

With respect to the punishment which ultimately gives rise to these 'wider social harms', the abolitionist criminologist, Nils Christie, suggested that there is a moral duty to strive for the reduction of punishment-induced pain in society, stating:

> I cannot imagine a position where I would strive for an increase of man-inflicted pain on earth. Nor can I see any good reason to believe that the recent level of pain-infliction is just the right or natural one. And since the matter is important, and I feel compelled to make a choice, I see no other defensible decision than to strive for pain-reduction. (1981: 11)

To this one might simply add that what is true for the pain which arises *during* legal punishment is true also for the pains which arise *following* legal punishment. As argued elsewhere, there is a case for abolishing the stigma associated with punishments which have already been served (Henley 2014) or, at the very least, halting the proliferation of post-sentence discrimination and pain arising from this stigma. To begin such a project, it is necessary to recognise the nature of the harms which arise from such discrimination.

In *The Society of Captives* Sykes (1958) outlined a number of 'pains of imprisonment' experienced by inmates during their detention. These included, alongside the loss of liberty, a deprivation of autonomy, security, heterosexual relationships and access to good and services enjoyed by 'free' citizens. As already suggested, a prior history of criminalisation can significantly reduce access to legitimate social roles, resources and opportunities for prisoners *after release*. Moreover, those subjected to other penal sanctions such as suspended sentences, fines and community sentences can also suffer negative consequences arising from their criminal record. Given the limitations of the term 'collateral consequences' already discussed, it is fruitful to draw upon Sykes' insights on the harms caused by imprisonment by discussing post-sentence discrimination in terms of the *pains of criminalisation.*

The pains of criminalisation are on-going forms of social discrimination or exclusion which affect PWCs *post-sentence* whether on a *de jure* or *de facto* basis. They involve restrictions of

the liberty, autonomy and enjoyment of full personhood or citizenship for those who have previously been subjected to legal punishment. These pains inextricably link processes of criminalisation and punishment to the production and reproduction of social and economic inequalities. Indeed, it has been argued that the extent of criminalisation (and thus of post-sentence discrimination) in the United States plays a role in *structuring* inequality (see *inter alia* Pettit and Western 2004; Wacquant 2009; Kirk and Sampson 2013; Wakefield and Wildeman 2014) although more research is required to make such an assertion with respect to the UK.

The pains of criminalisation have an expressive and denunciative character, in that they reflect censorious attitudes held in society towards those who have previously transgressed. Their practical manifestations arise during social relations between PWCs and those who possess knowledge of their criminal records. Thus, the 'harmful' outcome of criminalisation is not just the legal punishment imposed by a court of law, but the experience of discrimination at the hands of employers, landlords, providers of insurance and other financial services, members of civil society organisations, clubs and associations or prospective business associates - all of whom can, and often do, treat PWCs less favourably than others.

Whilst they stem from the knowledge that an individual has been subject to legal punishment, the pains of criminalisation do not exist solely for retributive ends. Indeed, they may also stem from a desire to avoid stigma 'by association' or victimisation at the hands of someone who is considered 'risky'. However, they run contrary to rational strategies of penal reductionism. This is largely because poor social reintegration amongst PWCs is known to *increase* the likelihood of recidivism (see Sampson and Laub 1995; Maruna 2001; Social Exclusion Unit 2002). It is also unlikely that a significant *general* deterrent effect can be achieved through post-sentence discrimination. This is because whilst most people may be aware of the potential punishments available for criminal offences, they are largely oblivious

of the extent to which criminal records have an impact on *post-sentence life* (with the exception of scholars who make a point of studying these effects, e.g. Larrauri 2014a, 2014b; Grace 2014; Jacobs 2015). There are several pains of criminalisation which can affect PWCs in England and Wales.

The denial of employment

A joint report by the Ministry of Justice (MOJ) and the Department for Work and Pensions (DWP) (2011: 4) revealed that of the 1.21 million people claiming the unemployment benefit Job Seekers Allowance, one-third (33 per cent) were 'offenders' (based on their appearance 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' and '[f]ive per cent of the *total claims* were made by [those] who had been eleased from prison during the same period' (emphasis added). The reluctance of employers to recruit people with criminal records is evidenced by research conducted for the employment organisation Working Links (2010: 4) who found that just 18 per cent of employers surveyed said that they had *knowingly* employed PWCs. They also discovered that:

> More than half of employers…said that the disclosure of an unspent conviction would have a negative effect on their recruitment decision, even if the candidate was considered equal to other candidates in all other areas. Around a sixth stated that they would automatically exclude a candidate with a previous conviction. (Working Links 2010: 26)

The nature of a previous conviction has consistently been found to be a significant factor in employer attitudes about recruitment of PWCs. Driving and alcohol-related convictions are the only offences ignored by a significant majority of employers whilst convictions for violent

and sexual offences are often cited as causing the most concern for employers (Fletcher *et al.* 2001; Chartered Institute of Personnel and Development 2007; Working Links 2010).

In addition to unemployment, increases in *under*-employment and *precarious* employment within the UK economy (see Standing 2009) have arguably created a social environment which is not conducive to the successful reintegration of PWCs. This is because when PWCs are required to re-apply for work and disclose convictions on a regular basis (because they do not have access to secure employment) there are more opportunities for employers to make discriminatory recruitment decisions about them. Moreover, in areas where employment opportunities are generally sparse, employers may be more likely to take the view that PWCs are 'less deserving' or more 'risky' than other job applicants. The instability and insecurity of labour markets have arguably been exacerbated further by the impact of globalisation and the long-term effects of the international financial crisis of 2008-9 (see Standing 2009; 2011). This is a troubling state of affairs since stable and secure employment plays a key role in PWCs not only 'going straight' but 'staying straight' (Sampson and Laub 1995; Maruna 2001; Benson 2013). Indeed, research suggests that 'employment reduces the risk of re-offending by between a third and a half' (Social Exclusion Unit 2002: 52). Thus, the exclusion of PWCs from the labour market may not only be experienced as emotionally distressing but also operate as a key driver of recidivism.

The denial of financial services

In addition to their difficulties in obtaining secure and regular income, PWCs also face discrimination when accessing financial services. A joint study by Unlock and the Prison Reform Trust (Bath and Edgar 2010) found that more than four in five ex-prisoners said their previous convictions made it harder to get insurance and that, even when successful, they were charged far more. The inability to obtain motor insurance has the effect of not only restricting an individual's mobility but also reducing opportunities to seek employment

involving driving such as couriering, haulage and taxi-driving. This problem is further exacerbated by the fact that much work driving a private-hire vehicle is subject to an 'enhanced' CBC revealing even spent criminal records. Moreover, being denied business or liability insurance can prevent PWCs from setting up their own company, thus denying the opportunity for self-employment as a means of avoiding discriminatory recruitment practices.

Historically these issues have been exacerbated by a situation where people with 'unspent' convictions had a duty to disclose criminal records as 'material facts' when applying for insurance, even if they were not asked about them by the insurer. The case of *Lambert v. Co-operative Insurance [1975]* involved a claim made by a woman who had some jewellery stolen. When the claim was lodged, the insurance company refused to pay out on the basis that she had not disclosed her husband's criminal conviction, despite not having been asked to. This situation was remedied by the Consumer Insurance (Disclosure and Representations) Act 2012 which places the onus on insurers to ask for such information (see Unlock 2013a). However, it remains the case that unspent convictions have often led to increased insurance premiums even when no close nexus exists between the nature of the conviction and the purposes for which the insurance is sought (*ibid.*)

Applications for credit may also be problematic for PWCs. For example, with respect to mortgage applications, the intermediary lender of the Co-operative Bank, state that: 'If the borrower makes us aware of any criminal conviction (other than a driving offence) or there is a pending prosecution, the application may be declined.' (Platform 2016: 10). Similarly, the policy for intermediary lenders of Santander states that they will 'not accept applications from customers with a criminal record (or where they are living with someone who has), unless the conviction is for a minor traffic offence, or is spent under the Rehabilitation of Offenders Act 1974' (Santander 2016: 3).

In any event, such policies are irrelevant if the applicant is unable to obtain (or afford) buildings insurance - a pre-requisite for those holding a mortgage. The applicant need not even be the policy holder for buildings and contents insurance to be affected, since such policies regularly require information on the previous convictions of those who also reside at the insured address. This might have the effect of invalidating the insurance policy of those who accommodate family members leaving prison or, at the very least, of causing a sharp increase in their premium. In this way, the actuarial methods used by insurers to calculate 'risk' extend the pains of criminalisation far beyond any formal legal consequences for lawbreaking. At an even more fundamental level, individuals with convictions for fraud, or those who have been bankrupted as a result of their conviction and imprisonment may have difficulties in opening bank accounts. This is because:

> All account providers reserve the right to reject applications from people who have a 'record of fraud' as a result of money laundering regulations….Banks do not have access to criminal records, however they do have systems to detect applications from people who have a record of fraud against financial institutions, such as banks and insurers…. (Unlock 2013b: 3)

The denial of accommodation

Housing issues faced by PWCs can be seen as part of a wider social problem relating to the provision of suitable accommodation. As Robinson and Crow have noted:

> Housing problems are not peculiar to offenders. There are many without an offending background who lack satisfactory accommodation, and given that the housing needs of offenders are unlikely to be satisfied completely in the near future the question arises of whether it is possible to be 'rehabilitated' whilst not having secure long-term accommodation (2009: 128)

Whilst many of these concerns often relate to the immediate resettlement needs of ex-prisoners (see Maguire and Nolan 2007) it is also possible to identify longer-term consequences associated with accommodation for PWCs. The housing charity Shelter (2012: 1) have noted that '[l]andlords can be reluctant to let rooms to ex-offenders due to perceptions and prejudices, and the costs of setting up a tenancy can be prohibitively high.' Additionally:

> changes from the Localism Act will make it harder for ex-offenders to find or maintain a social rented home. The Act allows authorities to set their own criteria under which applicants will, or will not, qualify for an allocation for a social tenancy. There is already evidence that ex-offenders sometimes face unlawful blanket bans by registered social landlords, and that more generally a large proportion of ex-offenders are unsuccessful in accessing public or social housing. (Shelter 2012: 5)

Some local authorities have even attempted to introduce restrictions on the eligibility of certain PWCs for social housing. For instance, in February 2013 Harlow Council in Essex (unsuccessfully) brought forward plans to try and ban individuals with certain criminal convictions from accessing social housing.[11] Prior to this, and following the August 2011 riots in various English cities, the government suggested that eviction from social housing could be used as a punitive measure against not only those involved in the disorder *but their families as well*.[12]

[11] 'Harlow Council plans social housing ban for criminals' (*BBC News*, 11th February 2013).
[12] 'Westminster vows to evict social tenants involved in riots' (*The Guardian*, 10th August 2011); 'UK riots: we will make criminals suffer, say MPs' (*The Telegraph*, 11th August 2011); 'London riots: Wandsworth council moves to evict mother of charged boy' (*The Guardian*, 12th August 2011); 'David Cameron backs councils planning to evict rioters' (*BBC News*, 12th August 2011).

The denial of civic participation

PWCs are often disqualified from participating as candidates in elections at various levels of representation in the UK. Many of these disqualifications date back to the Forfeiture Act of 1870 (see chapter four). However, the regulations on standing for election as a Member of Parliament are set out in the Representation of the People Act 1981. This Act was introduced after Irish Republican prisoner Bobby Sands was elected as an 'Anti H-Block/Armagh Political Prisoner' for the Fermanagh and South Tyrone constituency during his hunger strike[13]. Under this legislation, a person is disqualified from membership of the House of Commons if they meet the following criteria:

- They have been found guilty of one or more offences.
- They have been sentenced to be imprisoned or detained for more than one year.
- They are detained in the UK, the Republic of Ireland, the Channel Islands or the Isle of Man, or are unlawfully at large at a time when they would otherwise be detained.

(Electoral Commission 2013a: 31)

In effect, these measures merely prevent serving prisoners from becoming MPs. However, for elections to local government 'You cannot be a candidate if at the time of your nomination and on the day of the election…You have been sentenced to a term of imprisonment of three months or more (including a suspended sentence), without the option of a fine, *during the five years before polling day*' (Electoral Commission 2013b: 3-4; emphasis added). These criteria also apply to Mayoral elections and to those seeking to stand for election to the Greater London Authority.

[13] These hunger strikes were largely in response to the ending of 'Special Category Status' which made IRA detainees *de facto* political prisoners. Ironically, Special Category Status was withdrawn on the recommendations of a committee also chaired by Lord Gardiner (Gardiner 1975).

In relation to the office of Police and Crime Commissioner (PCC): 'You cannot stand for election if on the day of your nomination and on the day of election…You have ever been convicted of an imprisonable offence (even if you were not actually imprisoned or the conviction has been spent)' (Electoral Commission 2013c: 3). This issue caused some controversy in 2012 when Bob Ashford was forced to withdraw his candidature for the post of Avon and Somerset PCC due to having received a £2 and 10 shillings fine for 'trespass on a railway' and 'possession of an offensive weapon' when aged just 13 (an imprisonable offence, even though the 'weapon' was in this case only an air gun).[14] These rules effectively mean that the disqualification criteria for the office of PCC are *more stringent* with regards to criminal records than they are for the office of Prime Minister, Home Secretary or Lord Chancellor.

Criminal records may also act as a barrier to civic participation if PWCs are called for jury service. Those who have served a period of imprisonment or detention of more than five years (or any indeterminate term) are permanently disqualified from becoming jurors. Furthermore, a person who has received *any* prison sentence (including a suspended sentence) or a community-based order in relation to a criminal conviction, is disqualified from jury service for a period of ten years from the end of their sentence (HM Courts and Tribunals Service 2014: 3).

In relation to serving as a magistrate, PWCs are not *automatically* disqualified but are warned that they are unlikely to be accepted to serve if they have been 'found guilty of a serious crime' or 'found guilty of a number of minor offences' (UK Government 2014). Those wishing to become trustees of charities might also face restrictions based upon the nature of their previous offences. Section 178 of the Charities Act 2011 prohibits those 'convicted of any offence involving dishonesty or deception' from serving as a trustee where that conviction is

[14] 'Labour police commissioner candidate forced to withdraw over £5 fine' (*The Guardian*, 8th August 2012)

unspent. In addition, individuals who are, in addition to their convictions, placed on the 'barring lists' maintained by the Disclosure and Barring Service, may (on grounds of 'public protection' be legally prohibited from acting as trustees if the role entails close or unsupervised contact with children or vulnerable adults when these groups are the beneficiaries of that charity (Charity Commission 2012: 12-13).

Further pains of criminalisation

A number of other pains of criminalisation may apply to PWCs. For example, those wishing to train for work in various professions may be subject to disqualification based on their criminal record (particularly for those professions which are 'exempted' from the ROA 1974). However, it is worth noting that during the process of application for higher education in the UK, the Universities and Colleges Admissions Service suggest in their guidance on 'Filling in your UCAS application' that applicants declare 'any criminal convictions' (UCAS 2015) and it is only once applicants have registered for and logged in to the application portal that some clarification is offered about the need to only disclose 'relevant' and 'unspent' convictions or cautions for the vast majority of courses. This may have the effect of deterring applications from PWCs. Furthermore, the consideration of convictions as part of the application process could potentially expose applicants to discriminatory recruitment practices from Higher Education Institutions (Eaton 2014).

The opportunity to travel overseas can also be restricted due to previous convictions. Many countries around the world ask questions about criminal records to those applying for entry visas. For instance, the US may refuse entry to those convicted of 'crimes of moral turpitude' whilst Australia requires visitors to pass a 'character requirement test' which includes consideration of previous convictions (Unlock 2015). This, of course, affects not just the convicted person but also those who may wish to travel with them, for example, on a family holiday or business trip. Indeed, criminal convictions can also lead to the secondary

stigmatisation of families and associates. Condry (2006) has shown that female partners or relatives of prisoners often experience stigma and shaming in their social interactions due to the offences of their loved one. These negative social responses can stem from cultural and popular beliefs about familial blame and contamination. However, there is no reason to expect that these negative reactions cease simply because a prisoner's sentence has formally ended. Mills (2004), has highlighted the role that stable family relationships play in supporting effective resettlement, but has cautioned that any role in supporting desistance can also have negative implications and place families under pressures which may exacerbate existing social and financial problems. They may also feel responsible, or fear being blamed, if their loved one fails to desist from crime.

Previous convictions also impact upon whether an individual can receive compensation for injuries sustained when a victim of crime. The government's Criminal Injuries Compensation Authority (CICA) reduces any compensation payable to victims of crime who have unspent convictions by way of a 'penalty points' system. Those whose convictions cannot become 'spent' under the ROA are permanently excluded from the compensation scheme, whilst individuals who receive a fine, ban, conditional caution or similar disposal, can have these taken into consideration (CICA 2012). This policy even applies to family members making a claim following the murder of a previously convicted relative. In a particularly extreme recent case, a woman received severe injuries after being sprayed with chromic acid by an unknown person to whom she had opened her front door. Her assailant was sentenced to a lengthy term in prison, but she was denied compensation for her injuries by CICA on the grounds that she had unspent criminal convictions which included a previous custodial sentence.[15] The judgment ruled that:

[15] T.Q. v. Criminal Injuries Compensation Authority [2015], I thank my fellow trustee at Unlock, Salima Budhani, a solicitor at Bindmans LLP for sharing details of this case with me.

> [The compensation scheme] distinguishes between those with spent and unspent convictions by reference to the Rehabilitation of Offenders Act 1974. In numerous areas of government policy making, it is *legitimate and appropriate for those with unspent convictions to be treated differently* to those with spent convictions. In our judgment, the provision of criminal injuries compensation is one such area. (para. 76.5; emphasis added)

Accounting for the pains of criminalisation

In general terms, the pains of criminalisation involve potentially catastrophic impacts upon an individual's life chances. They exemplify how PWCs are effectively 'punished' beyond the scope of their sentences albeit through mostly informal social processes. A likely factor in discriminatory conduct against those with convictions amongst private non-state actors is the increased concern with 'risk' in late-modernity which numerous scholars have discussed (see *inter alia* Giddens 1990; Beck 1992; Ericson and Haggerty 1997; Hudson 2003; Mythen and Walklate 2006; Furedi 2009; O'Malley 2010). This issue of risk is discussed in further detail in the final chapter of the thesis. This section, however, draws upon sociological theories to consider why PWCs continue to be rendered socially marginal.

A functionalist perspective

Intuitively, negative moral sentiments which arise amongst members of society in response to acts of lawbreaking do not simply 'go away' after they have been conveyed to the convicted person via the sentence of a court. Instead, they might just as easily be conveyed through social processes of *de facto* discrimination which occur *after* any court hearings are concluded and the sentence has been served. Therefore the pains of criminalisation are explained, to a certain extent, by the desire of social actors to denounce wrong-doing *for themselves* by communicating collective social disapproval to lawbreakers. Taken to extremes, the social desire to condemn can manifest itself in acts of vigilantism in some

circumstances (see Girling *et al*. 1998; Bell 2002; Critcher 2002). However, it more commonly expresses itself through a tendency to exclude or discriminate against those who have transgressed.

If we regard this tendency as an informal extension of legal punishment, the functionalist perspective developed by Durkheim (1933) goes some way towards offering an explanatory framework. Lacey suggests that arguments for an expressive role for punishment 'cohere with Durkheim's thesis that one function of the criminal law and its enforcement is to reinforce the collective moral consciousness of a society' (1988: 34). Durkheim argued that punishment could be viewed as a moral phenomenon - the social function of which was to signify disapproval of a violation of society's *conscience collective* – a concept which he defined as 'the totality of beliefs and sentiments common to average citizens of the same society' (Durkheim 1933: 79). In Durkheim's analysis the act of punishing reinforces the conscience collective and strengthens social solidarity by reasserting the moral distinction between 'law-abiding citizens' on the one hand and 'wrongdoers', 'deviants' or 'criminals' on the other. Ultimately, of course, the state takes control of the penal process (see Christie 1977) and gives effect to the shared moral disapproval of wrongdoing by deciding how those who transgress 'ought' to be treated.

Ideally, this means that the spontaneous 'passions' of society are efficiently directed through support for legal punishments (Garland 1990: 61) although, of course, whilst 'some laws may be an 'index' of social sentiment…others may fly in the face of it' (*ibid.* p54). Moreover, whilst the urge or desire to punish wrongdoers exists as a strong social force in many societies, it is counteracted to a certain extent by an alternative social desire to engage in acts of forgiveness (see *inter alia* McCullough 2008; MacLachlan 2009; Griswold 2009; Konstan 2010). Indeed, the injustice of unfair or harsh treatment of former prisoners exists as a well-established literary and cultural theme. For example, one of the pioneers of silent film, Edwin S. Porter directed a film entitled *The Ex-Convict* in 1904 based on the plight of a release

prisoner trying to support his family (Musser 1991: 295-296). Additionally, literature's most famous ex-convict Jean Valjean is the central protagonist in Victor Hugo's (1862) *Les Misérables* - a novel which has inspired numerous films and the longest-running West End musical in history.

Therefore, as Garland (1990) has argued it is problematic to accept uncritically the notion of the conscience collective as something of a 'given social fact, a foundational entity, upon which other social phenomena rest' (p50). Instead, he argues, it may be more appropriate to speak of either a 'ruling morality' or 'dominant social order' (p52) because, 'even where an established moral order does exist, it does so by virtue of a successful struggle against competing forms of social order' (*ibid.*). Cotterrell (1992: 79) also draws attention to the inseparable nature of law and morality, and affirms the idea that '[w]ithout moral commitment to support it law is not part of society but mere words written on official paper'. However, he also suggests that Durkheim's work, and social integration theories in general, ultimately lack an adequate analysis of the power relations which give rise to legal norms. Therefore, it is necessary to consider the complex social processes of interaction and meaning-making which give rise to the labelling of certain behaviours as 'deviant' or 'criminal' in the first place.

Interactionist perspectives

Tannenbaum's (1938) 'dramatization of evil' hypothesis was one of the first attempts to draw attention to the social processes through which communities define certain acts as 'evil' and then subject those labelled as deviant to segregation either from or within their community. Tannenbaum suggested that this dramatization could lead to the internalization of a negative self-concept within those who are labelled and excluded as 'Other'. Paradoxically, this may then stimulate the very behaviours which were the initial object of complaint. Lemert (1951; 1972) further developed these ideas with his conceptualisation of 'primary' and 'secondary'

forms of deviance. Primary deviance refers to those initial tentative norm-violations which do not necessarily reflect the usual lifestyle of the lawbreaker and which can, therefore, be rationalised by that individual as examples of only a temporary detachment from 'mainstream' normative values (see also Sykes and Matza 1957 on the 'techniques of neutralization' which can facilitate this detachment). Secondary deviance, on the other hand, refers to the continued norm-violations which occur in response to an individual's internalization of labelling or stigmatisation following a pronounced negative social reaction to their primary deviance. It was subsequently argued that processes of labelling and stigmatisation were instrumental in the development of 'deviant careers' (Becker 1963: 25-39; see also Sartre 1963; Matza 1969 on the existential process of 'becoming deviant').

The casting of an individual as a 'criminal' or an 'offender' could therefore be regarded as a type of 'stigma'. That is, as 'an attribute that is deeply discrediting' (Goffman 1963: 13) which operates as '[a] sign of disgrace imposed upon certain identified individuals as a means of marking them out as different, deviant or criminal' (Muncie 2001: 292). Goffman (1963) distinguished between three types of stigma: physical deformity, the 'tribal' stigma of race, nation or religion and *blemishes of character* such as the possession of a criminal record. In accordance with labelling theory, Goffman posited that stigma was not so much derived from a particular attribute (or visible 'stigmata') but more through a social process in which certain attributes are discredited in specific times and places. However, his insights also related to the experience and management of a 'spoiled identity'. Goffman was particularly interested in the internal conflict which occurs between *virtual* and *actual* social identity when the reaction of others to a stigmatising characteristic was negative or hostile. He posited that when individuals react against their casting as a 'stigmatised person', the reaction itself may be viewed by others as confirmation of the original defect. Thus, people may make attempts to correct the characteristic which forms the basis of their stigmatisation,

but their 'outsider' status may still affect their self-esteem, self-concept and even future behaviour, with some individuals choosing to conform to their stigmatised role.

The very term 'stigma' is originally derived from an ancient Greek practice involving the marking (often with cuts or brands) of the bodies of those deemed to be tainted, polluted or morally inferior. The purpose of such marking was 'to expose something unusual and bad about the moral status of the signifier' (Goffman 1963: 11). In England, punishments such as branding and ear cropping were available during the early modern period as ways of deliberately inflicting stigma (see chapter four). However, when people in the present talk about stigma, 'the term is widely used in something like the original literal sense, [but it] is applied more to the disgrace itself than to the bodily evidence of it' (Goffman 1963: 11). With regards to PWCs, a process of stigmatisation might arise following the disclosure or discovery of their criminal record. In many circumstances of course, an individual may be able to conceal their past but in others it may be a legal requirement for them to disclose any convictions, for example in a job application, and evidence suggests that employers often interpret the character of PWCs as negative (see Pager 2003; Bushway *et al.* 2011; Hirschfield and Piquero 2010; Working Links 2010). If this leads to a decision not to recruit, the sense of being 'shunned' may generate feelings of estrangement from mainstream society and even cause PWCs to doubt their own character and identity (see *inter alia* Maruna 2001; Aresti *et al.* 2010; Bernburg *et al.* 2006; Chiricos *et al*. 2007; Ross and Richards 2009).

Processes of stigmatisation and labelling are, however, beset by the problem that there are no clear and universal distinctions between what constitutes 'normal' and 'deviant'. This is because 'crime' itself is a social and legal construct derived from complex processes of meaning-making associated with acts which, when performed in a particular context, can result in social disapproval. Social context is important because, for example, the killing of others might be regarded as 'normal' or even heroic when those killed are defined as 'enemy

combatants' during wartime. By contrast, such a killing would be 'deviant' if the victim was a civilian during peacetime – although again the status of the victim may play a role in the extent of any social reaction (see Christie 1986 on 'ideal victims'). Distinguishing between 'mainstream society' and 'the stigmatised' is not even about discovering inherent characteristics of individuals. Instead, the nature of stigma and any discrimination which stems from it is based upon individual moral judgement in the context of wider normative frameworks and social conventions to which those in a position to judge may not even conform themselves.

Becker's (1963) expansion of labelling theories entailed a more detailed consideration of the ways in which certain behaviours exhibited by certain individuals or groups come to be defined as deviant in the first place. Becker was 'less concerned with the personal and social characteristics of deviants than with the process by which they come to be thought of as outsiders and their reactions to that judgment' (p.10). In his analysis, '[t]he deviant is one to whom that label has successfully been applied: deviant behavior is behavior that people so label'. Therefore, deviance became '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'' (p.9).

Recognising that deviance was essentially a social construct, Becker went on to highlight the role of 'moral entrepreneurs' who act against newly defined groups of 'outsiders'. He argued that as a result of various forms of enterprise – or 'moral crusades' - new rules such as criminal laws are created from which agents of social control then emerge and are tasked with the enforcement of these new rules and the labelling of transgressors (pp.147-163). Becker (1963: 17) recognised, therefore, that the 'question of political and economic power' (p.17) permeated the creation and enforcement of rules insofar as:

> rules are made for young people by their elders…men make the rules for women…[n]egroes find themselves subject to rules made for them by whites…[and the] middle class makes rules the lower class must obey – in the schools, the courts, and elsewhere (*ibid.*)

Becker (1963) realised that processes of rule creation and enforcement (and therefore by extension 'labelling' and its consequences) were the product of unequal power relations between different social groups (and therefore a fundamentally political exercise - see Sumner 1994: 236). However, he 'did not theorize…[the fact] that the 'social deviants' of American society were people who resisted or fought against their economic, political and cultural suppression' (*ibid.*). This is particularly relevant to the criminalization and 'Othering' of those engaged in political conflicts with state power. A prime example from the UK would be the state's treatment of militant members of the Women's Social and Political Union (the 'suffragettes').

It would, of course, be simplistic to cast the majority of people who engage in acts of lawbreaking as proto-revolutionary actors whose 'crimes' reflect a deeper seated desire to resist to state power. However, *vulnerability* to state power, and thus to formalised systems of social control which reinforce official processes of 'Othering', does not merely stem from the fact that criminal offending exposes lawbreakers to ceremonies of public denunciation and legal punishment. It is also the case that a previous history of offending socially positions people in ways which might often result in a disproportionate reliance on state-run systems of social security or 'welfare'. Thus, PWCs are rendered more likely to come into conflict with political power and the power of the state to impose negative labels. For example, and as already discussed, PWCs are over-represented amongst those dependent upon unemployment benefits (MOJ and DWP 2011) and many exist in situations where their accommodation situation is precarious (Shelter 2012). Therefore they are more vulnerable

to secondary forms of stigmatisation due to negative perceptions which exist about unemployment and homelessness. That is to say that the vulnerability of PWCs to social processes of 'Othering' are not just the result of *official* labelling processes in courtrooms or 'degradation ceremonies' (Garfinkel 1956) which occur in *formal* institutions such as prisons. Rather, the social marginality of PWCs is also a reflection of the post-sentence discrimination which they face and which results from *unofficial* processes of labelling and *informal* social control mechanisms.

Discrimination as censure

Social knowledge of a person's lawbreaking may – on the face of it - appear to act as a relatively stable normative framework upon which *moral* judgements giving rise to post-sentence discrimination might be founded. However, it has also been argued that in relation to assessments of 'deviance':

> Years of research in sociology and criminology have shown that the categories of criminal law and common morality are hopelessly inadequate as empirical descriptions of specific social behaviours. Whether we take their abstract, discursive definitions or their practical definitions in the course of law enforcement or moral stigmatization, it is clear that the definitions of deviant behaviour, even within a single society, exclude what should be included, include what should be excluded, and generally fail to attain unambiguous, consistent and settled social meanings (Sumner 1990: 26).

Sumner's work on 'censures' (see *inter alia* Sumner 1990; 1997; 2001) offers a framework for thinking about the issue of post-sentence discrimination and its regulation. Censures denote 'the practical process of disapproval and stigmatization which arises so frequently in situations of relational conflict' (Sumner 1997: 499). They also 'mark off the deviant the

pathological, the dangerous and the criminal from the normal and the good…and are tied to a desire to control, prevent or punish' (Sumner 1990: 27). Thus, we might conceive of the pains of criminalisation described earlier as 'societalizing effects' (Sumner 1997: 508) of social censures which target 'criminals' or 'deviants' as a collectivity.

However, censures are also 'negative ideological formations which designate the practice, demeanour, or other manifestations of self or others as bad, unacceptable, criminal, wicked, mad, delinquent, and so forth' (Sumner 1997: 499). That is, they are 'clearly moral and political in character' (Sumner 1990: 27) and regard categories such as crime and deviance 'as elements of highly contextualized moral and political discourses' (Sumner 1990: 26). Moreover they:

> form a justification for repressive action against the offender and for attempts to educate the recipient into the desired habits or way of life. Their frequent appeal to general moral principles gives them inherent political potential in the constant struggle for hegemony. (Sumner 1990: 27)

As Sumner also explains censures retain 'an 'in the air'-like quality, as items of culture or subculture, which is not synonymous with their institutionalization in law' (1997: 499). That is to say they are:

> not simply the negative ideological categories expressed in law but also the partisan judgements which positively constitute the very institutions of state and government as the legitimate force of land. They are literally part of our constitution, whether that be the constitution of our institutions of state as mechanisms of societal organization or the constitution of our selves as the identities which drive our practices as individuals. (Sumner 1997: 500)

The analysis of post-sentence discrimination and, ultimately, of legislative attempts to militate against it must therefore consider not just the everyday interactions in which censure occurs but also the role of the state and its capacities as an ideological institution concerned with social control. That is, to encompass both the *de jure* and the *de facto* forms of post-sentence discrimination in which both state and non-state actors play a role in enacting, facilitating, prohibiting and regulating the social treatment of PWCs.

Conclusion

Post-sentence discrimination based on criminal records constitutes a problem for society insofar as it limits the life chances of PWCs by creating barriers to the full enjoyment of citizenship. As discussed in chapter one, the ROA offered only a partial response to this problem since the Act excluded many PWCs from its limited provisions. This chapter has discussed how several of 'pains of criminalisation' may affect PWCs in England and Wales and it has been argued that these 'pains' should be considered as actively constructed social harms and not merely as 'collateral consequences' of conviction. Of course, in some limited circumstances social actors are *required* to engage in discriminatory practices against PWCs because the law requires them to. However, they more often possess a large degree of discretion about whether or not to discriminate. This *de facto* discrimination may be linked to a number of factors. Some factors may be 'external' such as the economic context and labour market dynamics which influence recruitment practices. Others may be 'internal' and related to considerations such as an employer's desire to avoid 'risk' or their own moral judgement of those with convictions. These issues may in turn be influenced by secular or religious beliefs about 'redemption' and 'forgiveness' or experiences of either offending or victimisation, whether personally or vicariously through family members or associates.

Based on this analysis, there appear to be two core problems through which the state contributes to the socially harmful and ongoing censure of PWCs. The first problem concerns

the piecemeal approach of the state in responding to the clearly identifiable need to militate against discrimination. The second problem concerns *the active facilitation of discriminatory conducts by the state* through its dissemination of criminal record information for an expanding range of purposes. Despite the *de facto* character of most post-sentence discrimination, it might even be argued that state plays a role in *guiding the conduct* of social actors in ways that promote discriminatory behaviours and practices. This proposition is considered much later in the thesis. However, the under-researched problem to which the thesis initially attends is the inadequacy of state responses to discrimination against PWCs. That is, the thesis will seek to question why legal protections which attempted to mitigate the pains of criminalisation in England and Wales appear not to have been particularly effective. To explore this question the thesis examines the emergence of the ROA as a measure intended to tackle post-sentence discrimination but which, in many respects, has fallen short in this regard. This work begins in the next chapter which discusses how a Foucauldian methodology can be used to construct a critical history of legal rehabilitation in England and Wales.

3. Legal rehabilitation through a Foucauldian lens

To date, there has been no detailed investigation into the *emergence* of the ROA as the mechanism which provides for legal rehabilitation in England and Wales. Breed (1987), for instance, offered only a short description of the passage of the Act (including the opposition to it) and a brief commentary on the shortcomings of the final legislation. Elsewhere, discussion of the Act has been limited to fairly technical descriptions of its legal effect (Padfield 2011; Larrauri 2014b), discussion of its efficacy in assisting PWCs to 'live down' their pasts (Mears 2008; Home Office 2002, 2003) or of the extent to which it assists with the process of desistance from crime (McGuinness *et al.* 2013). On the issue of desistance, Maruna (2001: 162-165) offers only a brief description of the philosophy of the ROA but discusses more broadly the importance of 'redemption rituals' which 'reward' those who successfully cease offending (Maruna 2011). Similarly, Robinson and Crow (2009: 2-3) suggest that a 'symbolic dimension' to rehabilitation is provided by the ROA, and its 'enabling [of] the social reintegration of the offender'. However, insofar as they discuss the Act, these contributions are generally rather brief and do not offer any analysis of the social, economic, historical and cultural contexts which both gave rise to the ROA and restricted the scope of the conceptual and legislative processes which produced it.

In order to address this lacuna, this thesis proceeds by drawing on the work of Michel Foucault to provide a critical history of legal rehabilitation in England and Wales. This chapter provides an overview of Foucauldian approaches so as to contextualise the work which follows. The chapter, firstly, discusses the centrality of discourse to Foucauldian work, particularly in relation to the formation of dominant versions of 'truth' and the construction of various forms of subjectivity. Secondly, it considers Foucault's genealogical approach to historical analysis which involves 'problematizing' present-day social practices. It also explains the utility of his revisionist approach when compared to more 'progressivist' ways of writing history. Thirdly, the chapter discusses how a Foucauldian conception of power can

be applied effectively to an analysis of governmental practices. The final section sets out precisely how the remaining chapters of this thesis are loosely structured around these ideas.

The centrality of discourse

This section discusses Foucault's approach to discourse as something which is both *productive* and *constitutive.* This means that discourse: creates meaning and thus helps to shape the social world; it is always involved in constructing particular versions of knowledge or 'truth' concerning the objects about which it speaks; it has a certain force which produces power outcomes and effects; that these effects include the production of 'subjects' – figures who personify the particular forms of knowledge which the discourse helps to create and sustain; and also that discourse can take on ideological forms which are involved in the strategic exercise of power.

Discourse and discursive formations

Foucault's approach to social scientific enquiry is clearly aligned with traditions of social constructionism. Whilst Foucault accepted that things could have a 'real' objective existence, he also claimed that they could only become *meaningful* within the discourses which surrounded them (Hall 1997: 73). With respect to discourse and 'meaning-making':

> the [Foucauldian] concept of *discourse* … is not purely a 'linguistic' concept. It is about language and practice. It attempts to overcome the traditional distinction between what one *says* (language) and what one *does* (practice). Discourse, Foucault argues, constructs the topic. It defines and produces the objects of our knowledge. It governs the way that a topic can be meaningfully talked about and reasoned about. It also influences how ideas are put into practice and used to regulate the conduct of others. (Hall 1997: 72; emphasis in original)

Moreover, the Foucauldian approach is 'less with the way that discourse is structured or governed by internal rules…and more with…the idea of discourse as consisting of groups of related statements which cohere in some way to produce both meanings and effects in the real world' (Carabine 2001: 268).

In *The Archaeology of Knowledge* Foucault (1972) outlined his approach to discourse or 'enouncements' (from '*l'énoncé*' – 'the statement'). He regarded discourse not as discrete units of semiotic signs but as a more abstract composition of relations between objects, subjects and statements which together formed 'a system of representation' (Hall 1997: 72). In thinking of discourse as operating 'systematically' in the production of meaning, Foucault developed the concept of the 'discursive formation' which he defined as follows:

> Whenever one can describe, between a number of statements… a system of dispersion, whenever, between objects, types of statement, concepts, or thematic choices, one can define a regularity (an order, correlations, positions and functionings, transformations), we will say…that we are dealing with a *discursive formation* (Foucault 1972: 41; emphasis in original)

By a 'system of dispersion' and 'regularity', Foucault was referring to 'the establishment of the same theme in different groups of statements' which nonetheless may 'differ in structure and the rules governing their use, which ignore or exclude one another, and which cannot enter the unity of a logical architecture' (1972: 41). Discursive formations may therefore encompass all sorts of written and spoken forms of communication which possess 'regularity' and thus produce certain 'ways of thinking' about their object. As Hall put it:

> Just as a discourse 'rules in' certain ways of taking about a topic, defining an acceptable and intelligible way to talk, write, or conduct oneself, so also, by definition, it 'rules out', limits and restricts other ways of talking, of conducting ourselves in relation to the topic or constructing knowledge about it. (1997: 72)

Disrupting regimes of truth

Critically, Foucault also suggested that in analysing thought processes and the ways in which they are revealed within a particular discursive formation it was important to:

> grasp the statement in the exact specificity of its occurrence; *determine its conditions of existence*, fix at least its limits, establish its correlations with other statements that may be connected with it, and show what *other forms of statement it excludes*. (1972: 30-31; emphasis added)

The emphasis on the 'conditions of existence' for certain ways of thinking and speaking in a society is linked to Foucault's concern with outlining the *historical and contingent nature* of that which was traditionally viewed by philosophers to be absolute or universal. His analytical method seeks to identify not just discursive formations but also the 'surfaces of emergence' (Foucault 1972: 45) upon which particular types of knowledge, morality, or social practice come into circulation and the criteria by which they are subsequently held to be 'true'. Foucault's critical approach was largely concerned with disrupting the self-evidence of certain forms of knowledge and the unquestioned continuity of discursive formations which helped to sustain the 'general politics' or 'regime of truth' within each society (Foucault 1980: 131). In *The Archaeology of Knowledge* he argued that*:*

> These pre-existing forms of continuity, all these syntheses that are accepted without question, must remain in suspense. They must not be rejected definitively of course, but the tranquillity with which they are accepted must be disturbed; we must show that they do not come about of themselves, but are always the result of a construction the rules of which must be known, and the justifications of which must be scrutinized… (Foucault 1972: 28)

Foucault therefore possessed a radical and sceptical approach towards the analysis of discursive formations, regimes of truth and the social practices which they helped to construct and sustain. In *The Order of Things* (Foucault 1966) he argued that all periods throughout history possessed their own epistemological certainties which determined the validity of scientific knowledge or 'truth' at that particular juncture. These underlying assumptions about the status of knowledge in each era he defined as the *episteme* - a term which he would later define as:

> the strategic apparatus which permits of separating out from among all the statements which are possible those that will be acceptable within…a field of scientificity, and which it is possible to say are true or false. The *episteme* is the 'apparatus' which makes possible the separation, not of the true from the false, but of what may from what may not be characterised as scientific. (Foucault 1980: 197; emphasis in original)

Foucault (1966) also suggested that the conditions of possibility for discourse were not stable and they had, in fact, changed over time - from one period's episteme to another - often involving periods of 'epistemological rupture' - a term Foucault borrowed from Gaston Bachelard (1986 [originally 1938]). Related to this notion of what 'may or may not' be characterized as either 'scientific' or 'true' Smart (2002:5) suggests that Foucault's 'objective

has been a rediscovery of subjugated knowledge [and] not the construction of bodies of 'systematizing theory''. Foucault (2003:7) used the term 'subjugated knowledges' to refer to those 'historical contents that have been buried or masked in functional coherences or formal systematizations'. They are 'hierarchically inferior knowledges' (*ibid.*) which often become marginalised and disqualified by official or mainstream discursive formations of the 'truth'.

Foucault applied his search for subjugated knowledge to topics such as madness (1967), medicine (1973), punishment (1977) and sexuality (1980). Within these analyses, a significant aspect of Foucault's approach to the relationship between discourse and the social world is his notion that power is intimately linked with knowledge. Foucault's conception of power broke away from the more traditional understanding of something that can be possessed by individuals and wielded over others (a point expanded on later). Instead, Foucault conceived of power as working through individuals and institutions, cultures and various forms of social practice. Indeed, whilst discourse, power and knowledge are often discussed individually, it is important to consider how they relate to each other in Foucauldian analyses. Foucault regarded the connections between the knowledge which discourse produced and the operation of power in society as vital noting that: 'it is in discourse that power and knowledge are joined together' (Foucault 1978: 100). He therefore introduced a composite term - power/knowledge (*pouvoir/savoir*) - during the genealogical period of his work as a way of conceptualising what is 'made possible' by that which is known about a particular topic and the discourses which surround it. Therefore, discourse/power/knowledge, might be conceived of as an 'interconnected triad' (Carabine 2001: 267).

Discourse and the subject

Discourse is, therefore, integral to the strategic exercise power over people. An example of certain practices being 'made possible' is provided in *Discipline and Punish* where Foucault

describes how the institution of imprisonment relied on *a priori* forms of knowledge and practice which were constitutive of the individual 'criminal' or 'deviant' subject. As he explained:

> The prison form…had already been constituted outside the legal apparatus when, throughout the social body, procedures were being elaborated for distributing individuals, fixing them in space, classifying them…forming around them an apparatus of observation…constituting on them a body of knowledge that is accumulated and centralized. (Foucault 1977: 231)

In this important work, Foucault (1977) sought to account for the emergence of 'penal leniency as a technique of power' (p.24), by which he meant the transition from brutal and public spectacles of punishment, towards a more correctional form of penal power which was given effect in disciplinary institutions such as the prison. This ascent of 'disciplinary power' (see below) relied, according to Foucault, upon the discursive production of 'knowable' individuals (e.g. 'habitual criminals') upon whom new technologies of normalization could act. Foucault suggested that by analysing the transition away from forms of punishment centred upon the physical body:

> … one might understand both how man, the soul, the normal or abnormal individual have come to duplicate crime as objects of penal intervention; and in what way a specific *mode of subjection* was able to give birth to man as an object of knowledge for a discourse with a 'scientific' status. (1977: 24; emphasis added)

Thus discourse/power/knowledge plays a central role in the emergence not only of social practices, but also of subjectivities (or 'subject positions') due to the construction of particular spaces which allow for being *a certain kind of subject.*

In the original French version of the passage above, Foucault used the term *assujettissement* (more properly translated as 'subjectivation') instead of the word 'subjection'. Whilst Heyes (2011: 159-160) suggests that *assujettissement* conveys a 'positive', productive form of discursive power which 'enables certain subject positions … permits political mobilization, solidarity, mutual identification, the creation of social spaces, and so on' she also explains that Foucault often used the term to express how individuals may also be 'subjected or oppressed by relations of power'. Therefore, Foucault's work also facilitates analyses of the more repressive and control-oriented workings of state power.

The critical history of the present

This next section discusses what it means to conduct a 'Foucauldian genealogy' and considers the distinction between genealogy and Foucault's earlier 'archaeological' work. It also discusses how Foucault's use of genealogy as a way of *problematizing the present* offers a critical approach to history which rejects narratives of 'progress' and instead reveals how certain developments in our history can, in fact, lead to new constraints on freedom. Genealogy is, of course, commonly understood as a process of historical inquiry, often associated with tracing the lineage of families. However, to make use of genealogy in the way that Foucault did – as a philosopher, a historian of ideas and as a social theorist - requires a more complex understanding than this.

Archaeology and genealogy

Foucault's genealogies (see, for instance, Foucault 1977; 1978a) marked a methodological expansion of his earlier work on the development of knowledge which is often described as *archaeological* (see Foucault 1966; 1967; 1972; 1973). Archaeology, in the Foucauldian sense, refers to the historical analysis of the 'rupture' of new forms of knowledge within single unified fields such as science or medicine. This approach is concerned with marking

out the points of discontinuity between dominant forms of knowledge by 'resolutely focusing on the description of momentary slices of the archive' (Koopman 2013: 40). However, towards the end of *The Archaeology of Knowledge*, Foucault seemed to conclude that his chosen method may be somewhat inadequate for describing and thinking about processes of historical change, suggesting that:

> Archaeology…seems to treat history only to freeze it. On the one hand, by describing discursive formations, it ignores the temporal relations that may be manifested in them; it seeks general rules that will be uniformly valid, in the same way, and at every point in time: does it not, therefore, impose the constricting figure of synchrony on a development that may be slow and imperceptible? (Foucault 1972: 181)

Foucault's concern here is that by focussing solely on identifying moments of 'rupture' and outlining the emergence of new 'discursive formations', historical change is treated 'as an instantaneity of substitutions' (1972: 184) through which new knowledges and attendant forms of social practice arrived fully formed. It was this concern which led to Foucault's adoption of a more genealogical method as an attempt to broaden the possibilities of historical inquiries *into the present*. Indeed, in his first truly genealogical work *Discipline and Punish*, Foucault asks a rhetorical question about why he would choose to write a history of the prison:

> 'Why? Simply because I am interested in the past? No, if one means by that writing a history of the past in terms of the present. Yes, if one means writing the *history of the present*.' (1977: 31; emphasis added).

Koopman (2013: 31) remarks that whilst 'archaeology was informed by a singular conception of temporal discontinuity and a singular focus on the domain of knowledge … genealogy expanded the view so as to wrestle with multiple temporalities and multiple vectors of practice.' That is, the purpose of genealogy 'is to trace the struggles, displacements and processes of re-purposing out of which contemporary practices emerged, and to show the historical conditions of existence upon which present-day practices depend' (Garland 2014: 373). To distinguish further:

> *Archaeology* wants to show structural order, structural differences and the discontinuities that mark off the present from the past. *Genealogy* seeks instead to show "descent" and "emergence" and how the contingencies of these processes continue to shape the present. (Garland 2014: 371; emphasis in original)

Central to this idea is the notion of *problematisation* and Kendall and Wickham (1999: 22) note that 'Foucault's approach to history is to select a problem rather than an historical period for investigation.' That is, it starts not by viewing our present-day practices as the end result of a relentless tide of social progress but rather as 'a thoroughly heterogenous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions' (Foucault 1980: 194).

Foucauldian genealogy is concerned with *problematising the present* and revealing the temporary and contingent nature of that which we might easily take as given and 'natural'. It is therefore a mode of 'philosophico-historical inquiry into the conditions that make possible problems such as modern sexuality and modern punishment' (Koopman 2013: 6). That is, it attends not only to 'an analysis of the trajectory of the historical forms of truth and

knowledge' but also to 'the disturbance of narratives of both progress and reconciliation, finding questions where others had located answers' (Dean 1994: 4).

Critical and effective history

In characterizing Foucault's approach as a *problematising one,* Dean (1994) distinguishes it from the approach taken by *progressivist* and *critical theorists.* For Dean, the progressivist approach 'proposes a model of social progress through the teleology of reason, technology, production, and so on' (p.3). This approach might be seen, for example, in what are referred to as 'Whig histories' or in certain interpretations of the Weberian theory of rationalization. In *critical theory,* on the other hand, Dean argues that '[i]nstead of narratives of progress, we have narratives of reconciliation of the subject with itself, with nature, with the form of its own reason' and the production of narratives which 'promise emancipation and secular salvation' (*ibid.*) Dean regards the problematizing approach as distinct from both in that it 'interrogates progressivist narratives of social progress or critical ones of human emancipation from the perspective of what it calls *critical and effective history'* (p.4; emphasis in original).

The production of histories which are both 'critical' and 'effective' involves making use of history, as Foucault did, 'to help us see that the present is just as strange as the past, not to help us see that a sensible or desirable present has emerged [as in the progressivist approach]… or might emerge [as in critical theory]' (Kendall and Wickham 1999: 4). Thus Foucauldian genealogy seeks to trace the conditions of emergence for current thought and existence, or the practices in which present ways of thinking and existing manifest themselves. However, it also aims to promote change which counters domination and oppression through 'the undefined work of freedom' (Foucault 1984: 46) or, as Koopman puts it: 'If other genealogists have aimed at vindication or subversion of the problematizations of who we are, Foucault aims at a practice that would reveal our problematizations to facilitate

their further transformation (2013: 18). Foucauldian genealogy does this by describing 'the procedures, practices, apparatuses and institutions involved in the production of discourses and knowledges, and their power effects' (Carabine 2001: 276).

Before engaging in a more detailed discussion of the power effects and relations implicit in Foucauldian analyses, it is necessary to briefly situate this thesis within the wider body of work which Foucault conducted. Indeed, Foucault is often regarded as a theorist of power (as discussed later) but such a description does not do justice to the scope of his work. As Foucault once stated: 'the goal of my work…has not been to analyze the phenomena of power, nor to elaborate the foundations of such an analysis. My objective, instead, has been to create a history of the different modes by which, in our culture, human beings are made subjects' (2002a: 326) with a particular emphasis on 'dividing practices' or the ways in which '[t]he subject is either divided inside himself or divided from others' (*ibid.*). Since this thesis relates to the re-imagination of PWCs as certain kinds of subject, it does so with a particular focus on the 'dividing practices' which set them apart from other, un-convicted subjects. Much of this relates, of course, to the question of whether or not PWCs have 'freedom' and the extent to which that freedom (if it exists) is delimited by the historical and political spaces which they occupy. On this notion of 'freedom', May suggests that:

> Foucault does not defend any form of metaphysical freedom. Neither does he deny metaphysical freedom. He is often taken to be doing the latter, because he describes a number of constraints that have bound us. However, the constraints he describes, as he insists over and over again, are not metaphysical constraints but historically given ones. They are constraints that can be overcome. The overcoming of these constraints, however, is not a metaphysical or philosophical exercise. It is a political one. (2011: 74)

Indeed, Foucault's work is less concerned with the question of whether human subjects possess a metaphysical (or ontological) freedom which is not somehow pre-determined by biological or environmental factors. Rather he assumes that such freedom exists in order that forms of resistance are made possible. May distinguishes between metaphysical and political freedom by suggesting that:

> Political freedom concerns the liberties one does or does not have as a member of a political society. Freedom of speech, for instance, is a political freedom…Political freedom is not, as metaphysical freedom is, a doctrine about human nature. It is a characterization of particular elements in a society. (2011:73)

Foucault's work is concerned with promoting this freedom by showing how 'so many things can be changed, fragile as they are, more arbitrary than self-evident, more a matter of complex, but temporary, historical circumstances than…inevitable anthropological constraints' (Foucault 1990: 156). A key task for this thesis is to problematize the partiality of legal responses which seek to mitigate the pains of criminalisation in order to demonstrate how they are indeed the results of 'historical circumstance' and that whilst 'complex', they are only a 'temporary' configuration.

The analysis of state power

As already discussed, Foucault's conception of freedom entails a consideration of the historical and political contexts in which power/knowledge networks are constructed and sustained. It follows then that the dominant ideological projects of each particular era have had consequences for the ways in which PWCs are constituted as knowable subjects. To reiterate, Foucault suggested that individual lawbreakers were, during the emergence of modern forms of penality, constituted through 'a body of knowledge that is accumulated and centralized' (Foucault 1977: 231). The 'accumulation' and 'centralisation' of knowledge to

which Foucault is referring arose, in part, due to the formation of the modern nation-state and its agencies and the emergence of governmental and institutional power. These new forms of state power had implications for the construction of particular forms of 'truth' about lawbreaking subjects though the deployment of 'official discourses'. Burton and Carlen defined these as the:

> products of the articulation of knowledges as power relations. Like all discourses they are signifying practices that demonstrate the effect of ideology on language: an effect that is inscribed within a particular modality of power. (1979: 34)

Inglis suggests that it through such official discourse the state 'dominates symbolically by developing a monopoly over the means of producing and proclaiming the truth' since '[r]epresentatives of the state are thus able to decide whether someone's guilty, criminal, mad or poor' (2003: 176). Indeed, the state deploys official discourses in the production of new laws and policies which construct subject positions such as the 'criminal', 'law-abiding citizen' or 'rehabilitated person'. It is necessary therefore to consider *critically* the role of the state in dominating 'truth' claims concerning PWCs as governed subjects and the power relations at stake in such domination.

The Foucauldian conception of power

Foucault's emphasis on the discursive production of 'the subject' is not to say that a consideration of power is absent from the Foucauldian approach – far from it. Rather, it was Foucault's approach to questions of subjectivity which necessitated *an alternative conception of power* which broke from the more traditional view of power existing solely as a 'thing' which could be possessed by specified individuals and wielded over others. As Foucault explained: '[i]n political thought and analysis, we still have not cut off the head of the king' (1978: 78-79). By this he was referring to the shortcomings of a 'top-down', 'juridical' or institutional conception of power which rendered it 'necessary to expand the dimensions of a

definition of power if one wanted to use this definition in studying the objectivizing of the subject' (Foucault 2002a: 327). This reconceptualization of power has been described thus:

> First, imagine a pyramid, with a king at the top, his ministers in the middle and the king's subjects (the people) at the bottom. If the king issues an edict, then his ministers will execute the order, imposing it upon the king's subjects. Traditionally, power has been understood as "being at the top of the pyramid"; and that was all that it was understood to be. But Foucault expands (indeed, totally reconceives) what constitutes power, and shows how this traditional view can be situated within a fuller understanding. He observed that in actual fact, power arises in all kinds of relationships, and can be built up from the bottom of a pyramid (or any structure). (Lynch 2011: 13)

This emphasis on 'relationships' of power is critical to an understanding of Foucault's work. As he observed: 'while the human subject is placed in relations of production and signification, he is equally placed in power relations that are very complex' (2002a: 327). Therefore a Foucauldian approach views power not as a *property* held by specified individuals at a given moment in time and *not just* as that which descends from the top of a hierarchical structure to act upon relatively 'powerless' subjects at the bottom. Instead, it considers *power relations* as operating in a 'capillary' form - similar to the flow of blood through a body – and *working through* individuals at all different levels of a society and in all sorts of everyday social interactions. Indeed, wherever one individual interacts with another person, acts upon them in some way or causes them to act upon themselves, there exists a power relation and it is to the analysis of these relations (rather than the development of totalizing 'theory of power') that Foucauldian scholarship attends. Discriminatory conduct against PWCs is a prime example of just such a 'capillary' power relation given that, for the most part, it occurs not as a result of a 'top-down' legal requirement but due to discretionary

decision-making which, whilst influenced by the official discourse of the state, emerges at the micro-level.

Sovereignty/discipline/biopolitics

In 'Right of Death and Power over Life', the final chapter of Volume One of *The History of Sexuality,* Foucault (1978: 135-159) differentiated between the 'juridical' or 'sovereign power' exercised in the pre-modern era and the new forms of 'biopower' which emerged during the (post-Enlightenment) transition to modernity. Sovereign power, Foucault argued, was conditioned upon a 'right of rejoinder' through which a ruler could legitimately take the life of those who 'dared to rise up against him and transgress his laws' (p.135). This 'right to take life or let live' was symbolized by the sword and was exercised as a 'means of deduction…levied on the subjects…a right of seizure: of things, time, bodies, and ultimately life itself' (p.136). Its most obvious institutional form in the present is the criminal law by which 'time' can be 'deducted' from individuals in the form of incarceration. However, by contrast, in the post-Enlightenment or 'modern' era, Foucault argued that deduction has become:

> no longer the major form of power but merely one element among others, working to incite, reinforce, control, monitor, optimize, and organize the forces under it: a power bent on generating forces, making them grow, and ordering them, rather than one dedicated to impeding them, making them submit, or destroying them. (*ibid.*).

Foucault argued that during the modern era, a new form of 'biopower' emerged which 'brought life and its mechanisms into the realm of explicit calculations and made knowledge-power an agent of transformation of human life' (p.137). Biopower, Foucault argued, supplemented rather than replaced sovereign power and was rendered necessary by the

increasing concern of governments to optimize emerging modes of capitalist production through new techniques for 'the subjugation of bodies and the control of populations' (p.140).

At the level of individuals, Foucault described 'an anatamo-politics of the human body' - a form of biopower 'centered on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls' (p.139). However, in another form, biopower exists as 'an entire series of interventions and regulatory controls: a biopolitics of the population' which has as its target the 'species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that cause these to vary' (*ibid.*). These two levels of biopower not only 'operated in the sphere of economic processes, their development, and the forces working to sustain them', but they also 'acted as factors of segregation and social hierarchization … [thus] guaranteeing relations of domination and effects of hegemony' (p.141).

Thus, in the present, deductive mechanisms of sovereign power (laws and prohibitions) work in conjunction with two levels of biopower (*discipline* and *regulation*) and are given effect through the state's role as an administrator of life and a producer of 'official' knowledge. This knowledge has been generated historically through the comparison of individuals and groups to normative standards which in turn gave rise to a number of institutional and state responses to 'abnormality'. Taylor explains that:

> at one level disciplinary institutions such as schools, workshops, prisons and psychiatric hospitals target individual bodies as they deviate from norms, at another level the state is concerned with knowing and administrating the norms of the population as a whole (Taylor 2011: 45).

Foucault devoted significant time to exploring this 'institutionalization of the norm, of what counts as normal' (Feder 2011: 62) and his concern with processes of 'normalization' would see him explore the 'dividing practices' (Foucault 2002a: 326) which drew distinctions between 'mad' and 'sane' subjects (Foucault 1967, 2006), the 'sick' and the 'healthy' (Foucault 1973, 1999) and – with particular relevance for this thesis – 'criminals' from the 'law-abiding' (Foucault 1977, 2015; see also Pasquino 1991). He argued that the arrangement of contemporary society was increasingly based on medical conceptions of the norm rather than the classical legal notion of 'normality' predicated upon conformity to codes and the rule of law. This gave rise, for instance, to a perceived need to 'correct' or 'rehabilitate' lawbreakers rather than merely to punish them (see chapter five), although the transition from a sovereign power to punish to a disciplinary power of normalization would inevitably cause tensions between the legal and medical functions of the state (see Foucault 1978b). However, if as Foucault claimed, the ascendancy of biopower meant that the administration of life became the principle concern of distinctly *modern* governments, how might we account for the continuation of seemingly contradictory practices such as the death penalty, in some cases late into the twentieth century? Foucault answered this point directly in stating that:

> capital punishment could not be maintained except by invoking less the enormity of the crime itself than the monstrosity of the criminal, his incorrigibility, and the safeguard of society. One had the right to kill those who represented a kind of biological danger to others. One might say that the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death. (Foucault 1978a: 138; emphasis in original)

This subtle shift is indicative of the transitions in the strategic exercise of power which accompanied the development of the modern nation-state. The thesis returns to this notion of 'disallowing life' and its applicability to the topic of criminal records in the final chapter.

Governmentality

Garland (1997: 175) has suggested that the Foucauldian reconceptualization of power which began with *Discipline and Punish* (Foucault 1977) drew criticism not only for neglecting to attend to the role of the state in the emergence of disciplinary power but also for characterizing individuals as 'docile bodies' rather than as active subjects. Such criticism, particularly from the Marxist left (see Walters 2012: 15), was addressed in the late-1970s by Foucault's turn to the issue of 'government' and the exercise of regulatory power (or biopolitics) at level of the population. This turn to the role of the state and political government occurred in three of his *Collège de France* lecture courses (Foucault 2003; 2007; 2008) where the term 'biopower' first emerged and the concept of 'governmentality' was introduced and developed.

The term 'governmentality' refers to Foucault's project 'to retrace the history of what could be called the art of government' (2008: 1). By using the term 'art of government' Foucault meant 'the way in which one conducts the conduct of men' (2008: 186). The analysis of the 'conduct of conduct' offers a sort of historico-philosophical perspective through which to view the processes by which present-day concerns (e.g education, health or crime) are problematized and rendered as objects of government. That is, the 'governmentalization' of social problems. A governmentality perspective seeks to denaturalize how certain ways of exercising power are presently constituted by tracing (through genealogy) the historical development of certain governmental *rationalities* (ways of thinking) and *technologies* (ways of acting) in addition to analyzing the ways in which individuals have been '*subjectified*' (or made into certain types of subject) (see Rose 2004; Dean 2010; Walters 2012). The purpose of this denaturalization is not, however, to make definitive proposals for an alternative programme of government but rather to 'open up a space for alternative possibilities' (Garland 1997: 174). As Foucault put it: 'in this great preoccupation about the way to govern

and the search for the ways to govern, we identify a perpetual question which would be: 'how not to be governed *like that*…'' (1997: 44; emphasis in original).

Foucault's work on governmentality sought to 'construct the genealogy of the modern state and its different apparatuses' (2007: 354). He argued that modern forms of government had initially emerged as a result of the convergence of certain rationalities, techniques and practices which sought to guide people's conduct and organize them collectively through a form of 'pastoral power' (Foucault 2007: 115-190). As Bröckling *et al.* explain:

> Pastoral power conceives the relationship between the shepherd and his flock and between leaders and those they lead along the lines of a government of souls: their individual instruction and guidance takes place in view of otherworldly salvation, pastoral authority thus complementing the authority of moral and religious law (2011: 3).

However, 'such pastoral guidance techniques experienced an expansion and secularization in the sixteenth and seventeenth centuries' (*ibid.*) and three new rationalities of *political government* (of human beings rather than souls) emerged. There were: (1) 'reason of state' (*raison d'etat*) which involved a replacement of theocratic justifications for the state and a move towards more secular forms of governance bound up in the notion of a social contract between a 'sovereign' state and its citizens (a political 'Leviathan' as opposed to a 'shepherd and flock'); (2) the development of 'police' which refers not to the dedicated crime-fighting agency which emerged in the nineteenth century, but to a much broader programme of social regulation which relied upon both new forms of surveillance and control and a new science of classifying, managing and rendering knowable the 'population' as an entity; and (3) the emergence of 'liberalism' which, by contrast to the earlier rationales of *raison d'etat* and police, perceived the economy and civil society as self-governing entities or 'natural

processes' from which the state should maintain a degree of restrained detachment (see Garland 1997: 176-178; Bröckling *et al*. 2011: 4-7). This trajectory - a 'governmentalization of the state' (Dean 2010: 267) - involved the segmentation of life into a range of institutional fields. For instance, the family, economy, education, hospitals, prisons – all of which played a role in ordering and regulating the conduct of the population through the dissemination of shared values and customs and through the production of 'official' forms of knowledge. This exercise of 'power over life' across human populations contrasted significantly with the (often violent) use of sovereign power in pre-modern, feudal societies as the direct expression of authority of absolutist monarchs.

Foucault (2008) considered the rationalities, techniques and practices involved in these emergent forms of public administration with particular emphasis on classical European liberalism and the eventual emergence of the 'social market' model of German and American neo-liberalism. However, a broader 'Foucault effect' (see Burchell *et al.* 1991) has seen the governmentality perspective applied to issues of poverty, insurance, the government of the economy and labour markets as well as of crime (see Feeley and Simon 1992; Simon 2007; Borch 2015) and 'risk' (see O'Malley 2010: 13-15) within criminal justice. However, Rose argues that:

> To analyse political power through the analytics of governmentality is not to start from the apparently obvious historical or sociological question: what happened and why? It is to start by asking what authorities of various sorts wanted to happen, in relation to problems defined how, in pursuit of what objectives, through what strategies and techniques. (2004: 20)

This form of investigation involves adopting a perspective which seeks to question the 'invention, contestation, operationalization and transformation of more or less rationalized

schemes, programmes, techniques and devices which seek to shape conduct so as to achieve certain ends' (*ibid.*). Moreover, this approach to questions of government (whether of individuals, groups or even of the population as a collective) is interested in how certain behaviours or conducts *become problematized* at specific junctures in history. Indeed, governmentality studies are particularly concerned with analysing the conditions of possibility for certain governmental rationalities, technologies and practices to emerge.

Putting Foucault to work

This chapter now turns to a discussion of how Foucauldian concepts and theories might be applied to a critical history of legal rehabilitation in England and Wales. This section, firstly, discusses how the ROA might be read from the revisionist standpoint on history adopted by Foucault and Foucauldian scholarship. Secondly, the section reveals how the chapters which follow contribute to this history by either providing context, setting out the contingent events through which the ROA came to pass, or analysing the practice of legal rehabilitation in the present in relation to neoliberal governmentalities of rule.

Rejecting the progressivist reading

In terms of a critical history of legal rehabilitation and post-sentence discrimination, the ROA could, of course, be read simply as an act of 'social progress' akin to others which had gone before such as the Murder (Abolition of Death Penalty) Act 1965. Indeed, despite critiques of its technical shortcomings (see chapter one) it has largely remained unexamined by critical scholars and has largely been regarded as the replacement of a previous mode of informal social 'punishment' (unchecked post-sentence discrimination or censure) with a more 'humane' alternative (the possibility of certain convictions becoming 'spent'). Before the passage of the ROA there was no formal recognition that in England and Wales that PWCs could be redeemed in the eyes of the law. The Act might, therefore, be read simply as an emancipatory project which 'freed' PWCs from lifelong social censure. However, the pains of

criminalisation which described in chapter two are very much *an expanding feature of the present* (see *inter alia* Wacquant 2009; LeBel 2008, 2012; Larrauri 2014a, 2014b; Jacobs 2015) demonstrating that such a progressivist reading would be a naïve one.

By way of a comparison, Foucault (1977) problematized the notion that the emergence of the modern prison represented humanitarian 'progress' from the brutal punishments meted out during the *ancien régime* of absolutist rulers which existed prior to the French Revolution of 1789. Instead he argues that the turn towards a more 'correctional' form of punishment represented the ascent of a new *disciplinary* form of social control. This, Foucault claimed, comprised a 'mass of juridical absurdities' (p.20) in which a whole host of new 'parallel judges' such as psychiatrists, psychologists, educationalists and prison staff operate alongside the more traditional judicial mode of sentencing. He suggested that these new professions effectively 'fragment the legal power to punish' (p.21) by providing their 'assessment of normality and a technical prescription for a possible normalization' (p.21). Foucault continued by arguing that:

> As soon as the penalties and the security measures defined by the court are not absolutely determined, from the moment they may be modified along the way, from the moment one leaves to others than the judges of the offence the task of deciding whether the condemned man 'deserves' to be placed in semi-liberty or conditional liberty, whether they may bring his penal tutelage to an end, one is handing over to them mechanisms of legal punishment to be used at their discretion: subsidiary judges they may be, but they are judges all the same. (1977: 21)

As outlined in chapter two, the pains of criminalisation which follow on from formal punishment are largely inflicted by *de facto* practices conducted by other 'subsidiary judges'

rather than as the result of a strict *de jure* requirement to engage in discrimination against those with convictions. Following Foucault's (1977) arguments set out above, we can see then how the 'power to punish' (or rather *to censure*) is not merely fragmented in terms of its diffusion amongst other 'experts' but through the everyday conducts of employers, insurance companies, landlords and others who continue the punishment of convicted lawbreakers through post-sentence discrimination. Therefore, a progressivist reading of the ROA which views legal rehabilitation in England and Wales solely as an emancipatory practice which liberates PWCs from the stigma attached to their prior wrongdoing would not reflect the 'unintended consequences' of such a law such as the ROA which might also be read as the establishment of a new kind of *dividing practice* in our society (Henley 2016). That is, as a new technology of power which *regulates the redeemability* of certain lawbreakers based on the severity of the punishments they receive.

This is because the ROA unwittingly reimagined as 'un-rehabilitated persons' all of those who are not able to benefit from its provisions because they are either waiting for their conviction to become spent or because their conviction can *never become spent*. It thus renders more complex both formal and, crucially, *informal* restrictions and controls on PWCs. However, rather than arguing (as Foucault did in *Discipline and Punish*) that the fragmentation of the power to punish was related to the ascent of a new 'disciplinary' form of power, this thesis draws instead on his later works on governmentality to discuss how legal rehabilitation in England and Wales might instead be read as a form of *biopolitical control* through which the state administers and regulates the permissibility of certain discriminatory conducts against PWCs.

Applying Foucault in the remainder of the thesis

It is not, however, the intention in this thesis to adhere rigidly to any sort of methodological doctrine set by Foucault himself to merely produce a somewhat 'pristine' exegesis on Foucault's own work. Mills (2003: 110) notes that 'it is important to bear in mind that Foucault did not develop a fully worked out methodological position, and criticised the very notion of formulating one type of position.' Consequently, there is no such thing as a `how to' guide for the application of Foucault's ideas and the method adopted by individual researchers varies. Indeed, Foucault himself was famously unfussy with regards to how people made use of his work:

> …you are completely free to do what you like with what I am saying. These are suggestions for research, ideas, schemata, outlines, instruments; do what you like with them. Ultimately, what you do with them both concerns me and is none of my business. It is none of my business to the extent that it is not up to me to lay down the law about the use you make of it. And it does concern me to the extent that, one way or another, what you do with it is connected, related to what I am doing. (Foucault 2003: 2)

It is in that spirit that the rest of the thesis proceeds, by using Foucault's concepts and methods selectively – as one might make use of tools in a toolbox – but with the aim of critically reconsidering a very practical social problem. Therefore, the remainder of this section provides an overview of how the thesis proceeds and how it might be described as 'Foucauldian' in style.

Mills (2003: 112-114) warns that researchers should avoid an approach which makes 'second-order' judgements when writing history in a Foucauldian style. This means that in order to remain critical in respect of our own research we should avoid making the

assumption that a particular analysis of events constitutes a 'truth' around which we can then organise the 'facts' to consolidate our own position. Carabine notes that this charge of selectivity can be mitigated by situating the interpretation of discourses and events 'within other historical accounts and analyses of the period in an attempt to immerse and contextualise the ideas, beliefs, values and practices of the time' (Carabine 2001: 307). In this thesis, this context is provided by Part Two which, firstly, provides a much longer historical reading of the social practices of punishment (in chapter four) and rehabilitation (in chapter five). Chapter four, on the unresolved 'question of penal expiry' also explores an intriguing *absence* or *silence* within the history of punishment - that is, it concerns a discourse which 'is not present or not spoken of that you might expect to be' (Carabine 2001: 285). By contrast, chapter six provides the more proximal social, economic, political and cultural contexts to the ROA. It therefore acts as a prelude to Part Three of the thesis where the actual emergence of legal rehabilitation and the 'rehabilitated person' and the impact of neoliberal governmentality on these notions are discussed and analysed.

The purpose of Part Two is not, however, to make 'grand statements about culture from a particular time' (Mills 2003: 116) as this would perhaps make the mistake of 'assuming that the past is inferior to the present and that we have made great progress' (Mills 2003: 113). Such an assumption would, as already discussed, make exactly the sort of value judgement which Foucauldian genealogy seeks to avoid. Rather, Part Two considers the descent of influential power/knowledge frameworks which helped to shape legal rehabilitation as a social practice in England and Wales, and also their 'surfaces of emergence' (Foucault 1972: 45). These chapters provide not only a further layer of historical context to the ROA but also an appreciation of the 'inter-relationship between discourses' (Carabine: 285). That is, following Deleuze and Guattari (1987), a recognition of the 'rhizomatic' pattern of knowledge in which knowledge is *not seen* as developing like a tree 'with its unidirectional pattern of growth from roots up to branches and leaves via a solid trunk' but rather as a rhizome which

takes the form of 'a collection of root-like tentacles with no pattern to their growth, a set of tentacles which grow in unpredictable ways, even growing back into each other' (Wickham and Kendall 1999: 7).

In relation to the identification of possible sources of data in writing a critical history, Mills (2003: 111-112) has noted that the use of archives features heavily in Foucault's work. Carabine also suggests that when analysing social policy discourse:

> sources might include policy documents, discussion papers, parliamentary papers, speeches, cartoons, photographs, parliamentary debates, newspapers, other media sources, political tracts, and pamphlets from local and national government, quangos, and political parties. You might also wish to include an analysis of counter-discourses and resistances; here you might use material from campaigning and lobbying groups, activists and welfare rights organizations, etc. (Carabine 2001: 281)

Part Three of the thesis reveals how particular *discursive strategies* or 'ways of deploying' discourses about convicted lawbreakers are put into operation with 'meaning and force' (Carabine 2001: 288). To this end, chapters seven, eight and nine of the thesis are based on a wide range of source materials discovered in historical archives.

Certain of these sources are, of course, drawn from somewhat high-ranking figures or institutions. For instance, the minutes, papers and correspondence of the fairly 'elite' group of penal reformers who constituted the Joint Working Party on Previous Convictions (the 'Gardiner Committee') feature heavily in chapter seven, whilst their final report (JUSTICE 1972) provides the focus of chapter eight. This chapter also draws in some detail upon a contemporaneous critique of the Report provided by Morris (1972). Hansard records of

debates held in the UK Parliament on the Rehabilitation of Offenders Bill (the ROB) make up the bulk of the data which contributed to chapter nine.

However, Mills (2003: 111-112) has also commented upon Foucault's own use of somewhat obscure documents, often neglected by other academics, in his research. The selection of this sort of source material is not just related to Foucault's own predilection for the bizarre, but because such documents 'allow us to see the dividing lines in the confrontations and struggles that functional arrangements or systematic organizations are designed to mask' (Foucault 2003: 7). Following this logic, it is essential to avoid selecting only materials produced by 'elites' in their 'official' or finalised form. Indeed, a much fuller picture of the 'confrontations and struggles' can be attained by paying equal attention to 'knowledges from below' (*ibid.*) or from long-ignored debates where contrary positions were adopted to the suggested forms of social practice under consideration. To ensure that voices 'from below' are given due prominence, the words of PWCs themselves feature heavily in Part Three of the thesis, particularly through their letters to Tom Sargant, the then Secretary of JUSTICE.

Mills' (2003) warns those adopting a Foucauldian methodology of the risk of over-generalising findings from the data sources which they select. This is particularly so when this often involves looking at very specialist, precise archival materials during the research process and 'drawing upon apposite extracts to support the argument' (Carabine 2001: 306). Indeed, as Carabine notes, the charge of selectivity in relation to the range of sources examined in a genealogical project can be hard to refute. Thus, the sources examined in chapters seven, eight and nine are to be *interpreted critically* with a 'profound and radical scepticism' (Mills 2003: 112) about the knowledge claims which they contain.

Chapter ten, which concludes the thesis, focusses on identifying the *effects* of certain discourses about punishment, rehabilitation and the 'rehabilitated person' *in the present*.

Here, the thesis draws on Foucault's later work on governmentality and biopolitics as discussed earlier. This will include the analysis of particular rationalities ('ways of thinking') which are promoted and sustained through the discourses of rehabilitation, moral desert and what it means to be a 'good' citizen as well as specific techniques ('ways of acting') which are made possible through the use of such discourse. The chapter argues that the normalizing power effects of classifying certain people as 'rehabilitated persons' (as opposed to those with 'unspent' convictions) creates certain regulatory outcomes in the present which stem from this distinction. This is not, however, to argue that such present-day outcomes were inevitable or even part of a 'grand strategy' to render PWCs perpetually marginal in society. Instead, as Mills argues, we should 'look for contingencies rather than causes' (2003: 114) in a Foucauldian history of the present. Whilst social scientists are often accustomed to looking for clear causes and effects in relation to social phenomena, Foucault's work suggests that analysts should instead trace the way that certain events happened and examine the contingent events which may, or may not, have played a role in their development. This thesis proceeds on that understanding.

Conclusion

This chapter has considered how Michel Foucault's work might contribute to a re-reading of the emergence (and erosion) of legal rehabilitation in England and Wales. This has included an overview of Foucault's work on discourse and its real-world effects, such as the creation of particular subject positions. Foucault's critical approach to writing history using genealogy was also discussed, as was his rejection of notions of historical 'progress' on issues such as punishment. An overview was also provided of Foucault's work on power, including the strategic exercise of power through particular forms of governmentality. Finally, the applicability of these Foucauldian ideas to the chapters which follow was previewed.

PART TWO: CONTEXTUALISING LEGAL REHABILITATION

4. The question of penal expiry

This chapter provides some context for the practice of legal rehabilitation in England and Wales by focussing some attention on *the duration of the effect of legal punishments.* That is, if we return to Lacey's (1988: 7) definition of punishment as 'unpleasant consequences', it is important to consider the factors which determine how long this 'unpleasantness' lasts and whether there is a definite cessation of the 'consequences'. This chapter considers the historical ambiguity surrounding these issues and examines whether the transition of the punished subject - from the status of 'criminal' or 'lawbreaker' back to condition of at least notional equality with other persons – has clarity within our various historical approaches to punishment. The chapter aims to demonstrate how the very idea of a precise 'end point' to punishment has been rendered uncertain throughout the history of English penality. The discussion spans punishments from the early modern period through to the Victorian era and this historical approach begins with a discussion of punishments which targeted the bodies and, indeed, the very lives of lawbreakers.

Branding for life and punishment beyond death

In the present, at least in *most* advanced, liberal democracies, judicially sanctioned forms of torture and execution have largely been abolished. However, before the emergence of the prison and other 'modern' penal strategies, a broad range of corporal and, in many cases, capital punishments were available across Europe (see Spierenburg 1995). England was no exception where certain offences could potentially incur punishments which were designed to ensure that the stigmatising effects of having *been punished* would persist well beyond the execution of sentence.

Branding and cropping

The practice of physically distinguishing lawbreakers as different or 'Other' has a long history. For instance, a short-lived Statute in 1536 aimed at the suppression of begging and

vagrancy decreed that a 'sturdy beggars' (those thought to be capable of work) could be whipped for a first offence and then have their right ears cropped for a second offence (Poor Law Commissioners 1834: 7). Repeated offending of this nature could potentially result in imprisonment and execution (*ibid.*). Rathbone (2005) notes how the option of branding lawbreakers was introduced in the Duke of Somerset's Vagrancy Act of 1547. The Act provided that vagrants could be subject to two years' servitude (effectively slavery) and branding with the letter 'V' as a penalty for a first offence. Attempts to escape from penal servitude were punishable by lifelong slavery, with any subsequent escape attempt leading to possible execution. Whilst Rathbone questions whether these extreme measures were ever actually used with any degree of regularity, the idea of branding clearly persisted. Thomas (2007: 6) highlights a later example from the Shoplifting Act of 1699 which allowed for branding of offenders on the left cheek. However, the stigma of the brand had the effect of rendering the lawbreaker permanently unemployable since nobody was prepared to offer work to anyone so visibly labelled as a 'criminal'. In terms of penal deterrence then, branding proved counter-productive, since it forced first offenders into further criminality. It therefore fell into disuse during the eighteenth century and was formally abolished in 1779 (see McLynn 1989).

The brutality of such punishments for what would now be regarded as relatively minor offences may be shocking to modern sensibilities. However, what is notable about these punishments is that, in addition to retaining the ultimate sanction of death, each piece of legislation included some sort of measure aimed at permanently marking out individuals who had previously offended. The powerful symbolism of such measures ensured that those subjected to punishment could never be truly 'free' of their status as former lawbreakers. However, this extension of the effects of punishment was nothing new. In respect of capital offences there existed an even longer tradition of practices which distinguished convicted lawbreakers as 'Other'.

The sentence of death

The hanging, drawing and quartering of those convicted under the Treason Act of 1351 was a prime example of *posthumous* punishment. The destruction of the offender's body was intended not only to reflect the seriousness of attacks on the authority of the monarch in comparison to other 'lesser' capital offences (Bellamy 2004: 13), but also to continue punishment into the afterlife. This was because, in many Christian traditions, the burial of an intact corpse facing towards the East was a necessary precondition for the resurrection of the body on the final day of judgement (Yorke 2006: 215; Abbot 1996: 33). It could, therefore, be argued that this posthumous destruction of the body was designed to extend the effects of punishment *beyond the point of death*.

With respect to such punishments, Godfrey and Lawrence (2005: 71) suggest that '[t]he picture towards the end of the eighteenth century and start of the nineteenth is…a complex one' since alongside such grisly practices as those described above came calls for reform of the capital offence statutes. In 1814, the legal reformer and parliamentarian Sir Samuel Romilly, proposed to reduce the penalty for High Treason to death by hanging with the body being merely placed 'at the King's disposal' (Romilly 1820: xlvi). However, an amendment to Romilly's proposal retained the logic of the original Treason Act, arguing that such a move would leave the punishment for High Treason in a state 'less than the punishment annexed to murder' (*ibid.*). It was therefore resolved that posthumous decollation (beheading) would be retained '"as fit punishment and appropriate stigma" in such cases' (*ibid.*). Such punishments were actually carried out in 1817 when Jeremiah Brandreth, William Turner and Isaac Ludlam (the 'Pentrich Martyrs') were executed outside Friar Gate Gaol in Derby for their involvement in revolutionary activities (Turbutt 1999: 1265-1271).

It therefore remains difficult to ascertain whether, even with the end of the 'Bloody Code' (c.1688-1820; see Hay 1975; Gatrell 1994; Evans 2013), a precise 'end point' to a state of

being punished can be clarified for those who suffered death. The availability of posthumous-punishments for specified offences meant that in some cases, even the finality of death did not result in the convicted person fully expiating their guilt. Even if executions were not always routinely carried out and reprieves were granted as an act of 'mercy' (see Hay 1975; Elmsley 2005: 258), the early nineteenth century certainly saw an increase in the number of executions (Gatrell 1994: 7) and the *possibility* of 'hanging, drawing and quartering' for treason was retained on the statute books until the late-nineteenth century. Indeed, posthumous decollation was not formally abolished until the Forfeiture Act of 1870

The Murder Act of 1752 allowed for the corpses of convicted murderers to be either hung in irons (gibbeting) or used for public dissection so 'that some further terror and peculiar mark of infamy be added to the punishment' (Harrison 1983: 6). Gibbeting in particular was intended to act as a deterrent to other would-be murders, as well as highwaymen and pirates. Posthumous dissection, often conducted in public, had the effect of rendering a death sentence for murder as more 'notorious' than that which was commonly available for theft during this period. The sentence of 'death with dissection' was retained until the Offences against the Person Act of 1828 and was only rendered obsolete four years later following the Anatomy Act of 1832 which permitted the donation of bodies for medical research purposes.

Ostensibly, the Anatomy Act was designed to curtail the practice of 'body snatching' and a repeat of murders in the style of Burke and Hare who killed their victims in order to supply cadavers to unscrupulous medics (Fitzharris 2011). However, the principle that those who were executed for their crimes could not, even in death, return to a state of equality to other 'innocent' people was also present in the Act since it included a direction that the bodies of executed convicts belonged to the Crown. Consequently, they were to be buried within the prison grounds in unmarked graves (often containing several bodies) rather than returned to family members for private burial. In 1868 the Capital Punishment Amendment Act added

the provision that a formal inquest be held following execution, however this legislation retained the requirement that the body be buried within the grounds of the prison unless the sheriff of the county directed otherwise. The 1868 Act also included more precise instructions regarding prison burials and the need to carefully record the position of each grave - practices which continued up to the abolition of the death penalty in 1965 (CapitalPunishmentUK.org 2015). Therefore executed prisoners in England were never treated, even in death, in an equitable manner to those who had *not* broken the law and suffered punishment.

Attainder and corruption of blood

In addition to suffering the death penalty, those convicted of treason or felonies could be subjected to a wider range of legal consequences which effectively extended the effects of punishment beyond death (Damaska 1968). During the Middle Ages, bills of attainder were often passed 'as an adjunct to a death sentence or following a commuted capital sentence' (Edgely 2010: 405). The consequence of such bills was to pronounce the 'civil death' of the condemned person and to inflict the additional punishment of 'corruption of blood' upon them.

In effect, attainder meant that whilst the individual was still *physically* alive they were *legally* dead, even if only for the short period prior to their execution. As a result, an attainted person's property was forfeited to the Crown and they were forbidden from entering into contracts and inheriting property. Also, their wives legally became widows and their children were orphaned. Moreover, any civil or political rights enjoyed by the attainted person were stripped from them. Thus they could not give evidence in court or begin legal proceedings against another person. Neither could they sit on a jury or, in later centuries when the franchise had been extended, vote in any elections (Edgely 2010: 405).

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

Bills of attainder were typically passed by medieval kings and queens against political enemies or those who posed a threat to the security of the monarch's position. Whilst they were mostly made against men, notable women made subject to bills of attainder included Anne Boleyn and Catherine Howard, who were stripped of their titles and had their marriages to Henry VIII annulled prior to execution. Henry VIII also famously attainted his chief minister Thomas Cromwell on charges of treason in 1540 (Schofield 2008). Later, in events which helped precipitate the English Civil War, a bill of attainder was passed by Parliament against Thomas Wentworth, the 1st Earl of Strafford and one of the King Charles I's leading advisers (Lerner 2002). Whilst not strictly a bill of attainder, a 'bill of pains and penalties' was tabled by Gladstone's government as recently as 1869. The bill was intended to deprive Daniel O'Sullivan, the elected mayor of Cork and a magistrate, of his offices in response to comments he had made which were supportive of an assassination attempt on the Duke of Edinburgh made by Irish nationalists. In the event, O'Sullivan was persuaded to resign and the potentially inflammatory effects of his 'attainder' were avoided (see MacDonagh 1974; McConville 2003).

O'Sullivan's case perhaps contextualises certain provisions in the Forfeiture Act of 1870. The Act abolished the automatic forfeiture of goods and property to the Crown following a

conviction for felony or treason. However convicted prisoners are still prohibited from voting in elections in the UK (Behan 2014; Drake and Henley 2014) and, as discussed in chapter two, PWCs can still be deprived of the rights to stand for election in many circumstances. That the origins of these civil disqualifications can be traced back to the ancient doctrine of attainder demonstrates how the ambiguity of penal expiry in the present is partly an outcome of long-standing historical practices.

Proportional punishment and the debt to society

By the end of the eighteenth century, many of the punishments described thus far were either abolished entirely or used far less frequently. By this stage, the need for certain constraints on the power of sovereign authorities had come to pose an important philosophical question for scholars of governance. In particular, these scholars were concerned with how the very idea of 'being governed', or of people being bound to obey certain laws and rules, inevitably placed limits on individual liberty or the 'natural' state of freedom (see Locke 1967 [originally 1689]). This section considers how, during the Enlightenment era, a reconfiguration of this sovereign form of power took place and what the implications were for the question of penal expiry.

Constraining sovereign power

During the earlier stages of the Enlightenment, philosophers such as Hobbes (1991 [originally 1651]) argued for a social contract as a means of avoiding the brute situation of a state of nature or a war of 'all against all'. Hobbes argued that this could only be achieved through strong, undivided government exercising an absolute sovereignty on behalf of the people in either a monarchical or parliamentary form. The centrality of the rule of law to the legitimacy and authority of the state was observed in Hobbes contention that: '[a] crime is a sin consisting in the committing by deed or word of that which the law forbiddeth, or the omission of what it hath commanded' (*ibid.*: 179). By contrast, Locke (1967 [originally

1689]) suggested that the arrangement of civil society should not be bound up in the authority of a sovereign figurehead. Jean-Jacques Rousseau also questioned the 'divine right' of monarchs arguing instead that 'the general will' of the people was sovereign arguing that: '[t]he strongest man is never strong enough to be always master, unless he transforms his power into right, and obedience into duty…Let us agree, then, that might does not make right, and that we are bound to obey none but lawful authorities' (1998: 8 [originally 1762]).

Appeals to a 'social contract' during the Enlightenment undoubtedly contributed to the demise of absolutist monarchies with their often brutal and, as we have seen, *perpetual* punishments. This is because social contract philosophy has, at its core, recognition of the rights of individuals against the sovereign power of monarchs or 'the state'. Ultimately, these ideas helped to form documents such as the American *Declaration of Independence* in 1776 and France's *Declaration of the Rights of Man and of the Citizen* in 1789. Hudson explains how Locke, for instance, conceived of a social arrangement under which:

> state power comes from 'tacit consent'…[where] members of a society agree to stop short of harming the life, liberty and property of others in the exercise of their own freedom, and to hand over to the state the role of punishing infringements of the laws enacted to uphold these rights and freedoms. (2003: 7).

The idea that 'consent' was required before the state could punish or curtail fundamental liberties might be read as a *restriction* on legal punishment, although Hudson (2003) notes that social contract philosophy also provided a new *legitimation* of the power to punish. That is, whilst punishment had previously been regarded as something of a 'divine right' held by absolutist rulers, in the post-Enlightenment age it began to derive its legitimacy from the belief that lawbreakers were somehow 'in breach' of the social contract between state and citizens. They were thus rendered morally culpable for their actions and 'deserving' of the

punishment which state authorities administered on behalf of all citizens. However, the Enlightenment also gave rise to an increased concern that the severity of penal sanctions imposed, and the expression of moral censure attached to lawbreaking, should occur in equal measure to the seriousness of the offences which gave rise to them.

Proportionality

Debates about the moderation of penal severity and what constitutes 'just deserts' in sentencing policy are well-rehearsed in the literature on punishment. Indeed, they date back at least as far as Montesquieu (1989 [originally 1748]) who argued that the retributive, violent and irregular punishments of the *ancien régime* were counter-productive because those who witnessed them became inured to the spectacle. Beccaria (2003 [originally 1764]) further advanced the call for greater moderation in punishment, questioning the ubiquity of capital offences and suggesting that these ran the risk of 'destroying the moral sentiments…registered in the human spirit' (p.22). Advancing a more reductionist penal code, he argued that it was 'better to prevent crimes than to punish them' (p.22) and that 'the obstacles that deter men from committing crimes should be stronger in proportion as they are contrary to the public good, and as the inducements to commit them are stronger' (p.21).

Greater clarity regarding the precise meaning of 'proportionality' in punishment was provided in the works of the philosopher Jeremy Bentham. As Stephen (1900: 267) noted, 'Montesquieu and Beccaria had spoken…of 'proportionality'…but without that precise or definite meaning which appears in Bentham's Calculus'. Bentham (1970 [originally 1789]) posited that 'all punishment in itself is evil' and that thus, from a utilitarian perspective 'ought only to be admitted in as far as it promises to exclude some greater evil' (p158). He regarded the primary purpose of punishment as being that of deterrence, although he also argued that it could have secondary ends such as disablement (or what we might now term 'incapacitation'), moral reformation, and compensation. However, the principle of deterrence

retained primacy due to Bentham's conception (following Hobbes 1991 [originally 1651]) of human behaviour as being governed by a 'felicific' or 'hedonistic calculus' through which individuals sought to maximise 'pleasurable' experiences and minimise those which were 'painful' or costly. However, in contrast to Hobbes, Bentham rejected outright appeals to a social contract (see Bentham 2010 [originally 1776]) and famously regarded the Lockean idea of natural rights as 'nonsense on stilts' (Waldron 2014).

Given his view of punishment as inherently 'evil' Bentham (1970) argued that punishment ought not to be inflicted where it was: (1) *groundless*, because no 'mischief' had occurred which needed to be prevented; (2) *inefficacious*, because the punishment could not actually produce the desired effect of preventing the mischief; (3) *unprofitable* (or *too expensive*), because the 'evil' committed by enacting the punishment was greater than the mischief prevented; or (4) *needless*, because the mischief could be prevented without punishment or because it might simply 'cease of itself' (p159). Given his desire that punishment not be 'unprofitable' Bentham argued for frugality as one of the core principles of proportionality, by which he meant the avoidance of a situation where 'any particle of pain is produced, which contributes nothing to the effect proposed' (p179). Moreover, the 'perfection of frugality' required that 'not only no *superfluous* pain is produced on the part of the person being punished, but even that same operation, by which he is subjected to pain, is made to answer the purpose of producing pleasure on the part of some other person' (p179; emphasis added). Bentham's position on the minimisation of penal suffering seems, therefore, to support the principled idea that punishment should end *immediately* once the intended goal of future crime reduction has been achieved. That is, that any punitive effect of a sentence which extended beyond the limits of what was absolutely necessary to achieve a reduction in 'mischief' would be morally unacceptable.

But in this quest for greater proportionality Bentham's prescriptions for the calculation of appropriate punishments could not avoid rendering the sentencing of lawbreakers (and thus the determination of an end point to punishment) more of an art than a precise science. To explain, Bentham (1970) was concerned that the gravity of an offence should be reflected in the degree of punishment inflicted, arguing that the 'proportion between the one evil and the other will therefore be different in the case of each particular offence' (p163). Moreover, by seeking to ensure that punishment was both frugal *and* profitable his goal of penal moderation gave way to the utilitarian principles underpinning his penal philosophy. That is, Bentham explicitly suggested that the social 'usefulness' of the individual offender might be reflected in their sentence by arguing for due consideration of the 'extraordinary value of the services of some one delinquent; in the case where the effect of punishment would be to deprive the community of the benefit of those services' (p164).

A consequence of this utilitarian thinking is that the extent of any punishment suffered by an individual might be as much a reflection of their perceived 'value' to society as it is of the gravity of their crime. By extension then, the *expiry* of any sentence of punishment might be linked to the social 'usefulness' of each individual lawbreaker. Indeed, whilst Beccaria had 'argued for the unpredictable, irregular, passionate, and subjective chaos of the *Ancien Régime* to be replaced with the simplicity and certainty of an objective, detached, smoothly running (like clockwork) system of tariffs' (Lippens 2005: 129), Bentham had arrived at a position which sought to tailor punishments which were calculated in response to both the 'mischief' committed *and* the characteristics of the individual lawbreaker.

Calculating the debt to society

Alongside his contemporary John Howard, Bentham would become a significant figure in the development of the modern prison. Indeed, he was concerned not merely with the *philosophical* problem of how greater proportionality might be introduced to punishment, but

with the creation of *practical* models for the reformation of lawbreakers. However, it might be argued in the subsequent pursuit of new and better technical prescriptions for reform the idea of penal *expiry* perhaps became subsumed by a consequentialist pursuit of penal *efficacy.* Throughout the nineteenth and early twentieth centuries, in particular with emergence of the modern prison, concern for the reduction of criminal offending and the maximisation of the prison's efficiency took precedence over earlier concerns about sovereign authorities unnecessarily restricting individual liberty. Indeed, during this period the duration and ultimately the *cessation* of penal sanctions would become increasingly contingent not just upon the gravity of offences committed but upon 'expert' assessment of individual lawbreakers (see Foucault 1977; 1978b). These issues are explored in the next chapter which considers the development of 'correction', 'reform' and 'rehabilitation' as penal ideologies.

One legacy of the Enlightenment-era philosophers which remained relatively constant throughout this period and into the present is the linkage between punishments, the social contract and a notional 'debt to society'. This debt exists as a metaphor for a sort of civic and moral deficit accrued by lawbreakers following their commission of an offence representing a breach of the social contract. The debt must, therefore, be 'paid off' by the lawbreaker suffering an appropriately calculated punishment. Within this formulation, proportional punishment becomes a matter of judgement concerning the 'size' of the debt accrued and its meaningful quantification. The measurement of individual 'debts to society' has therefore given rise to a complex penological question for the state, the individual lawbreaker and society more generally. This concerns how each of these stakeholders understands when the debt has been 'paid off' and agrees when the censorious effects of a punishment should end.

As already discussed, the bodily punishments largely associated with the pre-Enlightenment era often ensured that the stigmatising effects of having been punished lasted for life or even,

in many cases, into the 'afterlife'. However, the gradual replacement of capital and corporal punishments with, for instance, periods of penal confinement did not, as might be expected, resolve this problem of penal expiry. Instead, it merely *restated* the problem in a new form – as a question of appropriate quantification. This problem is most clearly linked to the use of imprisonment where punishments are served in periods of time. The development of the modern prison coincided, of course, with the growth of capitalist industrial development and its associated institutions such as the factory where the efficient use of time was also a concern (see Rusche and Kirchheimer 1967; Melossi and Pavarini 1981). Pashukanis (1978: 180-181) has explicitly linked this commodification of time under capitalist modes of production to its use as a yardstick for penal severity. He notes that the '[d]eprivation of freedom for a period stipulated in the court sentence is the specific form in which modern…bourgeois capitalist, criminal law embodies the principle of equivalent recompense of man in … human labour measurable in time'.

This temporal quantification of punishment might, of course, suggest a greater degree of certainty as to when punishment was supposed to end. By 'doing their time' the lawbreaker can, supposedly, repay their debt to society and become free to enjoy all of the rights and liberties enjoyed by others. However, whilst the serving of time might go some way to expiating the guilt of the lawbreaker in the eyes of the criminal justice system, this has not always meant that the stigma associated with having *served* a punishment is expunged in the eyes of other members of society. Whilst not wishing to stretch the metaphor to the point of absurdity, whilst an individual's debt to society might be repaid through punishment, the same cannot be said for the 'bad credit history' which their original conviction represents. It would not, however, be true to say that no attempt was made during the transition to a more transformative penality to resolve the problem of how lawbreakers who had served their sentences 'ought' to be treated. Indeed, those responsible for administering punishment in Britain's overseas colonies attempted to practically resolve this issue.

Emancipation from punishment

The punishment of banishment or exile from the community, often as an alternative to corporal or capital punishment, has existed since ancient times. For instance, the Valerian and Porcian laws of the Roman Republic were intended to protect the bodily sanctity of citizens and exempted them from having to endure forms of punishment such as whipping, scourging, or crucifixion which were regarded as inherently degrading or shameful. As an alternative, these laws provided that citizens could escape a sentence of death by going into voluntary exile (Lintott 1999: 37-38). The use of banishment was also present in England in the fifteenth century as a response to vagrancy, although in these circumstance with much less regard for the integrity of the punished subject. The Vagabonds and Beggars Act of 1494 sought to make an example of vagrants before physically banishing them, decreeing that: 'Vagabonds, idle and suspected persons shall be set in the stocks for three days and three nights and have none other sustenance but bread and water and then shall be put out of Town' (Poor Law Commissioners 1834: 6).

Transportation and earning one's freedom

This use of banishment persisted in England and was given more widespread statutory footing in the Transportation Act of 1718 (Morgan and Rushton 2013). This legislation identified transportation as the preferred method for disposing of the vast majority of felons where execution was deemed too severe a penalty (Soothill 2007: 32). Thus from the eighteenth century until the middle of the nineteenth, Britain operated a system of penal transportation to its territories overseas. Initially this was to the colonies in America, however the American Revolution and Declaration of Independence in 1776 brought transportation to America to an end and the preferred destination became Australia (Godfrey and Lawrence 2005: 73).

Whilst, in some cases, a sentence of transportation could be imposed for life, in others the

sentence would be imposed for a set number of years after which the transported convict was permitted to return home. However, since no assistance was offered to lawbreakers released from their sentences to pay for their passage, many opted to stay in the colony as 'free persons', hoping to find employment as servants of the colony (see Hirst 1995). The first 'emancipist' of this kind was John Irving, a young trainee surgeon convicted of larceny in 1784 and sentenced to transportation for a period of seven years. Upon arrival in Sydney, he was employed as a surgeon's assistant at the hospital and, over the next two years, proved his worth to such an extent that the Governor of New South Wales, Arthur Phillip, granted Irving his emancipation on the grounds of 'unremitting good Conduct and meritorious Behaviour'. Irving remained in Australia and continued to work as a surgeon until his death in 1795 (Gray 1954). Over the next few years, the gradual process of emancipating transported convicts in New South Wales was formalised. The third Governor, Phillip Gidley King, introduced a 'ticket of leave' system which permitted convicts certain freedoms, such as the right to undertake paid employment, on the grounds that they continued to maintain a pattern of good behaviour. This was, in part, a response to the reality that three-quarters of the population of the colony was comprised of convicts (Hirst 1995: 238-243).

Later the fifth Governor of New South Wales, Lachlan Macquarie, introduced 'certificates of freedom' in 1810 which allowed ex-convicts who had served their sentences to have all the rights and privileges of free subjects restored to them. Macquarie had arrived as Governor in the wake of the 'Rum Rebellion' of 1808 in which his predecessor, William Bligh, had been overthrown by a combination of his military subordinates and members of the local business community. At this time, clear social divisions existed between free settlers (or 'exclusives') and ex-convicts who had served their sentences and chosen to settle in the colony. Quickly realising that he could not form a stable and orderly society in the colony without the inclusion of the (majority) ex-convict population, Macquarie appointed many emancipists to significant positions of responsibility including those of architect, surgeon and even, in one

instance, magistrate (Ellis 1952; Dillon and Butler 2010). These moves were, however, regarded as scandalous amongst free settlers who complained to London about Macquarie's liberal approach. In response, the UK Government dispatched a judge, John Bigge, to New South Wales to undertake an 'Inquiry into the state of the colony of New South Wales' (Bigge 1822: 118-155). The report of this Inquiry was highly critical of Macquarie's 'excessive' use of his authority to issue tickets-of-leave and pardons, and of his appointment of emancipists to senior positions. Governor Macquarie resigned prior to the report's publication (Spigelman 2009) and his efforts to bring about a clear demarcation of an end point to the stigmatising status of 'convict' were soon curtailed.

An alternative conception of how convicts might 'earn' their emancipation was provided two decades later in the experimental regime established on Norfolk Island by Captain Alexander Maconochie. At the time of his appointment the practice of transportation was facing severe criticism back in Britain. After the passage of the Slavery Abolition Act of 1833 concerns were expressed that the use of convict labour by colonists meant that the penal colonies were little better than 'slave societies'. In response, Maconochie proposed to replace the punishment of 'assignment' (under which convicts were placed at the disposal of a private master) with a scheme which linked a convict's sentence not to a period of time, but a quantity of labour measured through a system of marks. By completing set tasks satisfactorily and demonstrating good behaviour, convicts could earn 'marks' and therefore draw closer to the completion of their sentence. Food and clothing could be bought by the convicts but, in a measure designed to deter over-indulgence, this required them to spend their accumulated marks. Moreover, whilst the convicts had a free choice of who they could associate and work with, if any of these people committed further offences, all in the group could lose marks. This system was designed to incentivise conformity so that convicts could influence how soon they were able to gain, first of all, a ticket-of-leave and ultimately their freedom (Hirst 1995: 256-257).

Once again though, colonists on the Australian mainland were dismayed at such apparently lenient treatment of the 'hardened convicts' on Norfolk Island. They adopted the view that these 'old hands' had not been sent to the island to be reformed, but that they should instead be made to suffer as a deterrent to other convicts who, through fear of similar treatment, would remain focussed on their work. Ultimately, Maconochie was dismissed by the Colonial Office in London, despite a favourable report being filed by George Gipps, the then Governor of New South Wales. Maconochie was also unsuccessful in his attempts to introduce his 'marks system' to the English penal system during his short tenure as governor of the new Birmingham Prison (Hirst 1995: 260-262; see also Morris 2002) although Moore (2016) has recently suggested that this regime may have relied more heavily on coercion and corporal punishment than reform. One facet of the system of transportation was, however, adopted back in Britain.

Ex-convicts in Victorian society

Whilst the Penal Servitude Act of 1853 abolished all but long-term transportation, it also introduced the ticket-of-leave to the British mainland for convicted, adult prisoners held within the growing network of penitentiaries. Under this legislation, tickets-of-leave could be issued for prisoners near to the end of their sentences on the proviso that they were 'not guilty of idleness or misconduct' during their detention (Elmsley 2010: 289). A reduction in the use of transportation in the decade prior to this Act had caused a 'build-up of tension amongst frustrated convicts' who had been left behind in the national penitentiaries (*ibid*.). Thus, the measure arguably represented a practical solution to institutional pressures such as overcrowding rather than a clear moral commitment from the government to bring the punishment of lawbreakers to an earlier end.

Under the terms of their release, ticket-of-leave men were required to conform to expectations of good behaviour and were subject to recall to prison if they continued to

offend, associated with others of 'bad character' or led an idle and dissolute life without any visible means of support (Thomas 2007: 9). Upon introducing the ticket-of-leave system the Home Secretary, Viscount Palmerston attempted to assuage public anxieties about 'convicts at large', suggesting that:

> The convict must at some period or other lapse into the mass of the community. It was important that before that period arrived, he should have acquired habits of self-control, so that his conduct, when set free, should not be injurious to the interests of the community at large. (HC Deb, 12th August 1852, vol. 129, c.1685)

Despite these assurances, the introduction of the policy proved far from uncontroversial. Ignatieff (1978: 201) suggests that a degree of public panic accompanied the release of ticket-of-leave men and consequently they ended up being 'blamed for every crime, large or small' as well as 'barred from most employment, harassed by the police and vilified in the press.' Ignatieff also notes that 'a deeply felt sense of victimization at the hands of the press' amongst ticket-of-leave men eventually 'vent[ed] itself even against Henry Mayhew, the most sympathetic exponent of their cause in the London press' (p202) at a meeting in January 1857. Ignatieff argues that this stigmatization was particularly prevalent in *The Times* newspaper where it had been heavily implied that ex-prisoners, despite their not really possessing any deep political convictions, posed a threat to the security of the state. These insinuations followed ex-prisoners playing a key role in the Paris uprisings of 1848. Also numerous pickpockets and other petty criminals had been present at the Chartist demonstration at Kennington Common in June of the same year. Later, there arose a number of 'panics associated with several violent robberies committed by convicts released on ticket of leave' (McGowen 1998: 93). Of particular note were the famous 'garrotting scares' in 1856 and 1862 that lead to the introduction of the Security from Violence (or Garotters') Act in

1863 (Elmsley 2010: 290; Blom-Cooper 2008: 14) and, as discussed in chapter one, the Habitual Criminals Act of 1869.

The unenviable social status of ticket-of-leave men is highlighted by the fact that despite hostile coverage in many sections of the press, their plight did achieve some media recognition during this period – even in the previously hostile *Times.* In an editorial from 1856, the newspaper asked:

> Can anything much more desolate be conceived than the position of a discharged convict in an overcrowded country? As soon as he steps forth from his home in the hulks, or from the protection of Portland, and lifts his criminal eyes upon the first unconvicted pieman that crosses his path, he feels that in all means for earning an honest livelihood he is immeasurably the inferior of that humble tradesman. All the respectability of the world is against him.[16]

At this stage statutory supervision of ex-prisoners and other lawbreakers in the form of 'probation' had not yet been introduced. Instead, the police were given responsibility for monitoring ticket-of-leave men who were required to report to them on a monthly basis. However, Thomas (2007: 9) suggests that the police were over-zealous in respect of these supervisory duties, in particular because their power to recall ticket-of-leave men to prison was not kept in check by the requirement of a court appearance. On these developments Ignatieff (1978: 204) suggests that the extension of surveillance from within prisons to those released on licence into the community was indicative of a 'general disillusionment with the reformative promise of penitentiaries' and the discovery that there were offenders who 'resisted all attempts to reform them'.

[16] Editorial, *The Times*, 21st October 1856. Source: TDA

The harassment of ticket-of-leave men trying to find work became so problematic that in 1862 the commissioner of the Metropolitan Police issued an instruction that: 'the police are not to interfere with convicts on ticket-of-leave, so as to prevent their following any honest course for earning their living. Should the convicts obtain employment, the employers are not to be informed' (cited in Thomas 2007: 9). Elsewhere, voices spoke against any form of police supervision of ticket-of-leave men. Joshua Jebb, the former Surveyor-General of Convict Prisons, made the case that 'a ticket-of-leave man, as a general rule, is a proscribed man with the public. However desirous he may be, and however hard he may strive to regain his character, a brand has been put upon him that follows him to his grave' (cited in Doherty 2013: 974). Jebb also suggested that:

> To impose conditions and restrictions that would effectually stamp [ticket-of-leave men] as individuals belonging to a criminal class, in this country would be manifestly a most inexpedient exercise of power, and one that would be calculated to defeat the entire object of an improved system of convict discipline. . . To impose police supervision over a poor wretch struggling to find employment is the way to add to his difficulties and throw him back into crime instead of keeping him out of it. (Jebb 1863; cited in Doherty 2013: 974)

Therefore, instead of police monitoring, Jebb suggested that a more informal and less-coercive supervision conducted by 'benevolent individuals' was more appropriate and had a greater chance of promoting reintegration (Doherty 2013). However, the emergence of community-based supervision for ex-prisoners which Jebb seemed to be advocating did not occur in Britain until several decades later. Nor did this work occur on a full statutory basis until the Probation of Offenders Act 1907 (see Robinson and Crow 2009: 23-24). Rather, as Ignatieff explains:

> the state moved towards a policy of identifying this sub-population [of ex-prisoners] as accurately as possible, supervising their movements on the street and then incapacitating them as quickly as possible by renewed confinement. In this strategy the institution [of imprisonment] was used, not for purposes of reformation, but for penal quarantine. (Ignatieff 1978: 204)

In order to understand how state policy could have departed so far from the principled position that lawbreakers might somehow repay their 'debt to society' by suffering punishment, it is necessary to return to the emergence of the penitentiary system which came to dominate the British penal landscape. In particular, it is necessary to consider the regulation of the conditions of penal confinement and the influential doctrine of 'less eligibility' which underpinned them.

From less eligibility to non-superiority

Early concern with conditions in Britain's prisons included the Quaker George Fox's criticisms of prison hygiene in the 1650s and investigations into conditions at Newgate and Marshalsea by organisations such as the 'Society for the Promotion of Christian Knowledge' in 1702 (Higginbotham 2010: 37). Despite this long history of campaigns over dire prison conditions the late-eighteenth century was still:

> an age when debtors as well as criminals were thrown into prison, and when the whole prison system was so wretchedly organized that in some gaols the very warders did not dare to go into the felons' cells for fear of contamination. (Marshall 1969: 249)

The use of transportation to the American colonies was effectively brought to an end by the Declaration of Independence on July 4th 1776. This development served only to exacerbate

the squalor of British prisons. The dire conditions of penal confinement drew the attention of the Quaker philanthropist and Sheriff of Bedford John Howard whose self-funded report *The State of the Prisons* (1777) exposed not only poor conditions in the many 'houses of correction' and city, town and county gaols, but also the extent of corruption amongst gaolers. Howard's recommendations proved instrumental in improving the layout and organisation of prisons, their security, order and governance as well as the quality of prisoner health (including the improvement of both diet and the provision of an adequate supply of water). Howard was also particularly concerned that the recruitment of prison staff should be restricted to individuals who would set a good moral example (Higginbotham 2010: 38-40). Critically, his report also 'provoked some enthusiasm among reformers to identify the prison as a means of both punishing *and reforming* offenders' (Soothill 2007: 31; emphasis added). Howard also contributed to the drafting of the Penitentiary Act 1779 which provided for two new prisons to be built in London (one for men, the other for women) where those who might otherwise have been transported overseas could be imprisoned for a period of two years (Elmsley 2010: 276). Significantly, this Act also sought to bring prisons under central state control. However, an additional problem coincided with this recognition of the need for reform of the penal system.

The emergence of the 'less eligible' subject

By the 1790s, poor relief programs had been 'stretched to the limit' as a result of 'increased social mobility, industrialization, and economic fluctuations' (Sieh 1989: 161). The moral tone with which the 'deserving' and 'undeserving' poor came to be spoken during this period increasingly echoed earlier distinctions between the 'sturdy' and 'impotent beggars' who had been targeted by earlier corrective penal strategies (see Geremek 1994). These discourses led public administrators to seek 'principles to guide their actions' (Sieh 1989: 161) in the creation of a new poor relief system. One of these principles which would guide both welfare and penal policy for years to come was that of 'less eligibility'. This doctrine was predicated

on concerns that the poor might deliberately choose to rely on systems of poverty relief if living conditions in the workhouses appeared more desirable to them than the prospect of making a living through their own labour (Sieh 1989: 163). Its author, Bentham, described the idea thus:

> If the condition of persons maintained without property by the labour of others were rendered more eligible, than that of persons maintained by their own labour then…individuals destitute of property would be continually withdrawing themselves from the class of persons maintained by their own labour, to the class of persons maintained by the labour of others. (Bentham 1796; cited in Sieh 1989: 162).

Following the report of the Royal Commission on the Poor Law (1832-1834) - the first significant overhaul of the Elizabethan Poor Law Act of 1601 - these ideas were to become firmly embedded into a more centralised and uniform 'relief' policy introduced via the Poor Law Amendment Act of 1834. Alongside an 'assurance that no-one need perish from want' the Poor Law Commissioners (1834: 227) expressed the opinion that 'the mendicant and vagrant [should be] repressed by disarming them of their weapon, the plea of impending starvation' (*ibid.*). Sieh suggests that this approach was to prove 'effective in preserving the class structure and in maintaining its hegemony in class relations' (1989: 162).

The later application of less eligibility to the penal system (though not, it should be stressed, by Bentham who died in 1832) was intended to ensure that the threat of imprisonment retained a deterrent effect for those who might be tempted to commit crime in order to improve their standard of living. For the new wave of penitentiaries which were soon to be opened, the principle would mean that in practice: '[t]he upper margins for the maintenance of the prisoner …[were]… determined by the necessity of keeping the prisoner's living below

the standard of the lowest classes of the free population' (Rusche and Kirchheimer 1967: 108). Thus, as penitentiaries came to dominate the penal landscape in the Victorian era (Garland 1985), voices in both the media and in politics came to advocate not only longer sentences for members of the 'criminal classes' but also harsher regimes comprising 'hard labour, hard fare, and a hard bed' (McGowen 1998: 93). However, anxieties over released convicts in the 1850s and 1860s (as discussed above) would also help to ensure that the 'less eligibility' principle found a form which was detrimental to the interests of those *who had already served their sentences*.

The problem of 'non-superiority'

In *The Dilemma of Penal Reform*, Mannheim (1939: 57) provided an intriguing expansion of the less-eligibility principle by discussing how it was 'sometimes exchanged for...the principle of non-superiority'. This he defined as: 'the requirement that the condition of the criminal *when he has paid the penalty for his crime* should be at least not superior to that of the lowest classes of the non-criminal population' (*ibid.*, emphasis added). In describing this passage of text, McConville (2015 [originally 1981]: 211) suggested that 'Mannheim makes too much of his distinction between 'less eligibility' and 'non-superiority'' but then considers the distinction only in relation to the regulation of conditions in Pentonville and Millbank prisons. In so doing, McConville arguably fails to recognise the importance of the point which Mannheim was making – that less eligibility was not only 'the most formidable obstacle in the way of Penal Reform' (1939: 59) but that it had evolved from a principle concerned with the regulation of prison conditions into one which governed the treatment of lawbreakers *after punishment.* Fox (2001: 133 [originally 1952]) and Hynes (1989: 313) also yoked less eligibility and non-superiority together, although Sieh (2006: 353) has recently been much clearer on the distinction. Nonetheless, non-superiority has been given very little attention in academic criminology.

Mannheim suggests that the original intention behind the application of less eligibility to the penal system was to render the introduction of *reformative* confinement more acceptable to public opinion:

> When deterrence as the chief aim of punishment became increasingly supplemented by the idea of reformation, public opinion, in harmony with many penal reformers, insisted that the new idea of reformation had somehow to be made innocuous and this process of removing the sting from it was carried out largely by means of an application of the Poor Law principle of less eligibility to the penal problem. (1939: 56-57)

Therefore, by insisting that those undergoing 'reform' would not enjoy conditions of confinement which were preferable to those experienced by the poorest non-lawbreakers, the idea of reformation was rendered palatable. However, Mannheim also argued that the addition of a non-superiority principle to that of less eligibility had the effect of *eliminating the function of deterrence* for those at the bottom of society. Arguably this was because those who offended could not be deterred by the prospect of losing out on any future improvements in their social status *after punishment* if such a possibility was to be permanently denied to them. However, Mannheim also suggested that the introduction of these twin principles involved:

> A changing-over from a purely psychological principle [of penal deterrence] to an application of sociological ideas which requires the knowledge of objective standards, instead of more or less vague psychological hypotheses…the principles of less eligibility and non-superiority require at least some knowledge of social conditions and of their valuation by the different classes of society. (*ibid*. p58)

That is to say the 'pegging back' of the condition of prisoners and the status of PWCs could only be achieved by evaluating their position relative to those who experienced the lowest standards of living. However, despite the obviously exclusionary implications of these principles, Mannheim (1939: 58) noted that they also formed 'a kind of link between the criminal and the non-criminal population, by circumscribing the social standing of the prisoner, if only in a negative way. The mere fact of being made the object of a comparison creates a link between both parties of the comparison.'

Recognising the social implications of the non-superiority principle, and the social harms which could result from the stigma of punishment, Mannheim (1939: 96) suggested that the provision of 'after care' for ex-prisoners could have only a limited impact 'as long as there is hidden beneath the surface of the community the belief in the justness and inevitability of the principle that the ex-prisoner ought not to be treated more favourably than any other citizen'. He went on to argue that as a result of punishment:

> It is not only the prisoner's liberty, it is usually his and his family's whole existence, their livelihood and their reputation that are affected or even destroyed. The State has here placed itself in the role of a Shylock who, being entitled to a pound of flesh only, would take the blood of his debtor also. As a consequence, it becomes the legal duty of the State to compensate the prisoner for this excess of evil that the execution of the penalty has inflicted upon him. (1939: 97)

Mannheim also remarked on the implications for ex-prisoners of the transition from the classical school of criminal law – in which the punishment should fit the crime – towards 'the modern sociological school [which] tries to adapt the treatment to the individual needs of the offender' (1939: 98). He suggested that in many cases discharge from custody might occur

later, even for relatively petty offences, because of a greater perceived 'treatment need' on the part of the lawbreaker. Therefore, he argued that society ought to 'regard the fact of discharge in itself as a presumption that the offender has become reformed' and therefore 'it is no longer the offender who has to prove his reformation, but the community which has to rebut that presumption if it wants to treat the offender as unreformed' (p99). As this thesis explores later, the ROA would fall a long way short of upholding this clear moral principle.

Conclusion

What is evident from the various punishments discussed in this chapter is that they each possess a fundamental ambiguity about precisely when the 'unpleasant consequences' (Lacey 1988: 7) are meant to end. This is because the signification of shame has played a central role in the history of English penality. In the present of course, physical punishments such as branding and ear cropping have given way to a broad range of fines, community sentences and custody. However, with this transition in punishment 'from the body to the soul' (see Foucault 1977: 16), it has arguably become even *less clear* precisely when a punishment truly ends. The persistence of the twin doctrines of 'less eligibility' and – as discussed above - 'non-superiority' has ensured that the enduring post-sentence effects of shame continue in the present. This is evidenced by the pains of criminalisation described in chapter two. Indeed, as Foucault suggested: '[f]rom being an art of unbearable sensations punishment has become an economy of suspended rights' (1977: 11).

The logic of shame has been retained and even, it could be argued, expanded in the present (see MOJ 2014b). With the obvious exception of community payback schemes, contemporary punishments are not, for the most part, conducted publicly in the present. However, sentencing hearings which determine punishments are open to the public and, in many cases, they are also reported upon in the media. Therefore, these hearings continue to degrade the social standing of lawbreakers by publicly besmirching their reputations. In some

exceptionally serious cases, this has even applied to the public identification of child perpetrators who can suffer lifelong reputational damage (see Haydon and Scraton 2000). With the emergence of both online and 24-hour news reporting, the public signification of shame at sentencing hearings (and beyond) has a wider reach than ever before and with the advent of social media, the general public has never had such ease of opportunity to engage (through commentary) in acts of denunciation against lawbreakers. As already discussed in chapter one, this has been exacerbated by the 'Google effect' which often ensures that details of an individual's conviction and sentence are, if reported online, readily accessible to all for an indefinite period (see Calvert and Bruno 2010). Moreover, traces of the laws of 'attainder' and 'civil death' can be found in the present. This is exemplified in the denial of voting rights to prisoners (Drake and Henley 2014; Behan 2014) and the continued existence of the 'Honours Forfeiture Committee' which can recommend to the monarch that a title be stripped from an individual sentenced to more than three months in prison (see UK Government 2015). This trace is, however, more broadly exemplified by the *de jure* and *de facto* forms of post-sentence discrimination (discussed in chapter two), which hold PWCs *who have already served their sentences* to an indefinite standard of non-superiority.

From one perspective it could, of course, be argued that the public denunciation of wrongdoing plays a role in shaping the conscience collective in society and reinforcing shared moral sentiments (Durkheim 1933; see also Garland 1990: 23-46 for a critique). In this interpretation, the shame and condemnation associated with punishment plays a functional role in fostering social solidarity amongst purportedly 'law-abiding citizens'. But, by contrast, it might also be argued that where such commonly-held moral sensibilities produce punitive reactions which do not expire upon completion of the lawbreaker's sentence, then they actually have the potential to be *corrosive* of social solidarity – especially when a significant proportion of the population become permanently 'attainted'. Moreover, whilst rituals of public denunciation associated with sentencing and punishment might serve such an

expressive function, it is debatable as to whether they actually constitute a *necessary* part of the criminal justice process, especially when viewed from a reductivist perspective.

On the issue of 'shaming', Braithwaite has long recognised that 'sanctions imposed by relatives, friends or a personally relevant collectivity have more effect on criminal behaviour than sanctions imposed by a remote legal authority…because repute in the eyes of close acquaintances matters more to people than the opinions or actions of criminal justice officials' (1989: 432). Amongst the alternatives, Braithwaite discusses the case of Japan where long-standing traditional ceremonies of apology and restoration serve the function of mitigating the negative effects of shame which can arise from formal criminal justice proceedings (pp. 64-65). However, as suggested in this chapter, the quest for penal efficacy which commenced in earnest in the nineteenth century has perhaps tended to obscure the principled idea that punishment should have an ultimate end point resulting in the full requalification of the convicted lawbreaker. Moreover, the public signification of shame and 'disqualification' of personhood which occurs within criminal courts in England and Wales is not countered by a comparable ceremony of requalification which restores to lawbreakers all of the rights of citizenship – rights which have become, in Foucault's (1977: 11) terminology, 'suspended'. In the present, the absence and perhaps impossibility of a publicly conducted form of *civil resurrection* - to counter the effects of contemporary *civil death* – remains problematic and, as this thesis explores, the ROA was a considerable compromise towards achieving a full requalification of PWCs.

5. Transformative penalities and censured subjects

To think and speak in general terms about the 'rehabilitation of offenders' is somewhat problematic. Rehabilitation is a term which has throughout history taken on a range of different meanings and connotations. As Carlen has recognised:

> Early conceptions of rehabilitation in Europe were provoked by the formal and legal argument that once lawbreakers have paid the penalty for a crime, all record of the criminal conviction should be removed so that they can begin with a 'clean slate' and re-assume all the usual opportunities and privileges of citizenship and especially in relation to employment. Even so, formal recognition of the stigmatising effects of a criminal conviction was not incorporated into English law until the 1970s…And if the concept of 'rehabilitation' had remained focused solely upon the formal removal of criminal stigma, it would not have become so difficult to define. (2013: 91-92)

The ambiguity surrounding the concept of rehabilitation which Carlen warns us about is derived from the fact that the 'formal recognition' of 'stigmatising effects' to which she refers (in the ROA) was preceded by a number of alternative and occasionally contradictory understandings of, approaches to and justifications for rehabilitation. Indeed, McNeill (2012) describes four different forms of rehabilitation. *Psychological* rehabilitation 'is principally concerned with promoting positive individual-level change in the offender' (McNeill 2012: 27) and provides the rationale for including therapeutic interventions and 'offending-behaviour courses' as part of a sentence. Linked to this is the notion of *social* rehabilitation which, particularly in European jurisdictions, involves both the restoration of a lawbreaker's social status and also their access to the personal and social means to do so (van Zyl Smit and Snacken 2010). *Moral* rehabilitation conveys the notion, discussed in chapter four, that a lawbreaker must 'pay back their debt to society' in some way before being able to trade up to

a restored social position as a citizen of good character (McNeill and Maruna 2010). Finally, when this notional debt has been repaid, the former lawbreaker may benefit from a process of *legal* or *judicial rehabilitation* as defined in chapter one. To these four forms might be added the related concept of 'natural rehabilitation' (or desistance) whereby some individuals spontaneously cease their law-breaking behaviour and 'grow out' of criminality (see Sampson and Laub 1995; Maruna 1999, 2001; McNeill 2013).

Legal rehabilitation is distinct from the other models or ways of thinking about rehabilitation since it concerns the nature of the relationship between the law, individual lawbreakers and the societies in which they live as well as the ways in which they are governed as subjects *after* they have paid the legal penalty for their crime. In some jurisdictions such as France, one way in which legal rehabilitation can occur is through a formal ceremony or judicial ritual at which desistance is officially acknowledged (Herzog-Evans 2011). Crucially, PWCs in France can apply for judicial rehabilitation relatively soon after their conviction, in some cases after only one year (see Stacey 2015). However, in England and Wales the ROA does not focus so much on helping a person desist but in recognising a lengthy conviction-free period *retrospectively*.

For the reasons outlined in chapter two, formal recognition of the successful desistance of PWCs from offending is a matter of considerable social importance. However, to fully understand the emergence of legal rehabilitation in England and Wales, it is necessary to first consider the historical basis of the other dimensions of rehabilitation and of earlier practices which aimed at the 'correction' or 'reform' of lawbreakers. This is important because, as this chapter will show, various historical approaches to correction/reformation/rehabilitation have given rise to and sustained discourses which construct particular imaginaries of the convicted lawbreaker as a knowable subject and thus of the suitability of PWCs for formal or legal requalification as citizens.

This chapter approaches the topic of rehabilitation by providing an historical overview of what might be termed 'transformative penalities' – that is, of the modalities of punishment which have aimed to effect behavioural, moral or psychological change in convicted lawbreakers, and where the justifications for these approaches have not been solely retributive or incapacitative. The chapter also discuss how the rehabilitative project went into decline during the 1970s, driven partly by a collapse of faith in the 'treatment model' which had underpinned the modernist penal framework. It also considers in detail precisely *who is subjected to rehabilitation* in present-day England and Wales by considering the complex needs of those sentenced to imprisonment. A brief consideration of the inherent class, racial and gender biases which pervade transformative penalities in the present is also included. The chapter then concludes by asking precisely who rehabilitation is designed to benefit in an era when post-sentence controls on PWCs have expanded.

Transformative penalities

Correcting the idle, reforming the immoral

Identifying the point of origin for the use of penal measures to transform the behaviour of 'deviant' subjects is complicated by the fact that legislation concerning the punishment of lawbreakers was not introduced with uniformity in England until at least the nineteenth century. Prior to this point, punishment was largely administered in a somewhat arbitrary and localised manner and thus there are both temporal and spatial variations to consider. Indeed, it was not until the post-Enlightenment era and the Industrial Revolution that a 'progressive change from political order based on lordship and private land tenure to political order based in administrative institutions' (Thornhill 2011: 23) was fully commenced.

As discussed in the previous chapter, a significant focus for those charged with social control in both the medieval and early modern periods was the suppression of begging and vagrancy. These efforts focussed in particular on 'sturdy beggars' who had, since at least the Statute of

Cambridge in 1388, personified the idea that certain individuals were capable of work but chose instead to rely on the proceeds of begging or on early systems of poor relief (Poor Law Commissioners 1834). However, Geremek (1994: 207) suggests that the use of penal *confinement* for the purposes of 'correction' was largely focussed on impoverished or 'idle' subjects such as 'sturdy beggars' long before it was directed to the problem of addressing criminality. Copeland (1888) links the development of early correctional institutions to the decline of 'poor relief' mechanisms which followed Henry VIII's dissolution of the monasteries between 1536 and 1541, noting that:

> After the suppression of the monasteries and other religious houses, London became filled with multitudes of dissolute and necessitous persons, who before that period had depended on ecclesiastical charity for their support. It therefore became necessary to adopt some plan for the correction of offenders, and to afford a refuge and relief to such as were in actual want. (Copeland 1888: 22)

In 1553, in response to this problem, the Bridewell Royal Hospital was established (*ibid*. p.44). Its aims were to 'reform the idle and disorderly, to make them earn their keep and to deter others from indolence' (Higginbotham 2010: 25). However, the idea that certain lawbreakers were *beyond* correction was certainly present in England at this time and Spierenberg suggests that whilst the founding of Bridewell demonstrates that the 'idea that malefactors can be reformed…was certainly around at the end of the sixteenth century…the usual expectation was that *only some offenders*, in particular young thieves, could be reformed' (2005: 29; emphasis added). The Poor Relief Act of 1576 later promoted the expansion of the Bridewell model across England and Wales, proposing that every county should establish its own house of correction to deal with the able-bodied poor who were purportedly refusing to work (Higginbotham 2010: 26).

The regime at Bridewell and other 'houses of correction' opening across the country was centred on the use of 'monotonous labour…seen both as a punishment in itself, and as a way of re-integrating anti-social individuals… [which] was intended to make them used to working in the world outside, and hence prevent them from being a burden on the wider society on their release' (Godfrey *et al.* 2008: 152). Such establishments also sought to reinforce existing social hierarchies and structures of authority, and in particular the role of households, with the bridewell offering a 'substitute family for those who had none' in order to mould and guide behaviour (*ibid.*). To this end, the description of those charged with running these institutions as 'house-mothers' and 'fathers' became a common feature (see also van der Slice 1937).

Alongside the development of the bridewell system, the provision of labour for the relief of poverty took an institutional form in the network of 'workhouses' established during this period. By the start of the eighteenth century, a 'general belief in the efficacy of workhouses to deal with poverty' (Marshall 1969: 47) meant that the rationale of setting the poor to work in return for meagre wages, shelter and sustenance had become well embedded. However, the distinction between those who were merely poor and those regarded as 'criminal' was rarely made clear due to an 'often arbitrary distinction between the 'deserving' and 'undeserving' poor' (Matthews 1999: 6-7). As a result, workhouses and bridewells often dealt with the very same people and Briggs *et al.* (1996: 82) suggest that:

> from the 1690s a medley of minor offenders, ranging from poachers and runaway apprentices to petty thieves, cheats and utterers of seditious words, began to find themselves rubbing shoulders in the houses of correction with the vagrants and the idle poor.

This conflation of poverty and criminality was undoubtedly stigmatising and, as already discussed, underpinned the emergence of notions of 'less eligibility' (Sieh 1989).

The bridewells were often managed in a disorderly fashion and were often set up in buildings which were not designed for the express purpose of 'correcting' lawbreakers. Their shortcomings regularly drew criticism from penal reformers such as the Quaker philanthropist John Howard. As outlined earlier, Howard (1777) provided the blueprint for a state-operated network of penitentiaries as a replacement for the somewhat chaotic local gaols and houses of correction. He firmly believed that the *moral* reform of individual lawbreakers should be the overriding objective of the penal system and that the often 'seeming incorrigibility of the prisoner was the result not of human nature but of a mistaken punishment' (McGowen 1998: 86). He objected in particular to what he regarded as society's unnecessary use of physical punishments which Quakers opposed on the basis that they 'produced a harshness and insensitivity' (*ibid.*). Ignatieff has observed that as an alternative:

> Howard conceived a convict's process of reformation in terms similar to the spiritual awakening of a believer at a Quaker meeting. From out of the silence of an ascetic vigil, the convict and believer alike would begin to hear the inner voice of conscience and feel the transforming power of God's love. (1978: 58)

To enable such a transformation to occur, Howard advocated the provision of tough, but more humane regimes where prisoners were accommodated in individual cells and provided with medical care, proper sanitation and exercise facilities.

Concurrently to Howard's proposals, Bentham was busily developing an alternative model for the reform of lawbreakers with his design for a 'Panopticon' – 'a machine for grinding rogues honest' (Ignatieff 1978: 68). In Bentham's plans productive labour formed a key aspect of the

proposed regime – a principle fully in keeping with both extant notions of the 'curative' effects of hard work on lawbreakers and the industrious spirit of the era. However, what was truly unique about the Panopticon was that it constituted 'a moral architecture for prisons' (Coleman and McCahill 2011: 51). The plan utilised '[s]urveillance from one central point…to ensure that the inmates interiorised the discipline expected from them' (Spierenburg 2005: 43) and it was Bentham's contention that this application of (imagined) constant observation designed into the very architecture of the building could be adapted to a range of purposes.

As Foucault later observed, each cell might 'depending on the purpose of the institution…[accommodate]…a child learning to write, a worker at work, a prisoner correcting himself, a madman living his madness' (2002b: 58). The Panopticon was thus conceived by Bentham as something of a 'cure all' for a number of social problems which came to be recognised as requiring new forms of social administration during a period of increasing urbanisation. Given Bentham's view that all punishment was an evil that needed to minimised, the intended application of his Panopticon model to the reform of individual lawbreakers was tempered with a concern for their *moral* improvement. The proposed regime incorporated: '[s]olitary confinement…based on the illusion that inmates could *reform themselves* [through their own reasoning], by being left alone, apart from occasional contact with a minister of religion.' (Spierenburg 2005: 43; emphasis added).

The penitentiary model and the development of non-custodial approaches

Despite his long campaign for its adoption, Bentham's Panopticon plan was not adopted as the model for new prisons when concerns over the project's expense and commercial viability emerged. The prison was to have been financed using the labour of inmates and Bentham had even proposed himself as governor. However, the Holford Committee (1810-11) who considered the project was not convinced and his plan was ultimately dropped (Muncie 2001: 168). Instead, elements of Bentham's design, in particular the idea of solitary

cellular confinement, were integrated into the first national penitentiary at Millbank (*ibid*.: 166). However, the Millbank prison was beset by difficulties during its construction and, following its opening 1816, its running costs escalated its and governance proved nearly impossible. Brutality by the guards, rebellion by the prisoners and outbreaks of disease in Millbank caused major problems. Indeed, Ignatieff characterises its early years as 'a story of conflict and chaos' (1978: 171).

Charitable influences were perhaps more successful in promoting changes to early nineteenth century penality with Elizabeth Fry (b.1780-d.1845) in particular continuing the Quaker tradition of penal reform established by Howard and others. Fry was particularly associated with campaigns on prison conditions in Newgate and the establishment of the 'British Ladies' Society for Promoting the Reformation of Female Prisoners' in 1821. Her interest in the welfare of female prisoners led to their segregation from male prisoners and supervision by female prison officers following the Gaols Act of 1823 (Higginbotham 2010: 40-41). This Act also standardised the disciplinary punishments available in prisons and offered more centralised guidance on the operation of prisons. The establishment of a prisons inspectorate in 1835 further improved the system of regulation (Soothill 2007: 36-37). However, the strong moral and religious element to the Quaker engagement with the penal system remained. Briggs *et al*. note that: '[t]he object of [Fry's] ministrations was an ordered prison administered under the concerns of a Christian conscience' (1996: 162).

Many of these principles would find their institutional form in the network of penitentiaries which opened during the Victorian era after the failed Millbank experiment was downgraded to a holding prison for those awaiting transportation. For instance, in the 'model prison' at Pentonville which opened in 1842 and in other similar institutions, regimes were adopted based not just on work, but on discipline and *moral* education (Godfrey and Lawrence 2005; Elmsley 2005, 2010; Soothill 2007). Inmates at Pentonville were subject to confinement in

solitary cells and, to preserve their anonymity, wore masks (or 'beaks') when moving between parts of the building. This 'separate system' was maintained even at the obligatory church services where, it was believed, through 'the exhortations of the chaplain, [inmates] would come to a realisation and repentance of their wrong-doing' (Elmsley 2010: 285).

This approach to the reform of prisoners incorporated what Rotman (1990: 5) later described as a 'monastic ideal of penance' achieved via cellular isolation and the encouragement of silent prayer. The intention of isolating the offender from 'the contaminating influence of society' and subjecting them to various forms of indoctrination as a kind of 'reformative action' was grounded in the ambition of creating self-discipline through a combination of incentives and deterrents (*ibid*.). Moreover, the use of 'hard labour' in the penitentiaries once again reinforced the idea that lawbreaking and 'idleness' were inextricably linked and that work represented a route to reform.

The centrality of work in the reform process was also, by this stage, being introduced to non-custodial penalties through the idea of 'recognisances'. These involved an undertaking by younger lawbreakers to observe a number of conditions set by the court and to reappear when summoned. In some circumstances, a surety would be required by the court from a nominated responsible person, and whilst this was sometimes a parent it was often an employer. Indeed, Mair and Burke suggest that 'one of the founding narratives of probation is that some Warwickshire magistrates were using … [recognisance] in the 1820s to commit a young offender to the care of a suitable employer' (2012: 14). However, the legal basis for an early form of 'probation' as an alternative to custodial punishment is more properly traced to Massachusetts where the supervision of lawbreakers by an 'officer of the court' was formalised in 1869 (Raynor 2002: 1172-1173). Prior to the establishment of probation in England and Wales certain individuals could be made subject to police supervision for a period of seven years under part three of the Habitual Criminals Act 1869 (Thomas 2007).

However, as already discussed, this was often on the basis that ticket-of-leave men were regarded as potentially dangerous rather than capable of reform.

During this period the art critic, social thinker and philanthropist John Ruskin would again reassert 'the individualist nineteenth-century ideal of progress through industry and personal effort' (Rotman 1990: 5) as a path to reform. In 1868 his paper *Notes on the General Principles of Employment for the Destitute and Criminal Classes,* Ruskin (2003) contributed his ideas to a committee which explored how 'improvident and more or less vicious persons' should be helped. He argued that:

> The true instruments of reformation are employment and reward – not punishment… The beginning of all true reformation among the criminal classes depends on the establishment of institutions for their active employment, whilst their criminality is still unripe, and their feelings of self-respect, capacities of affection, and sense of justice not altogether quenched. (Ruskin 2003: 320)

To a certain extent, these principles would be reflected in the Probation of First Offenders Act 1887 (and later the Probation of Offenders Act 1907) which eventually gave a statutory footing to the community supervision of a wider range of lawbreakers in order to encourage their leading of honest and industrious lives (Raynor 2002; Mair and Burke 2012: 22-29).

On both sides of the Atlantic the development of community supervision was given particular momentum by the missionary zeal of Christian temperance societies. Weiner (1990: 79; cited in Mair and Burke 2012) argues that by the middle of the nineteenth century, particularly in Britain, 'drink became perhaps the leading explanation for crime' and an indication of the scale of the reformative 'mission' facing members of the Church of England Temperance Society during their work in the Victorian 'police courts' is provided by Hinde (1951; cited in

Mair and Burke 2012). Hinde notes that in 1877, in the city of Liverpool alone, the number of individuals under the age of 21 found guilty by the courts of being drunk and incapable totalled a staggering 5,371. Thus the work of the earliest 'probation officers' was often linked to the encouragement of abstinence and bodily restraint.

During this period, criminality was also increasingly being viewed as an issue associated mostly with juveniles. Consequently, prescriptions for the development of stronger moral conduct amongst younger offenders were often reflective of a Christian morality which had become concerned with the improvement of 'unhealthy bodies' and 'feeble minds'. The development of 'muscular Christianity' in the late 1850s had emphasised the development of the healthy and manly body as a route to spiritual improvement. These values were characterised by the work of authors such as Thomas Hughes (see *Tom Brown's School Days*, Hughes 1857) and Charles Kingsley. Kingsley's works, for instance, 'portray the ideal Englishman as a man of active, vigorous, healthful, loyal, Christian social virtues' (Park 1978: 18) whilst Watson *et al.* (2005: 1) have suggested that '[t]he basic premise…[of muscular Christianity] was that participation in sport could contribute to the development of Christian morality, physical fitness, and "manly" character.'

The central tenets of this new doctrine were readily applied to the British public school educational system. Watson *et al*. (2005: 7) state that: '[t]he primary reason was to encourage Christian morality and help develop the character of the future captains of industry and political leaders, and in turn strengthen the British Empire'. However, this concern for both physical and moral improvement would also be reflected in measures which added an educational element to the reform of young people within the penal system. The Reformatory School and Juvenile Offenders Acts of 1854 – inspired by the work of Mary Carpenter and Matthew Davenport Hill – led to the opening of a number of reformatory and industrial schools across the country where both exercise and training in physical skills (for

the purposes of labouring) were central aspects of the regime. Pavlich (2010: 24-25) notes that Davenport Hill in particular subscribed to the notion that 'criminals' could be identified by physiognomic factors. Thus, the physical condition of the body was often implicitly linked to the 'moral fibre' of the individual. Such schools were used with those aged under 16 following a prison sentence of at least two weeks (Elmsley 2010: 288; Muncie 2001: 188-189).

Rehabilitating the pathological: the history of the treatment model

The latter half of the nineteenth century saw a number of developments which had considerable significance for the history of rehabilitation. These included: the emergence of the 'habitual criminal' as a knowable subject (Pavlich 2010); the growth of criminal anthropology and attempts to scientifically identify 'criminals' (Lombroso 1876); and the insertion of the discipline of psychiatry into the penal system (Garland 1985: 81). These developments not only sought to distinguish those capable of correction or reform from those who were believed to be irremediable, but they were also central to the emergence of what Garland (2001: 34) describes as 'penal-welfarism' and its efforts to 'diagnose' lawbreakers problems. The idea of 'rehabilitation' was to form the central plank of this penal-welfare framework which was 'by 1970, the established policy framework in both Britain and America' (*ibid.*).

Pavlich (2010: 14) suggests that three key discourses supported and underpinned the acceptance of the idea of the 'habitual criminal'. These concerned the 'criminal class', 'criminal character' and 'criminal habit'. The view of a 'class' of criminals, in particular, dominated nineteenth century writing about crime and was in-keeping with the continental ideas that 'dangerous classes' existed. The 'criminal class' was distinct not only from mainstream 'decent' society (to whom they were believed to represent an existential threat), but also from other sub-groups such as the 'honest poor'. This was because they were

believed to have possessed a 'depraved character' and a reluctance to labour, instead subsisting predominantly by 'pilfering' and other lawbreaking. Indeed, Pavlich notes that those labelled as 'habitual' criminals were occasionally referred to as 'professional' in their criminality (2010: 17) with this language being used even amongst prominent penal reformers such as Carpenter, Davenport Hill and Henry Mayhew. Such ideas were, of course, sustained by longer-standing notions of 'idleness' on the part of lawbreakers, but during Victorian era they were given something of a 'scientific' sheen when:

> …towards the end of the century, this identity was attached to social evolutionary frameworks within criminal anthropology and later criminology. The habitual criminal here assumed a Lombrosian quality, as the fundamentals of eugenic thinking assembled around it. (Pavlich 2010: 31)

Cesare Lomroso's contributions were instrumental in developing criminal anthropology. In his most significant work *L'uomo delinquente* or *The Criminal Man* (Lombroso 1876) he developed the notion of criminal atavism (i.e. that 'criminals' represented an earlier stage of human evolution). These views marked a radical departure from the notion of the rationally-calculating lawbreaker (*homo economicus*) upon which earlier social contract theories of crime and punishment had been predicated.

In contrast to the 'classical school' thinking of Beccaria, Bentham and Howard, Lombroso's biological determinism positioned lawbreakers as 'pre-destined actors' whose conduct was governed by forces beyond their control. The logical extension of this viewpoint raised questions about moral culpability for criminal behaviour and the legitimacy of punishments, since if individuals were not ultimately responsible for their own offending then the moral justification of existing systems of punishment became problematic. Lomroso's students and fellow members of the 'Italian School', Raffaele Garofalo and Enrico Ferri, would take up this

penological quandary. Garofalo (1914 [originally 1885]) reframed the notion of 'the punishment fitting the crime', as in the classical conception, and argued instead that punishment should fit the *individual criminal*. This would involve the sentencing process focussing on a judgement of the offender's 'peculiarities' with a view to assessing the danger which they posed to society. His work was central to the formulation of the 'social defence' justification of punishment. Although both men claimed that criminal behaviour was determined rather than willed, Garofalo's research was concerned largely with the discovery of 'psychic anomalies' on the part of lawbreakers in contrast to Lombroso's focus on physiognomy.

Given the necessary repudiation of 'free will' implicit in this 'pre-destined actor' model of offending, Garofalo (1914) argued that it did not follow that criminal behaviour could be deterred since offenders were believed to be acting in accordance with innate forces rather than on the basis of rational calculation. He reasoned that the only reasonable justification for punishment was the incapacitation of offenders for a period sufficiently long enough to ensure that they no longer posed a threat to society. Ferri's (1917 [originally 1884]) work also marked a departure from the Lombrosian emphasis on biological causation. Like Garofalo, he was also interested in the psychological bases of criminal offending. However, he also focussed on the role of social and economic factors and supported measures aimed at social reform and the rehabilitation of those deemed to only be 'occasional criminals'.

Whilst Lombroso's work would not be translated into English until 1911, it was instrumental in propagating an early form of criminology in many countries that Foucault (1977: 253) would later deride as a 'zoology of social sub-species'. This was predicated upon the belief that 'delinquents' possessed a distinct pathology which somehow set them apart from non-lawbreakers. However, as Garland notes:

> the scientific approach to crime and punishment was not something which Britain reluctantly imported from abroad. On the contrary, there existed in Britain, from the 1860s onward, a distinctive, indigenous tradition of applied medico-legal science which was sponsored by the penal and psychiatric establishments, and it was this tradition which formed the theoretical and professional space within which "criminological science" was first developed in this country. (1988: 2)

Indeed, Britain during the nineteenth century had witnessed the development of strategies aimed at 'treating' lawbreakers based upon their supposedly underlying psychological abnormalities. According to Foucault, this was preceded by the insertion of a 'microphysics of asylum power' (2008: 189) into elements of the penal system during which:

> …around 1840 to 1860, there was a sort of diffusion, a migration of this psychiatric power, which spread into other institutions, into other disciplinary regimes that it doubled, as it were. In other words, I think psychiatric power spread as a tactic for the subjection of the body in a physics of power…I think we find it under what I will call the Psy functions: pathological, criminological, and so on. (Foucault 2008: 189)

Garland (1985: 81) discusses the growth of a new medical specialism in the late Victorian era - initially referred to as 'alienism' or 'psychological medicine' but which eventually established itself as the discipline of psychiatry. In Britain at least, the introduction of this discipline to the penal system meant that rather than merely attempting to isolate discrete groups of individuals based up physical characteristics, early criminological science was 'a therapeutically oriented discipline based upon a classification system of psychiatric disorders' (Garland 1988: 3). These developments coalesced with new techniques for the

categorisation of 'criminal types' developed largely for law enforcement purposes and the emergence of new methods for the physical identification and, indeed, *registration* of lawbreakers (see chapter one).

Crow (2001: 23) notes that Henry Maudsley was amongst the most influential figures in this 'applied medico-legal culture derived from the penal and psychiatric establishments'. Maudsley conducted several studies of the 'criminal' patients in his care which would be instrumental in further pathologising lawbreakers as 'habitual criminals' or, indeed, as 'dangerous individuals' (see Foucault 1978b). They also reasserted longer-standing claims that idleness and immorality were causally linked to lawbreaking. For instance, in *The Moral Sense and Will in Criminals* Maudlsley suggested that:

> Habitual criminals are a class of beings whose lives are sufficient proof of the absence or great bluntness of moral sense…a certain proportion of them are of distinctly weak intellect…They abound among vagrants, partly from a restless disposition and an inability to apply themselves to steady and systematic work, and partly because they do not easily find or keep employment (1885: 1).

In *Remarks on Crime and Criminals,* Maudsley (1888: 160-1) expanded these ideas, making distinctions between the 'occasional or accidental criminal' who could not be distinguished from the 'non-criminal' population and the 'natural or essential criminal…who is criminal by reason of defective mental organization'. Within this emerging penal-welfare framework, Garland notes that '[f]rom the 1890s to the 1970s, fewer and fewer categories of offenders were deemed suitable for standard imprisonment' (2001: 35).

This process coincided with the emergence of probation as a fully public service in the 1920s and 1930s (Gard 2012) and, in subsequent decades, of the engagement of probation officers

in a 'treatment model' of rehabilitation (Rotman 1990; Crow 2001; Robinson and Crow 2009). This model was characterised by an increased use of court orders to facilitate 'therapeutic' or 'social work'-oriented interventions with lawbreakers. Mair and Burke (2012: 108-9) note that 'the number of probation orders had risen by more than 10,000 between 1950 and 1960' and that whilst fewer people convicted of indictable offences were being given probation orders, 'the proportion of one-year orders had halved between 1951 and 1960, while three-year orders had doubled'.

In custodial settings, Rotman (1990) suggests that the introduction of a therapeutic model may have mitigated the harsh disciplinary regimes associated with the penitentiary model by incorporating a medicalised notion of 'care' into rehabilitation. However, it also carried with it the potential for more coercive forms of intervention as a kind of 'punishment in disguise' (Hannah-Moffat 2001; see also Sim 1990). That is to say that purportedly 'rehabilitative' interventions not only have the potential to violate the individual rights of detainees but can also foster an internalised sense of social stigma which increases the potential for recidivism due to a 'self-fulfilling prophecy' being created. Ultimately, the failure of the therapeutic, or rather 'therapunitive' (see Carlen 2002: 15), model to identify and describe an underlying pathology which separated 'offenders' from 'non-offenders' and to devise appropriate 'treatments' for them was instrumental in creating what Rotman (1990: 5) describes as an 'intellectual crisis of the rehabilitative concept' (see Allen 1981; Garland 2001).

Rotman (1990) suggests that the influence of social psychology throughout the twentieth century tended to correct the flawed theoretical basis of the therapeutic model and instead viewed crime as being the product of learned behaviour (see Sutherland 1947). The resultant social-learning model of rehabilitation emphasised the capacity for 'offenders' to become 'law-abiding citizens' through the use of structured forms of social interaction as a corrective to their supposedly faulty cognitions and behavioural deficits. This model is manifested most

clearly in the prison and community-based 'offending-behaviour programmes' still prevalent in many criminal justice systems (see Crighton and Towl 2008). However, the provision of such programmes and the interpretation of their results have remained contentious issues, particularly in relation to prisoners sentenced to indeterminate terms and whose release is contingent upon successful 'treatment' (Jacobson and Hough 2010).

Rotman (1990: 6) argues that in the US, a rights-oriented model later emerged due to a '[g]rowing respect for the dignity of offenders and for their rights… [leading] to a consideration of rehabilitation from the offenders' perspective'. This meant that offenders should be given the opportunity to reform themselves and reintegrate into society through both the adequate provision of education and training and the avoidance of 'physical and mental deterioration' caused by 'substandard conditions of incarceration' (*ibid.*). However, this rights-oriented approach was largely a response to outbreaks of violent resistance in the US penal system, for instance at Attica in 1971, and the pressures exerted by various prisoners' rights groups (Davis 2003a: 157; Fitzgerald 1977).

Indeed, it is debatable as to whether the purportedly therapeutic interventions to which lawbreakers have been subjected in the UK have ever been fully 'offender-centred' since they have mostly been justified by utilitarian concerns such as improvements in public safety or cutting the costs associated with re-offending (see Crow 2001; Garland 2001; Social Exclusion Unit 2002). The view of rehabilitation as a 'right', might alternatively be construed as meaning that lawbreakers should expect at least a minimal level of 'service' or 'care' from those charged with their supervision. Given the current context of 'offenders'' and particularly prisoners' rights being strongly contested by dominant political ideologies associated with punishment (see Sim 2009; Drake 2012; Drake and Henley 2014) a 'rights-respecting' penality remains an elusive proposition. It is perhaps an easier task to reflect that

rehabilitation has been adopted as a central *justification* of contemporary penality even if its ideology and intended effects are seldom realised (see Mathiesen 2006; Carlen 2013).

Garland (2001: 8) suggests that by the mid-twentieth century the ideology of rehabilitation had become 'the [penal-welfare] field's central and structural support, the keystone in an arch of mutually supportive practices and ideologies'. However, Crow (2001) notes how, in the late-1960s and early-1970s the treatment model of rehabilitation came under attack on theoretical, ethical and empirical grounds. The *theoretical* assault came from challenges to the dominance of the state-sanctioned 'scientific expert' as a 'corner-stone of the [criminal justice] system' (see Sim 1990: 51) and their role in 'labelling', or rather *diagnosing*, behaviour as deviant was beginning to be subverted (see Becker 1963; Matza 1969; Young 1971; Cohen 2002). The *ethical* assault was made on the basis that indeterminate detention on the grounds of 'treatment need' was also being called into question. This was particularly so in the US where Crow (2001: 26) notes how in 1971 the Quaker 'American Friends Service Committee' campaigned against indeterminate sentencing on the basis that 'doctors, social workers and other professionals took executive decisions which directly or indirectly affected people's freedom and autonomy without being able to be effectively challenged'.

It was, however, the *empirical* assault on the treatment model which did the most damage to the cause of rehabilitation. Crow suggests 'it was the interpretation of the results of a number of empirical studies that proved most conclusive in dislodging the treatment model from its position of pre-eminence' (2001: 26). Martinson's (1974) review of 231 research studies on a range of rehabilitative interventions which ran during the period 1945-67 was particularly influential. The review suggested that the various types of sentences, regimes and therapies (for instance, counselling, and individual and group-based work) were inconsistent in their efficacy at reducing re-offending and, at best, could only be consistently relied upon to alleviate the adverse effects of imprisonment. However, Martinson's conclusion that '[w]ith

few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism' (Martinson 1974: 25) was widely (mis-)interpreted as meaning that 'nothing works' (Crow 2001). Studies from the UK drew similar conclusions about the efficacy of the 'treatment model'. Folkard *et al.*'s (1976) IMPACT (Intensive Matched Probation and After-Care Treatment) study concluded that no overall 'treatment effect' could be demonstrated across the range of interventions assessed. Work by Brody (1976) – who focussed more on the effects of sentencing policy rather than different types of treatment – stressed the importance of 'matching…appropriate treatment to different types of offender' (p. 41) although this nuanced reading was again lost and the inconclusive results of the study contributed further to the 'nothing works' pessimism.

Allen (1981) has suggested that the significance and widespread impact of these studies was most likely a reflection of the fact that public attitudes in the 1970s were more receptive to the negative conclusions of the research. Bottoms asserted that it had become 'abundantly clear that there [was] no adequate overarching penal theory to replace the collapsed rehabilitative consensus of fifteen years ago' (1977: 91) whilst Garland (2001) has demonstrated how the early 1970s as marked by an unravelling of the penal modernist framework. The 'decline of social purpose' to which Allen (1981) attributes the demise of rehabilitation is contextualised in the next chapter which focusses on the social, economic and political conditions of Britain up to the mid-1970s. It is therefore something of an anomaly that a form of legal rehabilitation was introduced in England and Wales at the exact historical juncture when a supposed 'collapse of faith' in rehabilitation was occurring. However, before focussing on this anomaly in the remainder of the thesis, this chapter first considers the subjectivation of those who are targeted by transformative penalities and then sets out in some detail the social characteristics which define them in the present.

Censured subjects

Rehabilitation discourse and the censured subject

Earlier in the chapter, various approaches which have, throughout history, aimed to effect behavioural, moral or psychological change in convicted lawbreakers were characterised as 'transformative penalities'. It was also suggested that transformative penalities are distinct from earlier ways of punishing (where reductionist ambitions were realised largely through penal deterrence) due to their emphasis on the 'correction' or 'reform' of the lawbreaker. The shift in the nature of punishment represented by the ascent of transformative penality is, of course, well-trodden intellectual terrain. For example, Sharpe suggests that:

> the house of correction provides an almost unique example of an institution which has been universally regarded as marking a new departure in …[penal]… matters. The house of correction, of which the London Bridewell was the prototype, constituted an important shift in punishment policy. To the established notions of punishment as deterrence and retribution was added the idea that it might be possible *to cure criminal instincts through a healthy dose of labour discipline*. (1992: 179; emphasis added)

Thus, in the case of the early modern bridewell, the 'correction' required was to the detainee's disposition to work, with 'idle' individuals - personified by the 'sturdy beggar' – becoming the institution's primary focus. By contrast, an era of 'moral reform' began in earnest in the late eighteenth century. This was marked by Jeremy Bentham's somewhat mechanistic approach to human motivation on the one hand and, on the other, by John Howard's belief that reform involved a spiritual awakening on the part of wrongdoers. As Ignatieff observes of the two men:

> …both denied criminal incorrigibility, but from diametrically opposed positions – one accepting the idea of original sin, the other denying it. One insisted on the universality of guilt, the other on the universality of reason….Bentham…asserted that men could be improved by correctly socializing their instincts for pleasure. Howard believed men could be changed by awakening their consciousness of sin. (1978: 67)

Thus, to extant notions of 'idle hands doing the devil's work' which necessitated the imposition of hard work upon the unproductive as a corrective measure, was added the idea that lawbreakers as free-willed individuals with 'moral autonomy' (Kant 2002 [originally 1785]) could be reconditioned to choose a future life free of 'sin' and/or 'unreason'.

Within this formulation, a combination of repentance, industry and meritorious behaviour whilst in custody became the appropriate path to individual reform. However, this positioning of lawbreakers as dissolute and licentious subjects who ultimately retained responsibility for their own irrational, 'bad' choices was instrumental in cultivating the idea that criminal behaviour rendered the individual 'undeserving' and thus 'less eligible' than other members of society (Mannheim 1939; Sieh 1989). As described in the last chapter, this had the effect of setting an upper-threshold to the standard of life that prisoners and other lawbreakers – and indeed *former lawbreakers* – might expect.

A further, somewhat contradictory layer of subjectivation was added in the nineteenth and twentieth centuries by the gradual emergence of the idea that criminal (or rather, criminalized) actions were the result of predestination on the part of lawbreakers. Whether this predestination arose from biological, psychological or socio-economic and environmental factors has remained a central debate with positivist criminological scholarship ever since. However, one consequence of this pre-destined actor model of criminal offending has been

the establishment of a concern within many penal systems across the world of the need to firstly, *identify* and secondly, *to treat* the underlying pathologies which purportedly account for deviant behaviour. Thus, individual lawbreakers are further subjectified as sites of intervention for an array of quasi-therapeutic interventions overseen by various 'judges of normality' (Foucault 1977: 304) and purveyors of 'expert' rehabilitative knowledge (Sim 1990: 51).

The different penal strategies for correcting/reforming/rehabilitating lawbreakers which have been described in this chapter might therefore be considered as having given rise to their own, distinct *modalities of subjection*. The result of all this is that, in the present, lawbreakers now face the unenviable prospect of being represented and positioned in ways which draw upon a complex heuristic bundle of aetiological discourses. Those labelled as 'offenders' become constructed as potentially idle or immoral subjects (who are thus rendered undeserving) and/or as pathological in their offending (and thus inherently 'risky' or potentially 'dangerous'; see Castel 1991; Foucault 1978b). Moreover, as the boundaries between these distinct historically-contingent imaginaries become less clear and social knowledge of the 'criminal' individual as an (un)knowable subject converges and hybridizes, the social status of the *former* lawbreaker – and, by extension, their pathway to redemption or requalification as a citizen of equal merit – is rendered even more ambiguous.

Perversely, lawbreakers who have undergone processes of correction/reform/rehabilitation become potentially 'subjected or oppressed' (Heyer 2011: 160) *after they have served their sentences* by what Foucault described as the 'knowledge of the criminal, one's estimation of him, what is known about the relations between him, his past and his crime, and *what might be expected of him in the future*' (1977: 18; emphasis added). By virtue of having been subjected to (and subjectified by) myriad criminal justice 'interventions' designed to normalize them, lawbreakers become the objects of an epistemological quandary concerning

the uncertainty of knowing if they are to be regarded as *capable* of full rehabilitation and, if so, precisely *when* their rehabilitation has been brought to a successful conclusion.

Historically-speaking, advocates of various models of rehabilitation have had much to say on the precise prescription for correcting or reforming those who engage in offending behaviour and have engaged in frequent debates about 'what works' (see Crow 2001; Robinson and Crow 2009). Indeed, it is only relatively recently, with the growth of criminological scholarship concerned with 'desistance' that attention has started to turn to the issue of *when* we might know that PWCs have successfully desisted from crime (see, for instance, Soothill and Francis 2009). However, the emergence of such new bodies of criminological knowledge has coincided with what Wacquant (2002: 58) describes as a 'dystopic hypertrophy of the penal state' which, whilst more marked in the US, is no less problematic for the UK criminal justice system where the centrality of the 'welfarist' ideology of rehabilitation has been significantly displaced and redefined (see Garland 2001: 176-177).

One outcome of these developments has been an intensification of the lasting and counter-productive stigma experienced by individuals to whom any record of non-trivial previous offending relates. As discussed in chapter two, this stigma can have negative implications for the meaningful resettlement and reintegration of PWCs into society, particularly when formal recognition of successful desistance from crime is held in abeyance on the basis of 'desert' (because of *past* offences) or 'risk' (because of the possibility of *future* offences). These rationalities have implications for when a person's status as 'rehabilitated' might be legally certified and whether the mere absence of recent convictions offers sufficient evidence that a record of previous offending might be 'set aside' for most purposes. Thus, the question of when legal rehabilitation can take place is rendered perpetually uncertain. One consequence of this uncertainty is that laws such as the ROA have tended to take a partial and limited approach to legal rehabilitation with numerous 'exceptions to the rule' based upon the fear that re-offending might one day occur.

The contemporary targets of rehabilitation

If no definitive answer can be provided to the complex question of who is deemed *capable* of being rehabilitated and precisely *when* society can be certain that desistance from crime has occurred, the same cannot be said regarding the question of who, in the present, is subjected to rehabilitation in the first place. An examination of the characteristics of those who enter prisons in the England and Wales provides a troubling picture. For instance, research reveals a lack of education and skills on the part of many prisoners with 47 per cent reporting no formal qualifications (as opposed to 15 per cent of the UK working age population). Additionally, 21 per cent of prisoners report needing assistance with reading and writing or numeracy, 41 per cent with education more generally, and 40 per cent claim they need assistance with improving work-related skills (MOJ 2012a). Stewart (2008) reports that school exclusions are another common feature of the imprisoned population with 41 per cent of men, 30 per cent of women and 52 per cent of young prisoners having been permanently excluded from school.

MOJ (2012b) research on the prevalence of disability amongst prisoners estimates that 36 per cent of those interviewed were considered to have a disability of some sort (including problems with mental health) and of those 18 per cent were considered to have a physical disability. Loucks (2007) estimated that 20 to 30 per cent of those who come into contact with the criminal justice system have learning disabilities or difficulties. In relation to those defined as 'young offenders' Harrington and Bailey (2005) found that 23 per cent had learning difficulties (defined as an IQ of below 70) whilst a further 36 per cent had borderline learning difficulties (IQ of 70 to 80). Talbot (2008) has found that prisoners with learning disabilities were often excluded from elements of prison regimes, in particular opportunities to address the reasons for their offending behaviour.

In relation to mental health, the MOJ (2013a) found that 49 per cent of women and 23 per

cent of male prisoners were assessed as suffering from anxiety and depression. This compares to 16 per cent of the general UK population (twelve per cent of men and 19 per cent of women). Twenty-six per cent of women and 16 per cent of men in prison reported that they had received treatment for a mental health problem in the year prior to their incarceration, whilst symptoms indicative of psychosis were reported in 25 per cent of women prisoners and 15 per cent of their male counterparts (*ibid.*) (the rate within the general population is approximately four per cent; Wiles *et al.* 2006). The prevalence of self-harm and suicide in custody is indicated by the MOJ's (2016) *Safety in Custody Statistics.* These data indicate a total of 32,313 self-harm incidents in prisons in the twelve months prior to December 2015 (representing an increase of 25 per cent from the previous year's figure). This included 100 apparent self-inflicted deaths, a 27 per cent increase on the previous year (*ibid.*). Moreover, 46 per cent of women prisoners and 21 per cent of male prisoners reported having attempted suicide at some point in their lives (around six per cent of the general population report having ever attempted suicide) (MOJ 2013a).

Drug use and addiction are also common to those who end up in prison. Two-thirds (64 per cent) of prisoners report having used drugs in the four weeks before their imprisonment with more than half (55 per cent) reporting that their offences were connected to their drug taking - for instance, needing money to buy drugs (MOJ 2013a). Forty-eight per cent of women prisoners (compared to 22 per cent of men) reported having committed their offence to support the drug use of another person. Contrary to the supposedly rehabilitative intentions of imprisonment, 19 per cent of prisoners who reported having ever used heroin said that they used it for the first time in prison (*ibid*). Fourteen per cent of men and 15 per cent of women in prison at the end of December 2012 were serving sentences for drug offences (MOJ 2013b; *see Table 1.3a*). Alcohol abuse is also prevalent amongst those held in custody. The MOJ (2013a) report that of those prisoners who said that they had drunk alcohol in the four weeks prior to their incarceration, 32 per cent said that they drank on a daily basis. This

compares with 16 per cent of men and ten per cent of women in the general UK population. Of those prisoners who reported drinking daily - an average of *twenty units per day* were consumed (equivalent to approximately ten pints of beer).

A lack of secure housing and employment are also commonly cited issues for prisoners. In relation to housing the MOJ (2012c) have stated that 15 per cent of newly sentenced prisoners report being homeless before being sent to custody with nine per cent sleeping rough. Forty-four per cent of prisoners reported living in their accommodation before being incarcerated for less than a year, with 28 per cent having lived there for less than six months. Regarding employment, just 32 per cent of prisoners reported being in paid employment in the four weeks prior to arriving in custody whilst 13 per cent reported never having had a job. Of those prisoners who were in employment, 37 per cent did not expect to return to their jobs upon release. A quarter of these job losses were because of a reason connected with offending such as their being sent to prison or acquiring a criminal record (MOJ 2012a).

Financial exclusion and debt are also significant issues for people in prison. The National Offender Management Service (NOMS) (2007) conducted assessments in 2005 which suggested that over 23,000 of those subjected to criminal sanction had financial problems linked to their offending, with 48 per cent of the people in prison having a history of debt. A research report by the Prison Reform Trust and Unlock (Bath and Edgar 2010) has revealed that a third of prisoners said they did not have a bank account; of whom 31 per cent *had never had one*. The families of prisoners were also found to be affected by debt with seventeen of the 29 families interviewed for the report claiming to be in debt. Of these two-thirds said their debts had increased since the imprisonment of their relative (*ibid*.).

Given this troubling knowledge of social and economic marginality, exacerbated by problems of addiction, poor mental health and educational underachievement, one might expect a

modern welfare state such as the UK to take particular care over the release and resettlement into the community of PWCs. Not so. For the year 2011-12, the MOJ (2012d; *see Tables 13 and 15*) reported that only 27 per cent of prisoners entered employment after release from prison whilst 89 per cent had settled accommodation on release (meaning that one in ten *did not*). HM Chief Inspector of Prisons (2012: 59) has stated concern 'in too many cases release addresses were not stable and that prisons made insufficient attempts to interrogate arrangements prior to release.' Moreover, Bath and Edgar (2010) found that 72 per cent of prisoners interviewed for their report had not been asked about their financial situation whilst in prison.

Of even greater concern should be Pratt *et al.'s* (2006) findings, indicating that across all age groups suicide rates were much higher for prisoners in the twelve months following their release than for the general population with an overall age-standardised mortality ratio of 8.3 for men and 35.8 for women. The risk of suicide was found to be particularly high in the first few weeks after release. This approaches the levels of suicide seen in discharged psychiatric patients (perhaps unsurprisingly given the high levels of psychiatric morbidity in the prison population outlined above). Thus, Pratt *et al.* concluded that:

> The effective resettlement or release of people from prison…should be a multidisciplinary function addressing the full range of resettlement needs, and recognising the multiple barriers that ex-prisoners face. Such needs include: the maintenance or rebuilding of family ties; referral and access to community-health care and treatment programmes, where appropriate; identification of housing needs and assistance to access accommodation, including supported accommodation; and training or employment opportunities. (p.122)

Of those prisoners with drug addiction issues, men who return to live with a partner were

less likely to relapse into substance misuse and reoffend, although the opposite is true for women (Walitzer and Dearing 2006). This most likely results from the fact that women prisoners are more likely to be in relationships with partners involved in substance misuse and lawbreaking which can trigger their own relapse and reoffending (Hser *et al.* 2003; Hollin and Palmer 2006).

In summary then, characteristics common amongst the present-day subjects of rehabilitative talk are: poverty, unemployment, mental illness, drug and alcohol addiction, vulnerable accommodation status and educational underachievement. Yet, in the contemporary penal climate, rather than such characteristics being addressed as material needs on the part of lawbreakers (as in a welfare-oriented approach to criminal justice) they are often viewed as indicative of elevated 'risk to the public' and so mark out 'offenders' for further 'treatment', intervention or punitive control (see Hudson 2003; Carlen 2013). This, in turn, exacerbates the social marginality of the subjects of purportedly rehabilitative intervention.

Class, race, gender and rehabilitation

Given the extreme disadvantages experienced by the majority of those who come into contact with the criminal justice system, Carlen (2013) criticises the inherent absurdity of attempting to 'resettle' or 'rehabilitate' individuals who have often *never* occupied a social position to which it is desirable they be returned. This observation assumes even greater relevance when one also considers the extent to which the class, race and/or gender of those subjected to penal strategies of normalization might further construct lawbreakers as inherently or irretrievably 'Other'. For instance, Carlen (2013: 90) argues that a 'blatant class bias' exists within rehabilitation as a penal practice, noting that:

> With the exception of those who have committed traffic or addiction-related crimes, rehabilitation programmes in capitalist societies have tended to be reserved for poorer prisoners found guilty of crimes against property and for prisoners released after serving long sentences for non-business–related crimes. Rehabilitation projects and programmes have not been designed for corporate criminals however long their records of recidivism. (Carlen 2013: 96)

Race becomes an issue in relation to rehabilitation insofar as black and minority ethnic (BAME) people are disproportionately represented in the criminal justice system in the first place, and thus are more likely to be regarded as requiring some form of 'correction' or 'reform' than white people. Whilst only about ten per cent of the general population are from a BAME group (Equality and Human Rights Commission 2010) the MOJ (2015a) report that 26 per cent of the prison population are from minority ethnic groups. However, racial disparities are also evident in the sentencing of BAME lawbreakers compared to white people both in terms of their likelihood of receiving a custodial sentence and the average lengths of prison sentences handed down.

Official statistics reveal that BAME groups were sentenced to immediate custody for indictable offences more often than white people. For the year ending March 2014, some 28% of black people before the Crown Courts were sentenced to custody, compared with 30% for Asians and 42% in 'other' minority ethnic groups. By comparison 27% of white people received custodial sentences during this period (MOJ 2014c). Moreover, when determinate prison sentences for indictable offences during the same period are considered, those in 'other' minority ethnic groups received the lengthiest average custodial sentences at 24.6 months. By comparison black people received average sentence lengths of 22.9 months and Asian people 21.7 months whilst the average sentence length was recorded for white people at 16.5 months (*ibid.*). These disparities have direct consequences for the relative

length of time that some BAME PWCs may have to wait, compared to white people, for criminal convictions to become 'spent' under the ROA (see chapter one on 'rehabilitation periods').

When considering the position of women and their potential subjection to rehabilitative interventions, the statistical information on the characteristics of prisoners provided above demonstrates that, in many respects, women in the criminal justice system fare worse than men based upon the complexity of their needs. However, rather than seeking to address these obvious needs, numerous scholars have noted how rehabilitation regimes for women have largely been tailored to patriarchal concerns such as returning 'deviant' women to the 'traditional' gender roles from which they are often deemed to have strayed (see *inter alia* Carlen 1983, 2003; Worrall 1990; Howe 1994; Hannah-Moffat 2001; Barton 2005). Worrall (1990: 115) suggests that even where attempts to recognise vulnerability on the part of female lawbreakers has resulted in advocacy for 'alternatives to custody', the debate about how this might be achieved has largely ignored the complexity of the routes by which women are sent to custody in the first place. This is because:

> First, [the debate] renders the majority of female law-breakers invisible by constructing them as 'not recidivists'. Second, it renders a minority of female law-breakers highly visible by assuming that their presence in prison demonstrates either their dangerousness or their incorrigibility, rather than demonstrating the inadequacy of the discourses within which they are so constructed. (*ibid.*)

Moreover, where recognition of the vulnerabilities of female lawbreakers and the circumstances which lead to their offending *does* occur (see, for instance, Corston 2007; Douglas *et al.* 2009) arguments for alternatives to *prison-based* rehabilitative interventions all too frequently come into tension with the classical juridical conception of all lawbreakers as

rationally-calculating actors – a discourse which has seen a marked resurgence under neoliberalism and its 'cultural trope of individual responsibility' (Wacquant 2009: 307). Indeed, as Corcoran suggests, the 'axis of need and victimhood' upon which female lawbreakers are routinely positioned 'is compounded by a criminological 'discourse of the self' which refracts blameworthiness onto offenders themselves for failing to transcend their criminogenic life conditions' (2007: 416).

Conclusion

This chapter has discussed the evolution of transformative penality beginning with its origins in the 'correction' of vagrants and others deemed to be 'idle' in the early modern period. It then turned to the post-Enlightenment era of 'reform' and its concern for the spiritual and moral reclamation of lawbreakers. Later, the idea of 'rehabilitation' was examined as a penal strategy predicated upon the idea that individuals required 'treatment' for underlying pathologies which accounted for their criminal behaviour. The chapter also revealed how, in the last few decades of the twentieth century, the treatment model was displaced from its position as the central, guiding ethos of the penal-welfare framework due to the pessimistic conclusion that 'nothing works'.

Also considered in this chapter was the fact that those who enter the penal system *in the present* are largely poorer lawbreakers experiencing multiple forms of disadvantage and with complex range of needs relating to housing, low educational attainment, drug and alcohol dependency, unemployment and mental health problems. In addition to the 'blatant class bias' (Carlen 2013: 90) which pervades rehabilitation, the chapter discussed how those who become subject to rehabilitative intervention are disproportionately from black or minority ethnic groups due to sentencing disparities in the criminal justice system. Moreover, the practice of rehabilitation has tended to marginalise women – mainly due to any recognition of their needs being subsumed within patriarchal assumptions about female 'deviance'. This

has led to responses which seek to restore women to traditional gender roles, but also due to an agenda which responsibilises and blames women (and indeed men) in the criminal justice system for their own circumstances.

This differential treatment of poorer lawbreakers, ethnic minorities and women within the practice of rehabilitation is further underpinned by the discursive production of lawbreakers as subjects. As the chapter discussed, the historical modalities of subjection which have stemmed from different transformative penalities have cultivated a complex and hybridized subjectivity which positions lawbreakers as variously idle, immoral, undeserving, pathological, risky and/or dangerous. Perversely, these stigmatising labels beget social attitudes and responses which further marginalise those who are subject to purportedly benign interventions designed, ostensibly, to 'correct', 'reform' and 'rehabilitate'. That such a paradoxical situation could have arisen reveals a fundamental ambiguity about the ideology of rehabilitation. That is, by subjecting lawbreakers to supposedly transformative interventions society has applied to them to a further stigma based upon its estimation or diagnosis of them as subjects.

This raises the fundamental question of precisely who the intended beneficiaries of rehabilitative practices might be. A deontological approach to rehabilitation demands 'that we should rehabilitate offenders because it is just…[and] because each individual has moral importance' (Brooks 2012: 52). Such an approach would involve, in McNeill's (2012) formulation a recognition of not just the psychological or 'treatment' dimension of rehabilitation but also of the social and moral restoration of lawbreakers and, critically, of their legal requalification as citizens of equal worth. However, our motivation for rehabilitating lawbreakers has arguably never commenced from the principled position that the primary beneficiary of any attempt at correction/reform/rehabilitation is *the individual lawbreaker themselves*. Instead, various transformative penalities have, throughout history,

proceeded on the somewhat utilitarian basis that we should rehabilitate lawbreakers 'because it may save us money or reduce crime' (Brooks 2012: 52). That is, society is driven by a concern for the well-being and economic prosperity of the purportedly 'law-abiding majority' in society for whom rehabilitation exists as a safeguard against further victimisation at the hands of recidivists and the unwanted expense of repeated prosecutions and punishments.

Within this context, the extent to which PWCs might be formally or legally rehabilitated and their past record of offending 'set aside, sealed or surpassed' (McNeill 2012: 27) might seem limited. Moreover, their life chances in a society which has become increasingly 'exclusive' (Young 1999) may seem relatively bleak. Nonetheless, the legal rehabilitation of PWCs was not only introduced right at the moment when 'nothing works' pessimism was said to have taken hold of the penal system, but it also survived through a period when ever-tighter social controls on former lawbreakers have become the norm. This thesis now turns to the conditions of possibility in which this provision for legal rehabilitation in England and Wales came into being.

6. The Rehabilitation of Offenders Act in context

The Rehabilitation of Offenders Act 1974 was an unlikely piece of legislation. This does not mean that an Act providing legal protection to PWCs was 'unthinkable' in the early to mid-1970s. Indeed, the ROA seems to be thoroughly in keeping with a series of other liberalising reforms from the decade which preceded it. Rather, the Act was unlikely in that it was conceived of, drafted, passed by Parliament and enacted during a period in British history characterised by various political and economic crises (Beckett 2009; Sandbrook 2010), turmoil in industrial relations (Medhurst 2014; Smith and Chamberlain 2015), agendas of both social conservatism and radicalism and even suggestions of concerted plotting by members of 'the establishment' to overthrow the Labour government of Harold Wilson (Wright 1987; Penrose and Courtiour 1978; Leigh 1989; Dorril and Ramsay 1992).

The events of the early 1970s would lead to an erosion of the post-war consensus in British politics. This 'consensus' centred around a mixed economy (including Keynesian state-planning), collectivism and cross-party support for government provision of social security. In was later undone by the emergence of the radical New Right in the form of 'Thatcherism' (Kavanagh 1987) and a sustained phase of 'regressive modernization' (Hall 1988: 2). This was characterised by individualism, a monetarist free-market approach to the economy, a retrenchment of the welfare state and an intensification of populist authoritarian approaches to law and social order (Hall *et al.* 1978; Ryan 2003; Sim 2009). Given this context, it is debateable as to whether the ROA could have come into being had it been introduced into Parliament any later.

This chapter provides a political history of the period up to and including 1974 with the aim of contextualising the discussion of the 'making and unmaking' of legal rehabilitation which follows. Such a history is, by necessity, brief and selective given the space available. As a caveat, the aim is not so much to offer a fully comprehensive account of this historical conjuncture (for this see *inter alia* Beckett 2009; Sandbrook 2010; Medhurst 2014), or to

provide a fully theorized analysis of the transition to a more 'coercive' rather than 'consensual' approach to law and order (for this see Hall et al. 1978: 215-317). Rather, the inclusion of this chapter is intended to convey something of the particular 'surfaces of emergence' (Foucault 1972: 45) for legal rehabilitation as a form of social practice. That is, of the set of historical conditions of possibility (and, to some extent, impossibility) in which the legal requalification of PWCs became both thinkable and practicable. The chapter discusses not just social, cultural and penal politics, but also the precarious state of the economy and the conflictual nature of industrial relations during this period. These contextual factors have direct relevance for the different 'ways of thinking' about lawbreakers and the extent of their redeemability which were in circulation in the mid-1970s.

From welfare state to 'white heat': British politics 1945-1970

The post-war consensus

During the course of the Second World War there emerged 'a greater acceptance among policy makers of the idea that citizenship encompassed a range of social as well as political rights' (Kavanagh 1987: 45). One of the most influential factors in this growing consensus was the production of the report by Sir William Beveridge on *Social Insurance and Allied Services* (Beveridge 1942) which proposed a number of measures designed to rid Britain of the five 'Giant Evils' of squalor, ignorance, want, idleness, and disease. Taking up these proposals, the post-war Labour government led by Clement Attlee introduced a number of social security measures which have since been described as the 'welfare state'. These included: family allowance paid for by general taxation; a National Insurance Act to provide flat-rate benefits to those insured in the event of unemployment, sickness, retirement and widowhood; a National Assistance Act to support those without a full contributions record; and the establishment of a National Health Service to provide medical services for all, free at the point of use (Kavanagh 1987: 46).

Despite this radical program the Labour Party went on to lose a series of general elections to

a renewed Conservative Party in 1951, 1955 and 1959. The 1950s saw a marked consumer boom and a reduction in national debt providing Harold Macmillan with a platform from which to confidently assert to the public that 'you've never had it so good' when fighting and winning the 1959 general election (Hobsbawm 1994: 257). Yet, even though the Conservatives dominated British politics during the 1950s, a strong degree of consensus about the role of the mixed economy and the welfare state remained in place, albeit this was more a 'pragmatic acceptance' of these policies than a 'principled agreement…and in both [Labour and Conservative] parties there were dissenters' (Kavanagh 1987: 39).

However, whilst the country was undoubtedly experiencing a period of increased prosperity, this occurred against both the grim Cold War backdrop of nuclear weapons proliferation and a longer-standing sense of decline in respect of Britain's status in the world. This was particularly so given the phase of decolonisation which had followed the Second World War. Consequently, '[f]rom 1945 onwards, the issue of Britain's decline changed from a matter for intermittent public debate into a major and growing preoccupation of political life' (Beckett 2009: 15). This sense of Britain 'falling behind' in the world was also borne out economically, as between 1950 and 1964 the UK's gross domestic product grew at an annual average of just three per cent, in comparison to an average of at least five per cent in Germany, Japan, France and Italy (*ibid.*: 16).

The crisis of the British establishment

Within this difficult context, a number of significant events during the 1950s and early 1960s led to a crisis of public confidence in the British establishment. These included Britain's ill-fated military involvement in the Suez Crisis in 1956 (Varble 2003) and a gradual exposure of Soviet espionage at the heart of the British security services linked to the infamous Cambridge 'Ring of Five' (Wright 1987: 164). Then, in 1963 and only a year before the next general election, the Conservative Party would receive a major setback with the revelation that its Secretary of State for War, John Profumo, had been involved in a sexual relationship

with Christine Keeler - a young woman who had also been intimately involved with a senior naval attaché at the Soviet Embassy. The implications for national security were clear and, having previously denied the affair in a statement to the House of Commons, Profumo was forced to admit it only a few weeks later. He subsequently resigned from both the government and parliament (Young 1963; Denning 1992). These events severely damaged the confidence of Harold Macmillan who resigned as prime minister on grounds of ill-health in October 1963. He was replaced with the aristocratic Sir Alec Douglas-Home who was required to renounce his hereditary peerage in order to sit in the House of Commons as Prime Minister.

The aftermath of these events was of such significance that one commentator later remarked that, not only did it help to bring about the end of the old, aristocratic Conservative Party, but '[i]t wouldn't be too much to say that the Profumo scandal was the necessary prelude to the new Toryism, based on meritocracy, which would eventually emerge under Margaret Thatcher' (Cooper 1993: 310). With the harm done to the Government's authority by these developments, to say nothing of the Conservative Party's supposed reputation as 'the natural party of government', Labour seized the initiative. A new spirit of optimism was offered by Harold Wilson's promise to revive Britain through the 'white heat' of a scientific and technological revolution to sweep away 'restrictive practices…on both sides of industry' (Wilson 1963). The following year Wilson and the Labour Party won a slender parliamentary majority of only four seats at the general election. This close result stifled the new government's legislative programme and was resolved only by a further election in 1966 through which Wilson achieved a greatly increased majority of 96.

Table 5: Significant liberalising legislation of the 1964-1970 Labour Government

Title of legislation	Summary of effect	Date of Royal Assent
Murder (Abolition of Death Penalty) Act 1965	Suspended the death penalty for murder in Great Britain. The Act replaced the penalty of death with a mandatory sentence of imprisonment for life. It was made permanent in 1969 although the Act did not apply to Northern Ireland where they death penalty for murder survived until 1973.	8 November 1965
Race Relations Act 1965	Outlawed discrimination on the 'grounds of colour, race, or ethnic or national origins' in public places.	8 December 1965
National Health Service (Family Planning) Act 1967	Enabled Local Health Authorities to give birth control advice, regardless of marital status, on *social* as well as medical grounds.	28 June 1967
Sexual Offences Act 1967	Decriminalised homosexual acts in private between two men when both were aged 21 or over (applied to England and Wales only).	27 July 1967
Abortion Act 1967	Legalised abortions conducted in the UK by registered practitioners and regulated the free provision of abortions through the National Health Service (the Act did not apply to Northern Ireland).	27 October 1967
Theatres Act 1968	Abolished censorship of the theatre (prior to this scripts had to be submitted to the Lord Chamberlain's office for a licence).	26 July 1968
Race Relations Act 1968	Made it illegal to refuse housing, employment, or public services to a person on the grounds of colour, race, ethnic or national origins.	25 October 1968
Representation of the People Act 1969	Extended the franchise to people aged 18-20 (previously only those aged 21 and over could vote in UK elections)	17 April 1969
Divorce Reform Act 1969	Allowed couples to divorce after a separation of two years (or five if only one party agreed). Also enabled a divorce to be granted on the grounds that the marriage has irretrievably broken down and removed the removed the concept of 'matrimonial offences' which gave rise to the idea of divorce as a remedy for the innocent against the guilty.	22 October 1969
Equal Pay Act 1970	Prohibited any less favourable treatment between men and women in terms of pay and conditions of employment.	29 May 1970

The permissive society

A full account of the impact on the UK of the 1964-1970 Labour government is not possible in the space available here (for this see *inter alia* Shaw 2002; Sandbrook 2006; Fielding 2008; Tomlinson 2009). Instead, it will suffice to provide an overview of the growth of the so-called 'permissive society', under which it is claimed that conservative social norms became increasingly relaxed. Despite the 'moral panics' and subsequent clampdowns against 'Mods and Rockers' which followed disturbances at English seaside resorts between 1964 and 1966 (Cohen 2002), the so called 'swinging-sixties' also included several liberalising pieces of legislation. These represented 'a turning point in the social history of the country' which, from competing political perspectives were 'either a halcyon time of personal liberation or the onset of national decadence' (Campbell 1983: 89). This period included the abolition of the death penalty for murder, the decriminalisation of homosexuality and legislation which facilitated women's access to birth control, abortion and divorce. A summary of this legislation is provided in Table 5 (above).

The *dramatis personae* of social and penal reform

In considering the relevance of this 'liberalisation' to the ROA it is worthwhile providing some context to the climate of social and penal reform pre-1974 by discussing some of the key personalities involved. This section considers: Lord Longford, who helped to put the welfare of prisoners and ex-prisoners on the political agenda throughout his life; Roy Jenkins, who oversaw a number of key social reforms during his tenure as Home Secretary; and Lord Gardiner, who acted as Lord Chancellor for the Labour Government between 1964 and 1970 and who later chaired the Joint Working Party on Previous Convictions which conceived the ROA. Of course, these men were fairly *patrician liberal* figures given that each had relatively 'elite' status in terms of both social background and political rank (see also Loader 2006 on the era of 'platonic guardians'). However, recognising their significant role in the history of late-twentieth century penal reform is not to underplay the equally important role played by

lobbyists *from below.* The contribution of various 'non-elite' campaign groups and activists is discussed in the section which follows.

Lord Longford

Lord Longford (born Francis 'Frank' Aungier Pakenham) was the son of Thomas Pakenham, the 5th Earl of Longford in the Peerage of Ireland. Longford was originally a member of the Conservative Party and became a member of their Research Department in the early 1930s. However, he became a socialist and joined the Labour Party in 1936 following persuasion from his wife Elizabeth who was already a Labour parliamentary candidate and due to his concern at the growth of fascism in Europe (Stanford 2003: 80-85). A further 'conversion' occurred in January 1940 when, following encouragement from his friend Evelyn Waugh, Longford became a Catholic (*ibid*. p.113)

At the outset of the Second World War Longford volunteered for military service. However, shortly after this he suffered a nervous breakdown due to his inability to cope with the physical and psychological demands of army life and was medically discharged (Craig 1979: 58-60). Longford's wife later suggested that what he regarded as his 'failure' in the military gave him a 'greater understanding of others who had been brought, perhaps not before an army board, but before a magistrates' court and sent, not back to civilian life, but to prison' (Stanford 2003: 121). Longford himself would later acknowledge that:

> The compensations derived from my poor war record have been more than sufficient. With prisoners, ex-prisoners, outcasts generally…I have had one unfailing and unforeseen point of contact. I can say and mean and be believed, "I have also been humiliated." (Packenham 1964, cited in Craig 1979: 60)

After his discharge, Longford worked as an assistant to Sir William Beveridge on his

landmark 'welfare state' report and later, following the war, was created Baron Pakenham by Clement Attlee. He was therefore one of the few aristocratic hereditary peers ever to serve in a Labour government. Years later, when Labour returned to power in 1964, he became Leader of the House of Lords and Lord Privy Seal. However, it was during his years out of government that Longford perhaps did his most significant work in advancing the cause of prisoners and ex-prisoners.

Longford had first taken an interest in prisons in 1936 when he became a local Labour councillor and visited one of his constituents in Oxford jail. Prison visits would remain a feature of his life for over six decades. In 1956 he helped to establish the New Bridge Foundation – an organisation designed to befriend prisoners and assist them with the transition back into the community after release. Two ex-prisoners were also heavily involved in the establishment of the organisation: Lord Edward Montagu and Peter Wildeblood. Both men had been convicted of homosexual offences in the early 1950s and had been subjected to public opprobrium. By chance, Montagu also knew Longford's daughter Antonia and Longford had met him at Wakefield Prison whilst Longford was conducting the research that would lead to his book *Causes of Crime* (Packenham 1958). It was perhaps due to these personal associations that Longford was able to overlook his own personal, religious conviction that homosexuality was a 'sin' and support both the Wolfenden Report in 1957 and the decriminalisation of homosexuality in the Sexual Offences Act of 1967.

As this chapter discusses later, Longford held other socially conservative attitudes although he did make several significant liberal interventions into criminology with *The Idea of Punishment* (Pakenham 1961) and the report of an inquiry which he chaired into the *Problems of the Ex-Prisoner* (Pakenham/Thompson Committee 1961) (see chapter seven). He also, at the request of Harold Wilson, chaired a committee on crime prevention which led to the report, *Crime: A Challenge to Us All* (Labour Party Study Group 1964). This report had 'a profound effect between 1964 and 1970 on the Labour government's policy on law and

prison reform in general' (Stanford 2003: 275).

Generally, Harold Wilson tended to treat Longford 'with personal kindness but professional contempt, remarking that Longford - who had got a double first at Oxford - had a mental age of 12' (Stanford 2001). This opinion stemmed largely from what Wilson regarded as Longford's tendency to put his Catholic moral principles before the interests of the Labour Party. For instance, during the Profumo Affair, Longford had shown greater concern for the moral welfare of the protagonists than for the political capital that could be achieved from the decline of Conservative authority (Stanford 2003: 270-272). In her biographical portrait of Longford, Craig (1979: 206-207) suggested that through his championing of unpopular cases and 'outcasts' (most famously Myra Hindley), Longford was 'intolerant of the public's vengeful attitude' to the extent that it was perhaps 'arrogant of him to be so openly contemptuous of public opinion'. However, she also noted that 'by confronting the public fairly and squarely with an unpopular and emotive issue' and by being 'prepared to accept all of the insults and threats that are flung at him' (*ibid.*), he was able to ensure that the discussion about penal reform continued.

Roy Jenkins

Roy Jenkins was one of the key figures associated with the 'permissive society' during his first period as Home Secretary (23rd December 1965 – 30th September 1967) although he preferred to speak of the creation of a 'civilised society' himself. Jenkins 'was openly on the side of the sixties revolution, not against it and, if a 45-year-old politician could hardly be its patron saint, he can justly be seen as its benevolent sponsor' (Campbell 1983: 89). He did not, as is commonly believed, oversee the abolition of the death penalty. Rather, its suspension occurred during the tenure of Jenkins' predecessor Frank Soskice who ensured Government support for Sydney Silverman's famous private members' bill. Moreover, when the death penalty for murder was permanently abolished in 1969, James Callaghan was Home Secretary. It would also be an oversight to overlook the role of anti-death penalty

campaigners such as Ludovic Kennedy, Arthur Koestler, Victor Gollancz and, perhaps most dramatically, Violet van der Elst in bringing about abolition (see Gattey 1972; Seal 2013). However, Jenkins had long campaigned for abolition as well as for 'the legalization of homosexuality, the relaxation of licensing and Sunday Observance laws [and] the ending of theatre censorship' (Campbell 1983: 90).

In respect of numerous liberal causes, Jenkins *did not* actually put forward Government legislation (with the exception of theatre censorship and the strengthening of race relations legislation). However, he ensured that the private members' bills of David Steel (on abortion reform) and Leo Abse (on the decriminalisation of homosexuality) were both given 'the full resources of Home Office in drafting and technical assistance and he persuaded the Cabinet, the Leader of the House…and the Chief Whip…to give them the necessary allocation of Government time to defeat their opponents' filibusters and see them through' (Campbell 1983: 91). He also spoke in support of these measures but critically, by assisting their progress as backbenchers' initiatives rather than Government bills, he took advantage of Labour's majority in the Commons without making the Government directly responsible for the introduction of what were, at the time, controversial and emotively contested reforms.

It was through a shared obstinate determination to promote reform in defiance of public opinion that both Longford and, perhaps with greater political skill, Jenkins could be said to have prepared the political ground for a piece of legislation such as the ROA. The 'backdoor' model of liberalisation which Jenkins used to great effect to achieve reforms on abortion and homosexuality would be replicated when he returned for a second term as Home Secretary (5th March 1974 – 10th September 1976) and the ROB was placed before parliament. However, it was another parliamentarian who became the ROA's chief architect and political sponsor.

Lord Gardiner

Gerald Gardiner was born to a wealthy family and educated at Harrow and at Oxford

University where he became involved with the New Reform Club. Here, quite contrary to his father's conservative inclinations, he began his support for reforms relating to 'divorce, homosexual offences, legal punishment for suicide and capital punishment' (Box 1983: 38-39). Abandoning his earlier desire to become an actor he trained in law and became a barrister in 1925, reconciling himself that 'it was better than long runs [on the stage]. Your write your own part and there's a good deal of acting in it, of course' (cited in Box 1983: 30). As a conscientious objector he served in the Friends Ambulance Unit from 1943 to 1945 and following the war continued his legal career with great success becoming a King's Counsel in 1948.

Gardiner's most significant case came in 1960, when he successfully defended Penguin Books against charges under the Obscene Publications Act 1959 (which somewhat ironically had been introduced by Roy Jenkins as a private members' bill). This followed Penguin's publication of the unexpurgated and sexually explicit version of D. H. Lawrence's novel *Lady Chatterley's Lover*. The much quoted remark by prosecutor Mervyn Griffith-Jones (who also led the prosecutions stemming from the Profumo affair) about whether the novel was something 'you would even wish your wife or servants to read' is often cited as representing a British establishment which had fallen out of touch with popular opinion at the time (Box 1983: 117). The outcome of the trial is therefore regarded as a watershed moment for the emergence of more liberal attitudes in Britain in the 1960's.

In addition to his work as an advocate and his interest in law reform, Lord Gardiner took an active role in human rights and the reform of the penal system. He campaigned for the abolition of the death penalty from the late 1930s (Box 1983:54), authored *Capital Punishment as a Deterrent and the Alternative* (Gardiner 1956) and became Joint Chair (with Victor Gollancz) of the National Campaign for the Abolition of Capital Punishment in 1960 (Box 1983: 94). He had also been the original choice to chair the 1961 report into ex-prisoner welfare eventually led by Longford and Peter Thompson but was unable to take up

the appointment because he had not yet retired from the bar (Stanford 2003: 249). Gardiner was also a member of the International Commission of Jurists (an international non-governmental human rights organization) and attended the South African treason trials as an impartial observer 1956. He later became chair of JUSTICE, the British section the Commission in 1971.

Having been active in the Labour Party for nearly a decade, Gardiner was made a life peer by Harold Wilson (then Leader of the Opposition) in 1963 on the basis that he would become Lord High Chancellor (a member of the cabinet and the country's chief legal officer) if Labour won the election. Following Labour's success, this promise was kept and between 1964 and 1970, Gardiner presided over a number of important legal innovations such as the creation of the Government ombudsman, the setting up of the Family Division of the High Court and the establishment of the Law Commission as a means of keeping the law under review. During this period he would also carry the *Murder (Abolition of the Death Penalty) Act 1965* through the House of Lords with a contribution from the Woolsack which Wilson described as 'undoubtedly the greatest speech of the day, both for its content and manner and for the effect it had on doubters' (Wilson 1971; cited in Box 1983: 195). However, his tenure as Lord Chancellor would end on 19th June 1970 when Wilson and the Labour Party unexpectedly lost a general election to Edward Heath's Conservatives.

The crisis years: Britain 1970-1974

The decades before 1970 are often represented as something of a 'golden age' in British history and undoubtedly the post-war era had led to significant increases in living standards and social security for many. Indeed, Kavanagh notes that '[b]etween 1948 and 1970 the annual average level of unemployment never exceeded 3 per cent, compared with the norm of 10 per cent during the inter-war years' (1987: 40). However, as discussed earlier, the fragility of the post-war consensus had already been exposed by the 1960s and therefore an

alternative explanation to the retrospective framing of the 1950s and 1960s as a 'golden age' is that perhaps 'the gold glowed more brightly against the dull or dark background of the subsequent decades of crisis' (Hobsbawm 1994: 258). It is to the emergence of this period of crisis in Britain that this chapter now turns.

Hall *et al.* (1978: 237-243) suggest that the year 1968 was particularly significant in what they describe as 'the exhaustion of consent'. The year signified 'a remarkable cataclysm' which had a 'seismic impact' upon the political stability of many countries (p.237). It also helped to usher in an era of much more radical politics on the left and was marked by worldwide student protests, violent confrontations with the police and the pinnacle of the 'Black Power' movement in the US. The year was also noteworthy for Enoch Powell's 'rivers of blood' speech – a significant event in an era of more heightened racial tensions in Britain. However, some commentators have suggested that 'the Labour government had already done more to catalyse racial prejudice than Powell's rhetoric ever could' (Lattimer 1999) through its hostile policy response to UK-passport holding Asians who chose to leave Kenya following its independence from British rule.

True to form though, 'Britain moved into this cataclysm [of 1968] more cautiously and sedately' (Hall *et al.* 1978: 238) than other countries and therefore the emergence of a more 'exceptional' British state is perhaps more appropriately linked to the 1970-1974 period following the election of Edward Heath's Conservative government (see Beckett 2009: 9-14). This section provides an overview of the socially conservative backlash against the 'permissive society' which had emerged in the 1960s. It then turns to various strands of resistance 'from below' against the authority of the state which were prevalent from 1970 onwards. Finally, the twin crises of the economy and of industrial relations which plagued the Heath government during its period in office are considered.

The backlash against permissiveness

As 'permissive' as the 1960s in Britain may have been, a decisive shift towards a fully inclusive, liberal hegemony in society was never really a possibility during this period. A resilient streak of social conservatism and authoritarianism remained firmly embedded in the collective conscience of the British Establishment. In the final days of Wilson's Labour government, a House of Commons debate was arranged by the Conservative MP Peter Fry (who had recently been elected to Parliament in a by-election) on the problems of the 'permissive society'. His motion was as follows:

> That this House views with grave concern the continuing decline of moral standards and the increases of violence, hooliganism, drug taking and obscenity and the consequent undermining of family life; and calls upon Her Majesty's Government to enlist the support of parents, religious leaders, school and university teachers, broadcasters and social workers to give help to those members of the rising generation who may be in need of adequate discipline and a better example.
>
> (HC Deb, 7th May 1970, vol. 801, c38)

This debate foreshadowed the more significant backlash against 'permissiveness' which would follow in subsequent years. At the forefront of this backlash was Mary Whitehouse, a schoolteacher and socially conservative activist who had, in 1964, established the 'Clean Up TV' pressure group and, the following year, the 'National Viewers' and Listeners' Association' (NVLA). Whitehouse used her profile to criticise broadcasters and the BBC in particular for what she considered to be an excessive portrayal of violence, sex and bad language. Whitehouse's motivation stemmed from her traditional Christian beliefs and her hostility to the pace of social and political change in the 1960s (Caulfield 1976). Of these developments, Beckett (2009: 286) observes that during the first half of the 1970s 'British popular culture was becoming more hospitable again to right-wing conservatism'.

In 1971, Whitehouse would be a central figure in the organisation of the 'Nationwide Festival of Light' (NFOL) – a series of events including marches, a Christian music concert in Hyde Park and a large rally at Westminster Central Hall. The NFOL had begun as a grassroots movement and was instigated by Peter Hill – an evangelical Christian who had returned to Britain after spending four years as a missionary in India with his wife Janet. Hill had been shocked by what he perceived to be a significant decline in Britain's moral standards during the time that he had been away. The aims of the NFOL were twofold: to protest against 'sexploitation' in popular media and the arts more broadly and to promote the centrality of Christian values in the recovery of the nation's moral stability. The movement gained support from Anglican, Baptist, Plymouth Brethren and Pentecostal denominations as well as from high profile figures such as Whitehouse, Cliff Richard, Malcolm Muggeridge, the Chief Constable of Lancashire, the Bishop of Blackburn and Lord Longford (Whipple 2010).

In addition to his penal reform work Longford was, at this time, actively engaged in a campaign against pornography and published a privately-funded report on the topic in September 1972 (Longford Committee Investigating Pornography 1972). Whitehouse and others had contributed to this report which advocated greater government control of the availability of sexually explicit material. This censorious attitude was in keeping with the earlier NFOL and the prosecution of the editors of the satirical magazine *Oz* on the grounds of obscenity in 1971 (Hall *et al*. 1978: 280). Moreover, despite having opened the first Parliamentary debate in support of the Wolfenden Report in 1957 and voting for the eventual decriminalization of homosexuality in 1967, Longford would always retain a personal moral opposition to homosexuality which he regarded as a sin. He was similarly conflicted by his Catholic views on the issue of divorce (Stanford 2003). Thus the person who had, by this point, done more than any other to advance the cause of prisoners and ex-prisoners was also aligned with those at the forefront of a resurgent social conservatism in the early 1970s.

Resistance from below

In stark contrast to the more conservative ambitions of comparatively elite figures, the early 1970s were also remarkable for the emergence of a much more militant and radical approach from some on the political left. This included, in some cases, direct military action against the state. Inspired by the student revolts in Paris in 1968 and in a similar vein to the *Baader-Meinhof* (Red Army Faction) group in West Germany and the *Brigate Rosse* (Red Brigade) in Italy, the 'Angry Brigade' engaged in a bombing campaign against members of the British Establishment (Carr 2010). This involved attacks on banks, embassies, a BBC outside broadcast van at the Miss World event in 1970 and the homes of several Conservative MPs. Most significantly, the home of Employment Secretary Robert Carr MP was bombed on the night of 12th January 1971 (Bright 2002). The attack on Carr was claimed by the group as an act of defiance against the Conservative Government's *Industrial Relations Bill*. Hall *et al*. have suggested that the turn to violence by groups such as the Angry Brigade had a number of profound consequences:

> Unwittingly, it cemented in the public consciousness the inextricable link, the consequential chain, between the politics of the alternative society and the violent threat to the state. It made the possible seem inevitable. It gave the forces of law and order precisely the pretext they needed to come down on the libertarian network like a ton of bricks. It strengthened the will of ordinary people, for whom explosions in the night were a vivid self-fulfilling prophecy, to support the law-and-order forces to 'do what they had to do', come what may. (1978: 286)

The increasing authoritarianism of the era was also linked to the commencement of a mainland bombing campaign by the Irish Republican Army, beginning with an attack on the Post Office Tower in October 1971. This attack occurred partly in retaliation for the British

Government's controversial reintroduction of 'internment' in Northern Ireland under the '*Special Powers Act'*. Internment allowed the authorities to indefinitely detain without trial those suspected of terrorism. It also gave rise to more peaceful demonstrations by groups such as the Northern Ireland Civil Rights Association (NICRA). However, the events of 'Bloody Sunday' on 30th January 1972 where 26 unarmed civilians were shot dead by the British Army during a protest march against internment served only to escalate the IRA's armed confrontation with the British state (Beckett 2009: 109-117).

Within this climate, a more radical (though less-violent) approach to penal politics emerged. This included the establishment of groups such as the Union for the Preservation of the Rights of Prisoners (PROP – effectively a prisoner's union), Radical Alternatives to Prison (RAP) who advocated prison *abolition* rather than *reform* and the NAPO Members' Action Group (NMAG), a socialist alliance of junior probation officers who supported many of the aims of PROP and RAP (see Ryan 2003: 41-74). Similar modes of resistance were being organised in France at this time. On the 8th February 1971 the 'Groupe d'information sur les prisons' (GIP) launched its manifesto. Led by Michel Foucault amongst others the GIP set out:

> to make known [*de faire savoir*] what the prison is: who goes there, how and why they go there, what happens there, and what the life of the prisoners is, and that, equally, of the surveillance personnel; what the buildings, the food, and hygiene are like; how the internal regulations, medical control, and the workshops function; how one gets out and what it is to be, in our society, one of those who came out. (GIP Manifesto 1971; translated by Elden 2013)

The GIP's concern with both the treatment of prisoners and ex-prisoners and the medicalization of incarceration was driven, in part by the broader ideological questioning of the 'treatment model' of rehabilitation already discussed (see Crow 2001). However, it also

perhaps owed much to Foucault's interest in the social history of medicine (Foucault 1973) and with madness (Foucault 1967; 2006). The GIP was also more broadly aligned with the anti-psychiatry movement and the view of many 'treatments' as damaging rather than helpful to patients. Those at the forefront of this movement regarded psychiatry as a coercive instrument of social control underpinned by highly subjective diagnostic processes and unequal power relations between doctors and patients, often confined within 'total institutions' (see *inter alia* Goffman 1961; Szasz 1972, 1973, 1974, 1987; Cooper 1967; Laing 1965; Boyers and Orrill 1972; Kotowicz 1997).

The economic and industrial relations crises

The backlash against the permissiveness of the 1960s and the various forms of resistance to the authority of the British state were representative of a polarisation of British political activism. On the one hand, there existed a resurgent social conservatism and on the other, an increasingly resolute and occasionally militant radicalism. This polarisation is further contextualised by two significant crises faced by Edward Heath's government between June 1970 and March 1974. The first of these crises related to the economy and the second to the state of industrial relations in the UK. To a certain extent, Heath and his Conservative colleagues were victims of fortune in that the economic downturn was largely brought about by international events outside of their direct control. However, the government's somewhat heavy-handed approach to industrial relations would ultimately play a direct part in its defeat in the February 1974 general election.

One of the preconditions of the economic crisis occurred on 15th August 1971 when the President of the United States, Richard Nixon, unilaterally pulled the US out of the Bretton Woods system of monetary management. This system had, in 1944, established a regulatory system for commercial and financial relations between leading industrial economies (including exchange rates) by obliging each country to adopt a monetary policy which tied

the value of its currency to gold. The International Monetary Fund (IMF) had been founded at the Bretton Woods Conference, partly to underwrite this system by providing financial assistance in the event of member states having a temporary imbalance of payments (Beckett 2009: 317-319). When Nixon withdrew from the Bretton Woods system, the US the dollar effectively became a free-floating 'fiat' currency. That is, a currency not fixed to either another currency or a reserve such as gold but one allowed to fluctuate in response to foreign-exchange market mechanisms.

Since many other countries had linked their currency to the previously fixed value of the dollar, Nixon's decision brought about the *de facto* collapse of the Bretton Woods system. Britain, amongst others, followed the US example and floated its currency. Following this decision Heath's government 'cut interest rates, greatly loosened the rules that governed lending by banks, increased public spending and cut taxes' leading to a spectacular increase in the growth of the British economy from 1.4 per cent in 1971, to 3.5 per cent in 1972 and over five per cent in 1973 (Beckett 2009: 127). However, the increased demand caused by this boom could not be met by British manufacturers and service providers and the result was an increasing reliance on foreign goods which in turn caused a rapid inflation which the government tried to curb through public spending cuts (*ibid.*).

A further shock to a delicate economy occurred on 6th October 1973 when Egyptian troops invaded Israeli-occupied territories on the Sinai Peninsula and the Yom Kippur War began. In response to US support for Israel, including provision of arms supplies and financial assistance, the Arab members of OPEC (Organization of the Petroleum Exporting Countries) led by Saudi Arabia declared embargoes against the United States, and later extended this to Canada, Japan, the Netherlands, the United Kingdom. The cost of oil quadrupled from $3 per barrel to nearly $12 where it remained until the end of the embargo in March 1974 (Smith 1973; Licklider 1988; Smith 2006). These events precipitated a stock market crash in which

the UK economy was particularly badly hit with the FT-30 index on London's stock exchange losing 73 per cent of its value (Dampier 2003). Predictably, the UK economy went into recession and from the almost unprecedented economic growth which Heath's Government had stimulated, GDP fell by 1.1 per cent in 1974 - a problem exacerbated by the high price inflation of this period (a 'stagflation', see Davis 2003b).

The results of the 'oil shock' and the economic downturn were compounded for the Government by a growing crisis of industrial relations in the early 1970s. The full extent of the ongoing disputes is not possible to cover in the space available here (these are summarised in Table 6 below), however it was perhaps with the mishandling of these disputes that Heath and his colleagues played the greatest role in their own downfall. In their 1970 General Election manifesto, the Conservatives pledged to introduce an Industrial Relations Bill which would provide a 'deterrent against irresponsible action by unofficial minorities' who sought to 'disrupt industrial peace by unconstitutional or unofficial action' (ConservativeManifesto.com 2015). Essentially, the proposal sought to outlaw action taken by non-authorized picketers. It was further suggested that the Bill would set out what constituted lawful and unlawful conduct during industrial disputes, to create a registry of trades unions and to ensure that union rules were 'fair, just, democratic, and not in conflict with the public interest' (*ibid*.). Quite how this 'public interest' would be defined was not, however, clarified. When the Bill was introduced by Employment Secretary Robert Carr MP, it was bitterly opposed. In addition to the more violent response of the Angry Brigade already described, the Trades Union Congress (TUC) General Secretary Vic Feather described the Bill as 'not just an attack on the trade union movement…[but]…a limitation of free speech and a limitation of democratic action' (BBC News 2008a). The Bill prompted an unofficial walkout in which it is estimated that 'as many as 1.5 million people stopped work across the country' (*ibid.*).

Table 6. Timetable of the industrial relations crisis during the Heath administration

Key dates	Significant event
July 1970	Home Secretary Reginald Maudling declares a state of emergency over an ongoing dockworkers strike at UK ports.
March 1971	As many as 1.5 million people participated in an unofficial day of protest against the government's Industrial Relations Bill. Postal workers returned to work after a seven week strike following a dispute over pay.
June 1971	Over 100,000 shipbuilders on the Upper Clyde organise a 'work-in' due to the refusal of the Heath government to refuse further subsidies to sustain the industry. The dispute continued until October 1972.
January-February 1972	On 9th January mineworkers began their first national strike in over 50 years. On 9th February a state of emergency declared following power shortages caused by mineworkers strike and the disruption to businesses, schools and other public institutions. By 25th February Mineworkers vote to return to work after their union leaders agree a £95m pay package with the government.
June 1972	On 19th June the International Federation of Air Line Pilots Associations (IFALPA) began a 24-hour strike having accused governments of failing to take action to halt air piracy. Civil air travel all around the world was affected.
July 1972	On 28th July dockworkers begin an official strike to safeguard jobs. They had already been on unofficial strike for a week after the imprisonment of five shop stewards for contempt of the National Industrial Relations Court (NIRC). In response the Trades Union Congress (TUC) called for an official national strike on 31st July, demanding that the so-called 'Pentonville Five' were released. Their release was secured after the government's own Official Solicitor appealed to overturn the original arrest warrants, on the grounds that the NIRC did not have adequate grounds to deprive the shop stewards of their liberty and that the evidence against them was insufficient.
August-September 1972	Building workers used 'flying pickets' at numerous building sites including Telford and Shrewsbury in protest against dangerous workplace conditions. On 14th February 1973, twenty-four of the building workers' pickets are arrested and charged with various offences including unlawful assembly, affray, intimidation, criminal damage and assault. They were also charged with 'conspiracy to intimidate contrary to common law'. Over the course of the following year, they are convicted of various offences and sentenced to terms of up to three year's imprisonment in trials which have subsequently been questioned due to allegations of political interference.
May 1973	On 1st May approximately 1.6 million workers follow the Trades Union Congress' call for a one-day strike today to protest the government's pay restraint policy and price rises caused by inflation. Affected industries include the railways, car manufacturing, newspaper production, mining and docks.
December 1973	On 13th December, with coal miners engaged in an ongoing period of 'work to rule' in response to public sector wage restraint at a time of rising prices, Prime Minister Edward Heath announces a 'Three-Day Work Order' to restrict commercial energy consumption to three consecutive working days. In January, the National Union of Mineworkers (NUM) voted overwhelmingly to strike following rejection of the government's pay offer. In response, Heath called a snap general election calling on the country to decide 'who governs Britain?'

Sources: BBC News (2008); Beckett (2009); Darlington and Lyddon (2001); Hall *et al*. (1978); Medhurst (2014); Shrewsbury 24 Campaign (2015); Smith and Chamberlain (2015); Turner (2009)

The Industrial Relations Act of 1971 and the National Industrial Relations Court (NIRC) which it helped to establish have subsequently been described as a 'political and legal assault on the trade unions' (Medhurst 2014: 13). However, it also gave rise to an increased deployment of the criminal justice apparatus of the state against those involved in industrial action. Importantly, this occurred within the context of a broader concern at the heart of the British establishment about an increasingly radical politics on the left in the early 1970s. Smith and Chamberlain (2015: 46-47) note that during this period 'an interdepartmental committee was set up, on the advice of MI5 director-general Michael Hanley, to advise the Cabinet on subversion in public life'. Requests for reports by this committee on construction industry trade unionists and others have, to this day, been refused on grounds of national security.

The hostility to organised labour during this period is further exemplified by comments made by Sir Robert Mark, the commissioner of the Metropolitan Police, who stated that the convicted Shrewsbury pickets had by their actions 'committed the worst of all crimes, *worse even than murder*' (cited in Turner 2009: 77; emphasis added). Whilst Edward Heath's confrontation with organised labour would ultimately end in defeat for the Conservatives at the February 1974 general election, Mark's comments, the suspected involvement of the security services and the broader climate of concern about 'subversive elements' would foreshadow events a decade later when Margaret Thatcher would describe striking mineworkers as 'the enemy within' (see Milne 2014). Indeed, the emergence of Thatcherism was one of the outcomes of the 'short parliament' of 1974 since Thatcher would go on to replace Heath as Conservative leader after his second election defeat in October of that year. It is to this period that the chapter now turns.

The tipping point: 1974-1975

The introduction of this chapter described the ROA was an unlikely piece of legislation given the circumstances into which it was born. The pages that follow substantiates this point by

describing both the 'political arithmetic' of the UK Parliament in the period between the two general elections of 1974 and the concerted attempts to destabilise the Wilson government which occurred in the run up to the second of these elections. The chapter then discusses a number of factors which contributed to a climate which was altogether less hospitable to the notion of 'rehabilitation'. These include a number of tragic contingent events and the ascent of an authoritarian 'New Right' in the form of Thatcherism which effectively ended the era of consensus politics.

The short parliament of 1974

The general election of 28th February 1974 did not result in an obvious mandate for any political party. Heath's Conservatives ended with 297 seats in the House of Commons with Wilson's Labour Party on 301. Neither party had the 318 seats needed to constitute a majority. Nor had the margin of 'victory' for Labour been significant enough for Wilson to stake an obvious claim to form a minority government. As the incumbent Prime Minister, Heath retained the constitutional right to attempt to continue in government and made attempts to do so in coalition with Jeremy Thorpe's Liberal Party. However, to further complicate matters, the Liberals had won only 14 seats, despite making significant progress by increasing their share of the popular vote. This meant that they were not in a position to form a two-party coalition government with either Labour or the Conservatives. In any event, Thorpe's Liberals rejected the Conservatives' terms during coalition negotiations and Heath was forced to resign as Prime Minister on the 4th March. This allowed Wilson to return to power as the leader of a minority government (Butler and Kavanagh 1974).

The first priority for Wilson's government was to end the ongoing miners' strike which they did immediately by offering a 35 per cent pay rise. Other political priorities during this period were to increase spending on health, education and housing rents (largely through tax rises for the wealthy), to develop the potential of North Sea oil (as a longer term solution to

the economic chaos caused by ongoing events in the Middle East) and to respond to a number of difficult foreign affairs issues. These included: the reinstatement of a ban on arms exports to South Africa; opposition to General Pinochet's regime in Chile following the September 1973 *coup d'état* and his violent suppression of dissident groups; and the need to respond effectively to the Turkish invasion of Cyprus in July 1974 (Wilson 1979; Beckett 2009; Medhurst 2014).

The government also moved to stabilise industrial relations through repeal of the controversial Industrial Relations Act 1971 and the establishment of the Advisory Conciliation and Arbitration Service (ACAS) (Wilson 1979: 27-65). The Labour government was not universally successful in avoiding industrial conflict. However, the Ulster Workers' Council strike in May 1974 was driven less by disputes over pay, conditions and price rises than by the desire of sectarian loyalist interests to destabilise the Sunningdale Agreement which had set up a power sharing agreement in the province in December 1973.

Ultimately the strike and a considerable amount of political violence associated with it would be successful in this aim and Northern Ireland returned to direct rule from Westminster. However, it has subsequently been alleged that these events were actively encouraged by the British security services. In an interview with a *Sunday Times* journalist, former MI5 officer James Miller, who had been deeply embedded within the Ulster Defence Association (UDA), claimed that his 'handlers' had told him to push the idea of a strike within the UDA and that his bosses had suggested to him that Harold Wilson might, in fact, be a Soviet agent. It has thus been suggested that the Ulster Workers Council strike on May 1974 was actively promoted by MI5 to destabilize the Labour government (see Dorril and Ramsay 1992: 257 on the 'Clockwork Orange' plot).

A plot against Wilson?

Both in fiction and in fact, the year 1974 was marked worldwide by espionage and political skulduggery. In June, John le Carré's Cold War spy novel *Tinker, Tailor, Soldier, Spy* was released to critical acclaim. The novel concerned the search for a Soviet agent at the heart of British secret service. The next month, the Judiciary Committee of the House of Representatives would approve the impeachment of the President of the United States, Richard Nixon, for his role in the 'Watergate scandal' involving the wiretapping and burglary of the Democratic National Committee's headquarters and the subsequent attempts to cover these events up. On August 9th, Nixon became the first US President in history to resign his position. However, in events which are less well known and which to date are still not entirely clear, it has been suggested that another political plot was being hatched against the British Prime Minister.

It has recently been officially acknowledged that MI5 kept a file on Wilson from 1945 onwards making him the only serving British Prime Minister to have been the subject of an ongoing security service file (Andrew 2010). It has also been revealed that '[h]is file was so secret that he [Wilson] was given the pseudonym Norman John Worthington' and that 'Sir Michael Hanley, MI5 director general from 1972, went to even greater lengths to conceal its existence by removing it from the central index, meaning any search would result in a "no trace"' (BBC News 2009a). Whilst MI5 has subsequently denied any concerted plot within the security services to remove Wilson (Andrew 2010) there have long been suggestions to the contrary. In 1968, the proprietor of the *Daily Mirror* Cecil King 'made it clear that he would publish anything MI5 might care to leak in his direction' (Wright 1987: 369) which might cause difficulty for Wilson. King also met with Lord Mountbatten and others and suggested that Mountbatten might act as interim Prime Minister in the event of a crisis in which 'the Government would disintegrate, there would be bloodshed in the streets and the armed forces would be involved' (Cudlipp 1976: 326; see also Leigh 1988: 157-158). During

the run up to the October 1974 general election it was again suggested that numerous figures within MI5 might play a role in leaking intelligence about leading Labour Party figures to the press, including the allegation that Harold Wilson was a security threat (Wright 1987: 369).

This period also saw the public appearance of several 'private army' groups who claimed to be 'patriots' ready to intervene in the running of the country in the event of an 'emergency' (such as a sustained period of strike action) so that 'law and order could be maintained'. General Sir Walter Walker's *Civil Assistance* and SAS-founder David Stirling's *GB75* both received media attention during 1974 (see Dorril and Ramsay 1992: 264-269). These events played a role in distracting Wilson during a politically vulnerable period between the February and October general elections in 1974 when his government had no overall majority. Following his resignation in 1976, Wilson spoke at length with journalists about his concerns of 'foul play' during this period including:

> certain links between a section of the British Security Services and the circulation of damaging stories about himself and his colleagues. There were grounds for concern about the whole area of relations between, for instance, MI5 and the Prime Minister's office and about interruptions in the flow of vital information between civil servants and politicians. (Penrose and Courtiour 1978: 228)

The beginnings of the authoritarian drift

If the suggestions of plots within the British establishment remain impossible to verify fully, it is undeniable that the inter-election period in 1974 was marred by events which provided much more tangible evidence of political instability. On the 2nd May 1974, the fascist far-right National Front party achieved over ten per cent of the vote in several London council wards. Whilst failing to win any council seats, the National Front was experiencing considerable growth during this period (see Fielding 1981; Taylor 1982; Gilroy 1987). On 15th June, a

National Front rally would result in violent confrontations with both police and left-wing counter-protestors in Red Lion Square in London's West End. During this disorder a 21-year-old student Kevin Gateley would become the first demonstrator in 55 years to be killed on the British mainland.

The policing of events at Red Lion Square was controversial with counter-protestors questioning the tactics of the Metropolitan Police who had allowed the International Marxist Group to march towards the same destination as the National Front (BBC News 2009b). On the 29th August, the neighbouring Thames Valley Police would also be mired in controversy when they forcefully broke up the Windsor Free Festival and were later forced to pay compensation to several festival goers who had been injured. Beckett has suggested that '[s]ome interpreters of the British seventies see the closing down of the 1974 Windsor festival as a turning point, the day when the 'permissive society' created in the sixties reached its limits and the coming moral counter-revolution first showed its teeth' (2009: 248).

Whilst Roy Jenkins had (as already discussed) been strongly associated with the emergence of the 'permissive society' his second period at the Home Office (5th March 1974 – 10th September 1976) was less overtly liberal - perhaps as a result of his concern that the Labour Party was drifting too far to the political left. Although, the Home Office gave a 'fair wind' and assistance to the supporters of the ROA during the 'short Parliament' of 1974, Jenkins refused to intervene in the case of the imprisoned Shrewsbury picketers (see Table 6) despite pressure from within his party and the trade union movement more broadly (Campbell 1983: 167). The result was that the 'Shrewsbury Two' (Des Warren and Eric 'Ricky' Tomlinson) spent more time in custody under a Labour government than a Conservative one. Later, following the October 1974 general election, and in the wake of a spate of IRA bombings (including attacks on pubs in Guildford and Birmingham), Jenkins would oversee the introduction of the controversial Prevention of Terrorism Act 1974 which increased the

amount of time which the authorities could detain suspects before charging them. The powers invested in the police by this Act would later be linked to numerous wrongful convictions associated with IRA suspects (see Conlon 1990; Mullin 1990).

An era of malign forces

In addition to the spectre of IRA terrorism, the year 1974 would also be associated with increased public anxiety over violent crime due to the prominence of the so-called 'Black Panther'.[17] Following an extensive period of armed robberies dating back to at least 1967, Donald Neilson engaged in increasing brutality during 1974 including the murders of three post office workers. Neilson would not be captured until the December 1975 following the kidnap and murder of 17-year-old Lesley Whittle by which stage he had become firmly established as Britain's 'most wanted' (BBC News 2010).

More bizarrely, another high-profile killing during this period would result in a fierce row within the Anglican Church and the eventual acceptance of the possibility of *demonic possession* by the General Synod of the Church of England. On 5th October 1974, a Christian called Michael Taylor became convinced that he had been infested with demons following his previous involvement as an assistant at an exorcism. He approached a group in Barnsley, run jointly by an Anglican vicar and a Methodist minister who, after failing to convince him to see a doctor, attempted to exorcise him throughout the night (Stanford 1996: 226). The following morning, Taylor returned home but became convinced that his wife was the Devil and 'with his bare hands, he gouged out [her] eyes, tore out her tongue and then tore her face from off her skull' causing her to bleed to death (Walker 2012). Taylor was ultimately placed under indefinite psychiatric detention, however the media attention attached to these events led to serious concerns in the Church of England about the growth of 'unregulated' exorcisms.

[17] Coincidentally, Ian Kevin Huntley was born in Grimsby on 31st January 1974 – as already discussed in chapter one his crimes in Soham would go on to play such a significant role in changing the disclosure systems for criminal records in England and Wales (Bichard 2004).

In May 1975, the Archbishop of Canterbury Dr Donald Coggan gave his blessing to exorcism stating that debates around the issue had 'done some good…in that [they had] forced many people to think positively about the powers of evil and how to deal with them' (Nossiter 1975). By the end of the 1975 the House of Bishops would issue their *Guidelines for Good Practice in the Deliverance Ministry* to every diocese in the country, albeit these would recommend that exorcisms 'should be done in collaboration with the resources of medicine' (Church of England 2012). These events are further contextualised by the popularity of the film *The Exorcist* (1973, dir. William Friedkin) which had its UK premiere on 14th March 1974. The film was 'marred by reports of cinemagoers suffering fits, fainting and vomiting' and was 'subsequently denied a release for home viewing in the UK because of concerns that it was too disturbing' (BBC News 2001a).

The birth of Thatcherism

Whilst the Labour Party managed to achieve a small majority of three in the October 1974 general election, there were clear signs of changing political climate by the end of that year. As something of a barometer of this change, the Swedish social democrat Gunnar Myrdal shared the Nobel prize for economics with Freidrich von Hayek in December 1974. Hayek's *The Road to Serfdom* (1944) and *The Constitution of Liberty* (1960) would be highly influential in the development of the political thinking of the so-called 'New Right' and in particular Margaret Thatcher who succeeded Heath as Conservative Party leader in February 1975. Indeed, Thatcher once famously interrupted a presentation by a left-leaning member of the Conservative Research Department by 'fetching out a copy of *The Constitution of Liberty* from her bag and slamming it down on the table, declaring "*this* is what we believe"' (Margaret Thatcher Foundation 2015). The Chicago School of Economics' Milton Freidman and his advocacy of monetarist economic policies would be another key influence (Freidman also won a Nobel prize in 1976).

The political movement dubbed 'Thatcherism' (see Hall 1979) was marked by an ideological commitment to individualism, libertarianism and social conservatism and policies such as the dismantling of the 'welfare state', privatization of nationalized industries, a deregulation of business and financial markets and a restructuring of the nation's workforce to encourage both 'flexibility' and 'competitiveness' in increasingly global markets (Kavanagh 1987). The delicate balance between support for individual liberty (from the state) on the one hand and a socially conservative outlook on the other is exemplified by Thatcher's voting record before becoming Leader of the Opposition. Thatcher supported the decriminalization of homosexuality (one of very few Conservative MPs to do so; see HC Deb 5th July 1966 vol. 731 c267) and the legalisation of abortion (Thatcher 1995: 150). However, she voted against the relaxation of divorce laws (*ibid.* p.151) and, in opposition to her party's line, voted for the reintroduction of birching as a judicially sanctioned corporal punishment (Campbell 2000: 134) and for the reinstatement of the death penalty (HC Deb, 24th June 1969, vol. 785 c1235).

Another key influence on Thatcher was Sir Keith Joseph MP. Following the Conservative election defeat in February 1974, Joseph and Thatcher established the free-market policy think-tank the *Centre for Policy Studies* to champion the cause of 'the small state', economic liberalism, individual choice and personal responsibility (see Centre for Policy Studies 2015). On 13th June 1974 Joseph became Shadow Home Secretary and, whilst his tenure in this position would last only a few months, he made a number of pronouncements in the role which heralded an intensification of retributive approaches to issues of law and order. In an October 1974 speech (published in *The Guardian* under the headline 'Britain: A Decadent New Utopia') Joseph set his sights clearly on the 'problem' of illegitimate pregnancies amongst mothers who produced 'problem children, the future unmarried mothers, delinquents, denizens of our borstals, subnormal educational establishments, prisons, hostels for drifters' (Joseph 1974; cited in Sim 2009: 17). The speech also made an overt link between moral standards and economic decline asking whether the nation would 'move

towards moral decline reflected and intensified by economic decline, by the corrosive effects of inflation' or whether it was possible for Britain to 'remoralise our national life, of which the economy is an integral part' (*ibid.*).

Sim (2009: 17) suggests that whilst there was nothing particularly new in the advocacy of eugenicist intervention into 'the lives of what were regarded as working class, moral degenerates…it was agreed by most commentators that the speech effectively destroyed his chance of succeeding the increasingly vulnerable Edward Heath'. Ultimately, Joseph would withdraw from the leadership contest and endorse Thatcher's successful candidacy. After she became Leader of the Opposition on February 11th 1975 Joseph withdrew from the Conservative frontbench and instead took a leading role in research and policy development which proved highly influential in the development of the 1979 Conservative manifesto.

Whilst Joseph's speech may have been something of a political miscalculation in terms of his own political ambitions, it certainly spoke to a particular constituency of support in 1970s Britain. Sim (2009: 19) notes that his focus on moral standards drew support from, amongst others, Mary Whitehouse who publicly expressed her gratitude to Joseph and commented that 'the people of Britain have been like a sheep without a shepherd. But now they have found one.' Sim also notes that Joseph received 7,000 letters of support following the speech. His conflation of economics, morality and the 'problem' of law and order was a powerful ideological move. As Hall would later comment:

> The language of law and order is sustained by a populist moralism. It is where the great syntax of 'good' versus 'evil', of civilized and uncivilized standards, of the choice between anarchy and order, constantly divides the world up and classifies it into its appointed stations. (Hall 1988: 55)

Conclusion

The ascent of neoliberalism and the intensification of 'populist moralism' from 1975 onwards would affect the fate of a policy of legal rehabilitation. However, as discussed earlier, there was nothing inherently new in the discursive separation of 'good' from 'evil', 'deserving' from 'undeserving' or 'normal' from 'pathological' lawbreakers. In addition to creating the discursive potential for the ROA to be undermined, such 'dividing practices' (Foucault 2002a: 326) would also be central to debates about the scope of legal rehabilitation in England and Wales. Before turning to a detailed exposition of these debates in the chapters which follow, it is worth summarising briefly some of the key points made in this chapter about the political context in which the ROA was forged.

Whilst the post-war consensus in British politics provided the ideological basis on which the penal-welfare complex was founded, the reform of certain aspects of social and penal policy in the 1960s was, to a considerable extent, contingent upon the work of fairly 'patrician liberal' figures such as Longford, Jenkins and Gardiner. Indeed, the extent to which these figures helped to 'liberalise' penal policy in the face of popular opposition demonstrates that British society was not, perhaps, as 'permissive' as some commentators have suggested. Rather, the liberalisation of the 1960s was a fairly 'elite' if not elitist project (see also Loader 2006, on 'platonic guardians' within the civil service and penal reform lobby). However, by the mid-1970s, the post-war consensus was rendered particularly fragile by a 'perfect storm' of economic catastrophe, strained industrial relations and subtle shifts in public sensibilities towards a more socially conservative agenda. But before these conditions were able to contribute to the ascent of Thatcherism and its overtones of 'populist moralism', the election results of February and October 1974 delayed the ideological onslaught on an era of consensus politics.

During the 'short parliament' of 1974 the Labour government was unable to advance a fuller

political agenda due to its lack of a parliamentary majority and the need to focus on stabilising industrial relations during a period of profound crisis. This arguably created a window through which a liberal piece of legislation such as the ROA could 'slip through' the UK Parliament. Indeed, the Act would follow the same process of 'backdoor liberalisation' which Roy Jenkins and others had used to advance the causes of abortion reform, the decriminalisation of homosexuality and the abolition of the death penalty. In a manner similar to these earlier reforms, the ROA was conceived of and promoted by patrician liberal figures such as Lord Gardiner and Hugh Klare (whilst Lord Longford was otherwise engaged in his anti-pornography crusade). However, as discussed in this chapter, the ROA might also be viewed as a response from the penal reform lobby to a more radical agenda 'from below' advanced by groups such as PROP and RAP.

PART THREE: THE MAKING AND UNMAKING OF LEGAL REHABILITATION

7. 'No machinery exists at present': the conception of the Act

Part Three of this thesis involves a Foucauldian reading of largely neglected archival evidence to trace the complex emergence of a form of legal rehabilitation in England and Wales. This chapter, and the two which follow, precede an analysis which resists incorporation into the orthodox 'Whig' understanding of legal rehabilitation as a product of the supposed liberalism of 1974 which was subsequently undone by the authoritarian governmentalism of the present. This process begins here with an examination of the conception of the Rehabilitation of Offenders Act. In turn this chapter focusses upon: earlier reports on the welfare and status of ex-prisoners; a raft of correspondence between PWCs and Tom Sargant, the Secretary of JUSTICE, prior to the establishment of a Joint Working Party on Previous Convictions; and the minutes and associated papers of this working party (henceforth the 'Gardiner Committee' or 'the Committee') which met between December 1970 and December 1971 to consider 'the problem of old convictions'.

The recognition of a problem of old convictions

Earlier reports on the welfare and status of ex-prisoners

Prior to the late 1960s, the difficulties posed by PWCs were given relatively scant attention in reports on matters of penal policy, if indeed they were considered at all. In 1951, the Howard League for Penal Reform produced a short report[18] on the *Legal Disabilities of Ex-Prisoners* after the National Insurance Act 1946 and the Criminal Justice Act 1948 had brought about material changes to the situation of those leaving custody. The report recognised that in order to receive a range of state benefits (such as unemployment or sickness benefit) under the National Insurance Scheme it was necessary for the insured person to be fully 'paid up' under the scheme. This put discharged prisoners without a full record of National Insurance contributions at a clear disadvantage since, if their families or acquaintances were not able to cover their payments, they were required to make up any deficit on release and would not be

[18] 'Legal Disabilities of Ex-Prisoners', Summer 1951, Howard League for Penal Reform. Source: SIEGHART.

entitled to claim benefits until the shortfall was cleared. In relation to pensions, the report noted that a conviction did 'not of itself involve a loss of pension rights…[except in] cases of treason or felony punished by certain types of sentence' (p.7). Such punishments dated back to the Forfeiture Act of 1870 and included 'a sentence of death, preventive detention, corrective training or *any term of imprisonment exceeding 12 months*' (p.7, emphasis added).

The Howard League report also recognised that a sentence of imprisonment could have ramifications for the ex-prisoner who wished to emigrate due to entry disqualifications based on an array of offences, particularly for the United States and some Commonwealth countries. It further highlighted how PWCs could be disqualified from: being elected to various public offices (under the Forfeiture Act 1870 and the Local Government Act 1933); positions of employment by the Crown; appointments to positions in the military or navy, within universities and the clergy (where forfeiture of 'preferment' could be lost for sentences of imprisonment of more than twelve months under the Clergy Discipline Act 1892); and from running a licenced premises (under the Beerhouse Acts of 1830 and 1840 and the Licencing Acts of 1910 and 1949). However, the report did not recommend any changes to the law or question whether this range of 'legal disabilities' and disqualifications was actually necessary or socially just.

The report *Penal Practice in a Changing Society* (Home Office 1959) prepared for Harold MacMillan's Conservative Government, included a section dedicated to the 'Discharge and after-care' of prisoners. It suggested that 'at all prisons pre-release courses [should be] held, at which experts from outside come to hold an open forum with prisoners nearing their release on all the domestic, social and industrial problems with which they will be faced' (p.19). It also proposed an expansion of the use of 'well-qualified Prison Welfare Officers' who would work in co-operation with the National Association of Discharged Prisoners' Aid Societies (NADPAS, later the National Association for the Care and Resettlement of Offenders or 'NACRO') 'to deepen and widen their new task of assisting the social rehabilitation of those

who need and can profit by this help' (p.20). However, once again the report did not include any recommendations to either reduce the burden of disclosure concerning criminal records, or to prohibit discriminatory practices against PWCs.

In the report of the Pakenham/Thompson Committee (1961) into the *Problems of the Ex-Prisoner*, Lord Longford and his colleagues recognised 'the attitude of…employers who, on the grounds of protecting the public, are unwilling to take on an ex-prisoner at all as long as there is a chance of filling their vacancy with a man with a clean record' (p.35). However, whilst recognising that this presented 'a difficult point of social morality' the Committee concluded that 'it need not be discussed at length here [in the report], because it became evident early in the inquiry that for the majority of prisoners, the reluctant employer was not the main problem' (*ibid.*). Instead, it was concluded that 'the employer's attitude towards taking on a man with a prison record may be favourably influenced if the man is introduced to him by a sponsor' (*ibid.*). However, the report contradicted these conclusions when it also identified a problem of unofficial *de facto* discrimination against PWCs amongst certain employers. This was in defiance of a range of official company policies investigated in the report which claimed to take into account factors such as the nature and seriousness of any offence, the age of the person when convicted, how long ago their offence occurred and their subsequent conduct (p.36). Despite these findings, rather than seeking a tighter legal framework which would mitigate employment discrimination, the report merely expressed 'hope that the network of welfare and after-care officers will be able to help firms and organizations to carry out at branch level the liberal policies laid down by their head offices' (*ibid.*)

The Labour Party Study Group's (1964) report *Crime: A Challenge To Us All* was commissioned by Harold Wilson whilst Leader of the Opposition in December 1963. It set the tone for penal policy under the 1964-1970 Labour Government, proposing as it did measures such as the abolition of capital punishment (pp. 40-41). Again chaired by Longford, the group reported a need for greater statutory organisation of after-care and 'a major expansion of

voluntary work for ex-prisoners' (p.60). It also recognised that this was 'no more than a beginning…in tackling the problem and tapping resources of human kindness and the desire to help the less fortunate' (*ibid.*). The report also suggested that '[w]hat is needed by many ex-prisoners on their release is just not material help...[a]bove all they need understanding friends, who will accept them unpatronisingly as they are, take them into their own homes as welcome guests, and generally help them to put down roots' (*ibid.*). However, despite Longford's prior recognition of the problem of *de facto* discrimination against ex-prisoners, the report did not propose any measures to deal with this issue and the momentum produced by his earlier report was lost.

In each of these reports, with proposals restricted to a mix of state intervention, charity and reliance on kinship networks, the emphasis was placed on the needs of ex-prisoners, thus ignoring the problems of other PWCs who might have been experiencing disadvantage or discrimination. Moreover, each report shared an approach to 'rehabilitation' as something which needed to be either 'done to' or 'done for' prisoners and ex-prisoners, rather than simply easing restrictions imposed upon them. Significantly, no mention was made of the need to legally protect individuals from discrimination based on criminal records.

A clearer recognition of the need for legislation to mitigate discrimination against PWCs arose in late 1969 when the problem drew the attention of Tom Sargant, the Secretary of JUSTICE. Sargant had been to a conference of jurists in Europe and discovered that Britain was 'the sole member of the Council of Europe without any legislation relating to the rehabilitation of past offenders'.[19] On 13th October 1969, Hugh Klare, the Secretary of the Howard League for Penal Reform wrote to the Home Office to raise the question of expunging the convictions of first offenders.[20] This approach was referred to in a letter on 4th November 1969 by R.L. Morrison, the Director of NACRO, who wrote to Sargant suggesting that JUSTICE might

[19] Chapman, C. (1977) 'An examination of the legislative history of the Rehabilitation of Offenders Act 1974', Unpublished Dissertation, Thames Polytechnic, p.6 Source: SIEGHART.
[20] *Ibid*. p.38.

contact H.B. Wilson (Assistant Under-Secretary of State and Head of the Criminal Policy Department at the Home Office) about this issue and, if his reply was not satisfactory, that an alliance between JUSTICE, NACRO and the Howard League might be formed (see Appendix 1).

The problems of 'The People'

Sargant evidently responded positively to Morrison's invitation because he then contributed a letter to *The People* newspaper on Sunday 14th December 1969, to bring the problems caused by previous convictions to wider public attention. His letter proposed that in many cases a just course of action might be to 'wipe the slate clean' for those who had not subsequently been re-convicted for a number of years.[21] The correspondence Sargant received in response to this article suggests that discrimination was an issue faced by many PWCs (see Appendices 2 to 8). One of the first letters came from 'M', a man left 'feeling rather desperate' because his livelihood was being affected by a seven-year-old previous conviction. 'M' explained to Sargant how he was preparing to invest his savings in a new business but had been given legal advice that his conviction could be 'held against him' in this venture. M also enquired about whether JUSTICE might be able to help make representations on behalf of others in his predicament, suggesting that an:

> organised body, whose aim is to assist such as myself, would perhaps be prepared to listen sympathetically and assess the facts in an unbiased way, and perhaps help me to prepare a solid case for presentation to the proper authorities at the right time. [22]

In response to 'M', Sargant wrote that there was 'really nothing I can do to help or advise you

[21] It has not been possible to acquire the original article but its use of the phrase 'wipe the slate clean' is evident from the correspondence with Sargant which it prompted. Moreover, the issue was again raised in the same newspaper a few months later - see Appendix 9. 'Forget It! It's time the law knew when to wipe out a man's past', *The People*, Sunday 12th July 1970. Source: U DJU/8/13-14.
[22] Letter from 'M' to Tom Sargant, 14th December 1969, Source: U DJU/8/13-14.

in your particular circumstances' and suggested that he should heed the advice of his solicitor. He added that 'M' should also be careful to declare his conviction on any insurance policy lest it be used by the insurance company to repudiate any claim. Sargant noted that the basis of his inability to help was that 'no machinery exists at present' - a reference to the lack of any legal mechanism which could mitigate the problems caused by old convictions. [23]

Another letter from 'J' concerned the difficulties he encountered after being fined and deprived of his previously unblemished driving licence for a drink driving offence. Whilst accepting that 'justice was done according to the law', 'J' was perturbed that now, as a convicted person, he was unable to obtain motor vehicle insurance at a reasonable rate and that 'my licence has been endorsed with full details of the offence which I have been told will remain for ten years'. He added that his 'attitude to British justice has changed considerably – and hardly for the better'.[24] Sargant again responded in a pessimistic tone and indicated a reluctance to press for fundamental reforms suggesting to 'J' that whilst he had read his letter 'with some sympathy', the 'exorbitant premiums' demanded by insurance companies from 'persons whom they consider to be bad risks' was 'only natural commercial prudence'. He added that '[o]n the question of the duration of the conviction, I have more sympathy', but merely expressed hope that 'eventually something will be done about this'.[25]

Former prisoner 'H' claimed that after staying out of prison for nearly twenty years, due largely to the positive influence of his wife, he had 'had to live like a monk because no-one would ever employ me'. Given his interest in writing, he had managed to obtain a donation from NACRO to buy a second-hand typewriter, but this had to be bought on his behalf by a probation officer because 'even NACRO could not trust me to purchase it with their donation!' 'H' also suspected that he had been denied a hardship grant to decorate his house from the Department of Health and Social Security (DHSS) on the basis that 'in my dossier at their local

[23] Letter from Tom Sargant to 'M', 22nd December 1969, Source: U DJU/8/13-14.
[24] Letter from 'J' to Tom Sargant, 15th December 1969, Source: U DJU/8/13-14.
[25] Letter from Tom Sargant to 'J', 24th December 1969, Source: U DJU/8/13-14.

office … are details of a crime I committed in 1941' which involved 'committing wilful damage to the then Public Assistance Board's property'. He suggested that '[e]ver since then I have made two appeals to the local Tribunal against the decision to refuse me similar grants and the Tribunal having read in my dossier about my crime, refused me my appeal.'[26] In response Sargant suggested that his concerns about his treatment by the DHSS Tribunal might not be 'entirely due to your 1941 conviction but [that] many factors have to be taken into account'. However, whilst he offered to make representations on behalf of 'H' he did not 'really hold out any hope of getting anything done'.[27]

Another former prisoner - 'S' - had 'led an honest life' since his release from prison several years earlier. This phrase understated the extent to which he had demonstrably turned his life around. Following his release and with the support of his wife he had started work immediately and established his own business. He made such a success of this that he was able to pay back a start-up loan of a thousand pounds in half the time which had been scheduled for repayment. His business expanded and diversified and, after only a few years, 'S' and his wife had a sizeable business portfolio. However, his difficulties began in July 1969 when an accidental gas explosion destroyed the building and contents of one of his business premises (see the trail of correspondence in Appendix 5).

After attempting to claim £15,000 for the damage and loss of income from the explosion, his insurer informed him that 'they had been informed that ['S'] was a man with previous convictions and that because they had not been declared when [he] sought insurance they were treating the policy as void'. This also applied to all of the other businesses for which 'S' had arranged cover with the same insurer. This occurred despite the fact that when taking out his initial policy '[a]t no time was it ever mentioned or indeed suggested that ['S'] was a man with a past criminal record, nor was there any question on the proposal forms regarding this'. Whilst 'S' had taken legal advice and was advised that he had a case, he was still 'faced

[26] Letter from 'H' to Tom Sargant, 15th December 1969, Source: U DJU/8/13-14.
[27] Letter from Tom Sargant to 'H', 4th February 1970, Source: U DJU/8/13-14.

with ruin' not only due to the losses caused by the accident, but because a hire purchase company had issued writs against him for vehicles destroyed in the fire. He remarked to Sargant that:

> It is said that when a man has served his time he has paid his debt, but this case proves just the opposite, I have earned the respect of very decent well respected local business people, who know of my past, and they are all shocked at the treatment meted out to me in this case by a well know company.[28]

In relation to this case Sargant adopted a more active approach. This may well have been due to the clear gravity of the consequences for 'S' and his wife given their treatment at the hands of their insurance company. To this end, Sargant brought the case to the attention[29] of the Chairman of JUSTICE, the former Attorney General (Lord) Hartley Shawcross to see whether he might make direct representations to the managing director of the insurance company in question. However, Shawcross was described as 'always averse to JUSTICE taking up individual cases'[30] and he did not pursue the matter any further.

In a follow-up letter approximately one year later, 'S' related that he had 'issued a writ in Chancery, but because the law lists were full there was no hope of a hearing until about May/July this year, and as I was being forced into bankruptcy I had to accept an offer.' The figure offered was only £6,000 which came nowhere near covering the losses he had incurred. Due to the debts he and his wife had accrued whilst waiting for this settlement he noted that '[a]ll the sum was accounted for and we were left with nothing'.[31] This problem would have arisen from the legal basis that the previous conviction constituted a 'material fact' in relation to the insurance policy (see 'The denial of financial services' in chapter two).

Another letter to Sargant came from 'R' and revealed a further problem which could arise due

[28] Letter from 'H' to Tom Sargant, 15th December 1969, Source: U DJU/8/13-14.
[29] Letter from Tom Sargant to Lord Shawcross, 22nd December 1969, Source: U DJU/8/13-14.
[30] Letter from Tom Sargant to 'S', 22nd December 1969, Source: U DJU/8/13-14.
[31] Letter from 'S' to Tom Sargant, 26th December 1970, Source: U DJU/8/13-14.

to involvement in criminal proceedings. 'R' had not yet been convicted and claimed to be innocent of the 'minor charge' for which he was due stand trial in a few months' time. As a result of these proceedings 'R' told Sargant that he had lost his 'responsible position' of employment. He further explained that: '[d]ue to the fact that a small item appeared in the local press and the fact that I have told the truth in interviews, up to the present I have been unable to obtain another appointment.' 'R' was also concerned that, if found guilty and fined, he would be barred forever from either '[t]aking up a government appointment' or '[e]migrating to say Australia or Canada.' In a postscript to his letter, he remarked that '[f]rom my experience over the past few weeks I can now see how normal persons are turned into criminals' and enquired as to whether Sargant had had any response from the Home Office on the problem of old convictions.[32] However, Sargant responded that '[a]ny reaction from the Home Office to the representations made are likely to be very prolonged as, to my knowledge, the problem had never been given serious consideration and the wheels of legal reform turn very slowly.'[33]

'E' wrote to Sargant to raise the problems that his old conviction was causing him when trying to find employment. After serving in the RAF between 1940 and 1946, 'E' chose to become self-employed and ran a mobile coffee stand. He later became the proprietor of two cafes and a licenced betting shop. Years later, he chose to sell some of these businesses because he wished to work more regular hours. He was taken on as a trainee telephonist by the General Post Office but did not declare that he had been fined £600 five years previously for receiving stolen goods. When he was questioned about this he felt obliged to resign the position. He was later on the verge of being offered another job working for a tour company but following the interview was 'asked to sign a declaration saying that I did not have any convictions'. 'E's' honesty on this occasion about his 'one mistake in 56 years' led to the interview being terminated. Reflecting on this experience, he wrote:

[32] Letter from 'R' to Tom Sargant, 15th December 1969, Source: U DJU/8/13-14.
[33] Letter from Tom Sargant to 'R', 16th December 1969, Source: U DJU/8/13-14.

> I came out of [the interview] wondering what it was all about and asked myself what was I – a cast out and a no good citizen? I do not have to worry about a job, but how does a man, maybe with a family and a record, feel when he gets similar treatment? Most people in his position must turn to further crime or scrounge on social security.[34]

In February 1970 Sargant wrote back to 'E' and stated that he was 'a little concerned to learn that an organisation like [name of employer] are not willing to employ any person with previous convictions' and that he 'may perhaps make some enquiries into this'. However, he yet again held out little prospect of anything being achieved, writing to 'E' that 'I think we are agreed that I cannot assist you in any way'.[35] Thus, whilst sympathetic in tone, Sargant's responses to enquiries on this issue remained pessimistic in early 1970 and he felt powerless to assist those who had written to him after reading his article in *The People*.

On 8th August, 'K' wrote to Sargant[36] having seen an old copy of the article. 'K' stated that he 'would also like to have my 'slate wiped clean' from previous convictions committed more than 20 years ago as a juvenile'. He enquired about whether his previous record might prevent him from moving to Australia to join the Army and about 'how far the Home Office managed to get with studying the problem'. In response, Sargant again informed 'K' that 'in the meantime there is nothing I can do to help you' and was unsure about the question of emigration. However, he added that the case was 'a very good example of the problem [of old convictions]' and that '[w]e are setting up a committee to work out a scheme to put to the Home Office'.[37] Thus by the summer of 1970, the proposal to form a Joint Working Group on the problem of old convictions made nearly a year earlier had clearly gathered momentum.

[34] Letter from 'E' to Tom Sargant, 18th December 1969, Source: U DJU/8/13-14.
[35] Letter from Tom Sargant to 'E', 19th December 1969, Source: U DJU/8/13-14.
[36] Letter from 'K' to Tom Sargant, 8th August 1970, Source: U DJU/8/13-14.
[37] Letter from Tom Sargant of JUSTICE to 'K', 14th August 1970, Source: U DJU/8/13-14.

The work of the Gardiner Committee

On Sunday 12th July 1970 another article in *The People* argued that it was 'time the law knew when to wipe out a man's past' and announced that JUSTICE, NACRO and the Howard League were 'planning to press the Home Secretary to limit the time a man's record can be held against him' (see Appendix 9). The membership of this committee, Chaired by Lord Gardiner, included prominent figures from both JUSTICE and the Howard League, in addition to a number of magistrates and several lawyers who would contribute to the drafting of any proposed legislation (see Table 7 below).

Table 7. Membership of the Joint Working Party on Previous Convictions

The Rt. Hon. Lord Gardiner (Chairman)	Former Lord Chancellor
Louis Blom-Cooper QC, JP	Barrister, Legal Academic
Kenneth Cooke, OBE	Stipendiary Magistrate
Eric Crowther	Stipendiary Magistrate
Kate Frankl JP	Magistrate
Hugh Klare CBE (until June 1971)	Former Secretary, Howard League for Penal Reform and Head of the Division of Crime Problems, Council of Europe
Tom Sargant OBE, JP	Secretary, JUSTICE
Paul Sieghart	Barrister
Eric Stockdale	Barrister
Rupert Townshend-Rose	Solicitor
Martin Wright (from October 1971)	Director, Howard League for Penal Reform
Henry Hodge (Secretary)	Solicitor

Preliminary discussions on the mechanism of legal rehabilitation

The 'Gardiner Committee' met for the first time on 22nd December 1970 (see Table 8 below for the schedule of meetings). Prior to the meeting, Sargant had been developing a catalogue of evidence about discrimination against PWCs (in addition to the letters discussed earlier, see also Appendix 10). As well as considering preliminary memoranda by Paul Sieghart[38], Tom Sargant[39] and others the Committee considered summaries of rehabilitation laws in

[38] 'Justice: Preliminary Memorandum' by Paul Sieghart, December 1970 Source: SIEGHART.
[39] 'Erasion of Previous Convictions: Preliminary Memorandum' by Tom Sargant, December 1970 Source: U DJU/8/13-14.

other countries[40] and were keen to draw on the experience of as many other jurisdictions as possible in their deliberations. The majority of the discussions focussed on both the legal mechanism through which rehabilitation might be achieved and who the proposed law might actually benefit.

Table 8. Timeline of meetings of the Joint Working Party on Previous Convictions

1st meeting	22nd December 1970
2nd meeting	15th January 1971
3rd meeting	3rd February 1971
4th meeting	23rd March 1971
5th meeting	28th April 1971
6th meeting	24th May 1971
7th meeting	6th July 1971
8th meeting	8th November 1971
9th meeting	22nd November 1971
10th meeting	20th December 1971

In respect of both issues, the initial proposals were remarkable for their conservative approach to the problem. On the point of how any law might work, the Committee considered the system of judicial rehabilitation available under the Parole Board of Canada which allowed people to apply to a court for permission to have their criminal record expunged. However, 'nobody was much attracted by the proposal' chiefly because '[i]nquiries as to applicants' good behaviour could cause harm and the illogical situation of granting a pardon for an offence for which a person has been convicted and punished was considered undesirable'.[41] Furthermore, the prospect of actually deleting or expunging criminal convictions from official police records was rejected on the basis that '[t]hose of the

[40] Summaries were provided of the 'New Canadian Law on Rehabilitation' in addition to 'Notes on the Procedure in Holland' (prepared by A.A.M. Struycken on 13th November 1969) and a 'Summary of the German Law on Criminal Records' (prepared by Dr. M.T. Bohndorf on 31st October 1969) Source: U DJU/8/13-14.

[41] 'Minutes of the 1st Meeting held on 22nd December 1970', Joint Working Party on Previous Convictions; para. 2. Source: U DJU/8/13-14. This point was made in Sieghart's preliminary memorandum which stated that '[s]omething which has once happened cannot be made to "unhappen". For this reason alone, the grant of a pardon does not seem to me to reflect the reality of the situation.'

Committee with judicial experience were strongly of the opinion that a full knowledge of a person's record was most useful in deciding sentence' and because of concerns that the 'Home Office itself is known to consider the whole subject of the Committees' deliberations as 'difficult''.[42] It was therefore deemed necessary to invite a representative from the Home Office to the next meeting.

The decision was then made 'to approach the problem in relation to: (a) the type and gravity of offence, (b) the sentence imposed, (c) the period of time that should elapse before 'removing the record' such that recommendations could be made which were 'simple and appealing' with distinctions made between 'arrestable and non-arrestable offences, or finger-printable offences, or custodial and non-custodial sentences, or sentences of more or less than three months, or offences before and after a certain age.'[43] These distinctions would depend upon the purposes for which expungement or sealing of criminal records might occur – that is, 'simply court hearings; or employment applications; or any questions relating to previous convictions or police records'.[44] However, because:

> concern was expressed in relation to public opinion. Some members felt it better to start small, because of this and the attitude of the judiciary, and to limit the recommendation for instance, to convictions in Magistrates Courts; but this did not meet with unanimous approval.[45]

Thus, as a compromise the Committee agreed to begin their discussion with the Home Office with the objective of 'expunging, for certain purposes records of those who had served sentences of not more than six months, after a period of ten years.'[46] Also, because of

[42] *Ibid.*, para. 3.
[43] *Ibid.*, para. 4.
[44] *Ibid.*, para. 5.
[45] *Ibid.*, para. 6.
[46] *Ibid.*, para. 7.

concerns that the judiciary might otherwise object to their proposals, the Committee agreed criminal records 'perhaps should be allowed for sentencing purposes' and that 'in any event criminal records should not be destroyed'.[47] On this latter point, Louis Blom-Cooper was emphatic:

> It seems to me that we should *on no account countenance the destruction of any public record*. Once it is envisaged that something *as valuable as information about a person's criminal career* can be destroyed, we shall run into powerful arguments for their retention. And I personally do not favour the principle that there is a period of prescription on public documents. As a criminologist, I am only too aware that we have suffered in the past from the lack of knowledge about crime.[48] (emphasis added)

At the second meeting of the Committee on 15th January 1971, H.B. Wilson – the Head of the Criminal Policy Department at the Home Office – was informed of the outcome of the discussions at the previous meeting and made clear his department's position. In summary, this was that: '[i]t was important to leave existing court machinery and the system of police records intact'; that the cut off point for legal rehabilitation of six months imprisonment was a 'sensible limit' but that some convictions which attracted heavy fines might need to be brought outside of the scope of any legislation; that a system of application for pardons 'would be unacceptable here'; that other government departments would want 'to keep the right to be fully informed of the records of applicants for employment, whatever view might be taken by private employers'; that the Magistrates' Association position was that a 'complete list of previous convictions should be available' for sentencing purposes 'even if it was not always referred to'; and that in the case of crimes 'where previous convictions were

[47] *Ibid.*, para. 8.
[48] 'Note from Louis Blom-Cooper for the 1st meeting of the Joint Working Party on Previous Convictions', circulated to the Committee by Hugh Klare of the Howard League, December 1970. Source: SIEGHART.

an ingredient of the offence' criminal records should remain admissible during trials in some circumstances.[49] He further noted that the Home Office was 'sympathetic in principle but found it difficult to formulate a sensible and practical scheme' adding that they had particular reservations 'about employers not being able to find out about convictions'.[50]

The position of employers' 'right to ask' about previous convictions was considered particularly problematic for the Committee with the question being raised as to whether it would be necessary to legally prohibit such enquiries. However, '[i]t was generally considered that this would be undesirable' because 'Credit Investigation Agencies or Enquiry Agents could cause considerable problems as it would be difficult to prevent their passing on information in a manner which could not be proved against them.' Moreover, it was 'impossible to secure the destruction of old press files' to which employers recruiting from such agencies could be referred. In addition, the issue was raised of employers asking questions about whether job applicants had been *charged* as well as *convicted* of offences. On this issue, Wilson pointed out that the Department of Education and Science was routinely provided with such information in relation to prospective teachers.[51]

Further discussion surrounded the date from which the period of rehabilitation might run with the Committee agreeing upon the date of conviction rather than the sentence expiry date because the former option was 'the vital date for all records'.[52] Also, in an extension of the scope of the legislation agreed at the previous meeting, a discussion was initiated by Paul Sieghart and Tom Sargant on the possibility of having 'a more flexible scheme which provided for differing periods for erasing based on the sentences imposed'. However, this was thought undesirable by Wilson because he 'thought this would make it more difficult to get the

[49] *Op. cit*. n.40; para. 3.
[50] *Ibid.*, para. 8.
[51] *Ibid.*, para. 6.
[52] *Ibid*., para 4.

scheme accepted' and because there was 'a great advantage in simplicity'.[53] On this issue however, Gardiner suggested that members of the Committee consider 'the question of scales in relation to the periods to run from conviction to erasing' in advance of the next meeting'.[54]

Agreeing the scope of legal rehabilitation

Paul Sieghart prepared a memorandum for the subsequent meeting on 23rd February 1971 proposing three different schemes of legal rehabilitation based upon the length of sentence.[55] Each proposed more inclusive arrangements in terms of the numbers of PWCs who might be covered (see Table 9 below). The first of three schemes simply reflected the discussions which had occurred in the Committee's initial meeting in December 1970 - that sentences of not more than six months in custody would become 'rehabilitated' after ten years. However, in the second and third proposed schemes, Sieghart invited the Committee to consider two options under which the 'rehabilitation period' would increase steadily in line with the severity of the sentence imposed.

Crucially, all three schemes retained an ultimate 'ceiling' beyond which some PWCs could never be legally rehabilitated. In addition, Sieghart proposed the following: (1) that of 'those who reform completely after the commission of one or more offences…a majority are adolescents (sometimes delayed) who just grow out of it'. Therefore, there was 'a strong case for saying that the rehabilitation period or periods should be halved in the case of convictions under a certain age' with 21 being proposed 'to take care of the late developers who are more often delinquent than those whose adolescence follows a more "normal" pattern; (2) that indeterminate sentences for juveniles should be assigned notional rehabilitation periods with approved school orders being treated similarly to custodial sentences of six months and orders for Borstal training being treated like custodial sentences of two years; (3) that if

[53] *Ibid.*, para 5.
[54] *Ibid*., para. 9.
[55] 'Memorandum by Paul Sieghart for the 3rd meeting of the Joint Working Party on Previous Convictions', 23rd February 1971. Source: SIEGHART

there was to be a rehabilitation period for sentences of more than six months 'it may be dangerous if it dates from conviction, since this may leave too short a time after discharge from prison'. Thus it was suggested that the period should run from the sentence expiry date with remission being ignored and treated 'purely as a reward for good conduct in prison'; and finally (4) '[b]ecause of the emotive implications, it might be wise to exclude altogether offences including any kind of assault – violent or sexual – on children.'[56]

Table 9. Rehabilitation schemes proposed by Paul Sieghart to the Joint Working Party on Previous Convictions in February 1971

	Sentence	Rehabilitation period
Scheme 1	Non-custodial sentences or sentences of 6 months of less	10 years
	More than 6 months	Never
Scheme 2	Non-custodial sentences	5 years
	6 months or less	7 years
	6 months to 2 years	10 years
	More than 2 years	Never
Scheme 3	Non-custodial (if fine £25 or less)	3 years
	Custodial (7 days or less)	3 years
	7 days to 6 months (or fines between £25-£100)	5 years
	6 months to 2 years (or fines between £100-£500)	7 years
	2 years to 5 years (or fines between £500-£1000)	10 years
	5 years to 10 years (or fines between £1000-£5000)	15 years
	More than 10 years (or fines greater than £5000)	Never

(Source: SIEGHART)

When these three schemes were presented to the Committee, Sieghart suggested that 'scheme 1 was too simple'. The minutes also record that 'after considerable discussion' the Committee settled on scheme 2 as the basis of its recommendations with rehabilitation depending on the sentence imposed but running from the date of conviction. It was also

[56] *Ibid*., paras. 1-4.

agreed that after the requisite period had expired 'the conviction should be inadmissible in all civil proceedings'.[57] Magistrate, Eric Crowther made a suggestion that previous convictions could be made inadmissible for all court hearings, including sentencing, once the rehabilitation period had expired. However, this was rejected by the Committee after Gardiner 'pointed out that the man we want to rehabilitate is the one who goes straight' and that the 'man who had a later conviction has not'.[58] It was also agreed that a five-year rehabilitation period for fines was 'reasonable' and that suspended sentences should be treated as equivalent to custodial sentences for the purposes of any scheme. Significantly, the minutes also record that a sentence in excess of two years 'was generally accepted as being the sort of sentence a *hardened criminal* would receive so it was right that, if the Committee is to provide for no rehabilitation in some cases, this would be *the appropriate dividing line*' (emphasis added).[59]

In relation to Sieghart's proposal to halve rehabilitation periods for young people, the Committee agreed with the principle but settled upon the age of 18 years (rather than 21) as the 'cut off' point for this special dispensation since it was 'the age of majority and many persistent young offenders grow out of criminal activities at about that age'. It was decided to treat Borstal training as the equivalent of a custodial sentence of six months (even though average terms spent in Borstal were nearly twice as long) since 'the purpose of the sentence is to rehabilitate the offender, so a 6 month base period could help'. Periods in detention centres were also to be treated as custodial sentences although approved schools were treated as non-custodial 'since the decision to send to a community home [approved school] should always be based on the needs of the offender not the type or gravity of the offence'.[60]

[57] 'Minutes of the 3rd Meeting held on 23rd February 1971', Joint Working Party on Previous Convictions; para. 7. Source: U DJU/8/13-14
[58] *Ibid*., para 6.
[59] *Ibid*., para. 8.
[60] *Ibid.*, para. 12.

Hugh Klare of the Howard League had not been present at either the February or March meetings where the scope of the original scheme had been expanded. However, at the fifth meeting of the Committee in April he raised concerns about the inclusion of those who had served sentences of up to two years imprisonment on the grounds that 'the simplicity was lost'. He also stated that he 'thought this would ask for trouble from Parliament and not commend itself to the Home Office'. On this point, Louis Blom-Cooper presented prison statistics from 1969 which indicated that 32 per cent of prisoners were serving terms of six months or less, 72 per cent twelve months or less, 81 per cent eighteen months or less and 88 per cent two years or less. Thus the amended scheme proposed by Paul Sieghart would incorporate the vast majority of ex-prisoners. In support of his proposals, Sieghart pointed out that those sentenced to two years imprisonment would have to remain conviction free for a period of at least eight years after their sentence expired before they could benefit from the scheme and that 'any person who achieved it should be entitled to rehabilitation'. Following this discussion the Committee voted 'by a small majority' to adopt Sieghart's proposals under scheme two.[61]

Restricting and penalising disclosure

Another matter which formed a significant part of the Committee's discussions was the extent to which disclosure of old convictions should be restricted or penalised. At its fourth meeting, the Committee was joined by Mr F.E. Williamson, a former Chief Constable of Northumberland Police and an HM Inspector of Constabulary (HMIC), to see whether the proposed scheme would cause any particular difficulties for the police in respect of their duties. With the exception of 'vagrancy and firearms offences where previous convictions are important in [the detection of] new offences' Williamson did not raise any substantial

[61] 'Minutes of the 5th Meeting held on 28th April 1971', Joint Working Party on Previous Convictions; para. 7. Source: U DJU/8/13-14

objections although it was recommended at this point that the Committee should also consider how the position in Scotland might be different.[62]

Gardiner raised the problem of information on previous convictions being obtained from the Criminal Records Office suggesting that this could happen through either 'reputable bodies such as professional organizations' (to whom disclosure was permitted), private detective agencies or individuals pretending to be police officers. In response, Williamson suggested that an existing Home Office circular provided the framework for legitimate disclosure to bodies concerned with the professional registration of doctors, midwifes, teachers and potential solicitors and barristers. He also acknowledged that the policy of non-disclosure of records 'created an artificial blockage between people, particularly employers, who want information and the police who had it' and that this could give rise to malpractice. However, he argued that based upon his experience of being in charge of the criminal records office in Manchester, it would be 'impossible for unauthorized persons to obtain information about previous convictions'.[63] These comments, of course, predated the launch of the Police National Computer in 1974 which massively expanded access to criminal records (see chapter one).

The Committee also discussed with Williamson whether it would be desirable to make the penalty for unauthorized disclosure of spent criminal records greater than for those which were unspent. However, it was agreed that it might prove practically difficult for the police to distinguish between the two types of record and, in any event, the distinction might be reflected in the *sentence* for any unlawful disclosure offence rather than in the actual *charge*. Moreover, Williamson argued that the imposition of such a distinction would not be well received by police organizations when officers were already prohibited from unauthorized

[62] 'Minutes of the 4th Meeting held on 23rd March 1971', Joint Working Party on Previous Convictions; para. 4. Source: U DJU/8/13-14.
[63] *Ibid*., para. 6.

disclosure by the Official Secrets Act and the Police Disciplinary Code. It was recommended by barrister Eric Stockdale that any new offence concerning disclosure might include a defence that such a disclosure 'was in the public interest', although the minutes of the Committee do not record any discussion about precisely how this public interest was defined.[64]

Gardiner also asked Williamson whether the proposal to halve rehabilitation periods for juveniles would cause any particular difficulties for the police. Whilst Williamson suggested that it would not, he did explain that this might cause some problems in relation to the police retention of photographs of people with records since these were ordinarily kept for a period of five years. He also argued that 'it would be wrong for a detective to have to justify the use of collections of photographs where it might be that some of the people were rehabilitated'. Whilst the Committee agreed that it might be necessary to reconsider the rehabilitation period for Borstal offenders and that the use of photographs for identification purposes was 'a risky operation', Williamson remained 'convinced that the Police should not be deprived of the right to use them'.[65] Moreover, when Tom Sargant enquired whether the proposed new law might cause difficulties in the case of witnesses to crimes who claim to be of good character because they had been legally rehabilitated, Williamson 'felt it might be a handicap *but he was not very concerned about it*' (emphasis added).[66]

Restricting rehabilitation and the problem of publications

During the fourth and fifth meetings, the Committee also began to consider certain restrictions on the scope of rehabilitation under their scheme. It was agreed that in the draft Bill a clause would be included which would allow the Home Secretary discretion to change the rehabilitation periods and that some additional schedule might be included setting out

[64] *Ibid.*, para. 7.
[65] *Ibid*., para. 9.
[66] *Ibid*., para. 10.

acts which disqualified people 'for a long time' from things such as fostering children.[67] As already stated, Paul Sieghart 'was minded to exclude [from legal rehabilitation] those classes of offences which stick in the public mind, like assaults on minors'.[68] To this end, solicitor Rupert Townshend-Rose had prepared a paper which, amongst other issues, raised the possibility of 'exclusions' from the general principles of rehabilitation in the proposed legislation. This paper included the following draft clause:

> The forgoing provisions of this Act shall not apply in relation to an offence where the act or any of the acts constituting the offence consisted of an assault or threat of violence to another person, or of having or possessing a firearm, an imitation firearm, an explosive, or an offensive weapon, or of indecent conduct with or towards a person under the age of sixteen years.[69]

Consideration was given to this paper at the April meeting. However, it was ultimately decided that there should be no exclusions based on offence-type because: '[o]nce the relevant period has passed from conviction, then there seems no logical reason why some convicted persons should be rehabilitated and others not, as the gravity of the particular conviction should in any event be reflected in the sentence.'[70] However, it was also suggested that if Parliament wanted to create exceptions to the principles established by the proposed legislation, then these could be tabled by way of amendment.

Another difficult issue with which the Committee grappled was the publicity given to old convictions that a person had managed to live down. This related particularly to post-rehabilitation court proceedings where prior convictions might be used in evidence. This

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[67] *Op. cit.* n.61; para. 11.
[68] *Ibid*., para. 7.
[69] 'Memorandum by Rupert Townshend-Rose', 6th April 1971, Joint Working Party on Previous Convictions; para. 3. Source: SIEGHART
[70] *Op. cit.* n.60; para. 5.

matter was complicated when Gerald Hines (a judge who joined the Committee at its sixth meeting in May 1971) raised the fact the Committee had not considered the problem of section 11 of the Criminal Evidence Act 1968. This legislation regulated the admissibility of previous convictions into evidence during civil proceedings by allowing them to be considered in court where to do so was 'deemed to be relevant to any issue in those proceedings' (s11.1). Whilst the Committee was minded to prohibit unnecessary publication of old convictions, a number of exemptions from this principle were proposed. These were that 'books already in print at the date of the act will have to be excluded' and that 'legal text books, law reports, and such like must be able to be published'. It was suggested that 'C.I.D officers' memoirs might not be able to be published although many felt that this would not be a bad thing'. Also, 'Louis Blom-Cooper thought that the exemption should cover publications of legal or sociological interest' although it was not made clear why such works could not still be published in an anonymised form.[71]

By the sixth meeting, the minutes still recorded that no final decision was taken on the exact wording of a clause which would make actionable the publication of 'spent' convictions.[72] This was postponed until the seventh meeting on 6th July 1971 where it was reported that 'Lord Gardiner had discussed the proposals with new Lord Chief Justice who strongly supported them but had raised the problem about re-publication of old records when, for instance, consulting Times Law Reports.'[73] Also at this meeting: '[t]here was considerable discussion of the problems of republication of contemporary reports' but '[t]he Committee still reached no decision on how to deal with this area' and instead resolved to discuss it again at a future meeting.[74] At the ninth meeting, it was eventually decided to protect 'contemporaneous reports of proceedings', 'bona fide text books' and 'inadvertant [*sic*] post-

[71] 'Minutes of the 6th Meeting held on 24th May 1971', Joint Working Party on Previous Convictions; para. 7. Source: U DJU/8/13-14.
[72] *Ibid*.
[73] 'Minutes of the 7th Meeting held on 6th July 1971', Joint Working Party on Previous Convictions; para. 5. Source: U DJU/8/13-14.
[74] *Ibid*., para. 7(g).

rehabilitation publication of anything published during the rehabilitation period or before the passing of the Act, whichever is the later'. It was also stated that further clarification about what an author could write without falling foul of the proposed Act would be provided in the final report of the Committee.[75] However, as chapter nine will reveal, the issue of defamation in respect of spent convictions would prove to be the most controversial aspect of the ROB when it was placed before the UK Parliament.

Agreeing the finer points

During its later meetings, the Committee was primarily involved determining the actual text and format of its report although other technical legal issues were also discussed. These included how various ancillary court orders made alongside sentences might affect rehabilitation and where absolute and conditional discharges, supervision orders and care orders would fit into the scheme.[76] Also considered was the complication created by attempting to apply the proposed legislation to two distinct legal jurisdictions (England and Wales, and Scotland). For instance, at its eighth meeting the Committee pondered correspondence by Mr D J Cowperthwaite of the Scottish Home and Health Department and it was noted that because Scotland had no clear distinction between summary and indictable offences, the proposals might run into some difficulties.[77] However, these appear not have been borne out following the eventual passage of the Act.

In terms of the actual title of the report an early draft had proposed the somewhat dramatic 'Death of Rehabilitation' although this was not favoured by the Committee.[78] Instead, at the eight meeting, the Committee agreed upon 'Living It Down: A report on restricting the

[75] 'Minutes of the 9th Meeting held on 22nd November 1971', Joint Working Party on Previous Convictions; para. 4. Source: U DJU/8/13-14.
[76] 'Minutes of the 8th Meeting held on 8th November 1971', Joint Working Party on Previous Convictions; paras. 6-8. Source: U DJU/8/13-14.
[77] *Ibid*., para. 4; see chapter one on the final form that the legislation took and how certain distinct Scottish legal procedures were incorporated.
[78] *Op. cit.* n.72; para. 7(b).

disclosure of previous convictions'[79] although this was later changed to 'Living It Down: The problem of old convictions' in the final version (see JUSTICE 1972). The perceived need to be careful in terms of the choice of language used in the final report was evident in earlier discussions held by the Committee. When considering how those who would benefit from the scheme and their convictions were to be referred to, the Committee had previously considered talking about people being 'redeemed' or 'reinstated in society' and their convictions being either 'purged' or 'expiated'[80] (see also Appendix 11). These terms did not meet with unanimous approval and the chosen form of words was not finalised until a late stage. Indeed, at one meeting '[c]oncern was expressed over categorising people as "professional criminals" and a more neutral form of words was agreed on'.[81] This precise issue had been raised by Tom Sargant who had written to Lord Gardiner back in July 1971to express disappointment that the proposed scheme did not offer the prospect of rehabilitation to those who had been sentenced to more than two years' imprisonment (see Appendix 12).

There was also a sustained attempt by the Committee to discover how many people might benefit from the scheme that was being proposed. At earlier meetings they had agreed to enquire to the Home Office how many people had effectively 'gone straight' for a sufficiently long period that they might be regarded as rehabilitated. Whilst this research had clearly taken some time, at the ninth and penultimate meeting, the minutes record that: 'Paul Sieghart had heard from the Home Office Research Unit that there are probably *at least one million people* in the country who have committed criminal offences over ten years ago and not reoffended'[82] (emphasis added). Whilst this statistic provided useful evidence to the Committee's cause, news of the proposals had started to become more widely known and opposition was already starting to foment. During the ninth meeting it was reported that the magistrate's magazine *Justice of the Peace* 'had carried an article critical of [the] proposals

[79] *Op. cit.* n.75; para. 2.
[80] *Op. cit*. n.60; para. 3.
[81] *Op. cit.* n.72; para. 7(f).
[82] *Op. cit*. n.74; para. 2.

based on the leak in the Howard League's Annual Report. Lord Gardiner agreed to write to the magazine so as to try and stop the matter going any further.'[83]

The Gardiner Committee met for the tenth and final time on 20th December 1971. At this meeting, Gardiner read the letter which he had submitted to *Justice of the Peace* magazine in response to their earlier criticisms.[84] The final draft of the 'Living It Down' report prepared by Paul Sieghart was also agreed to, save for 'various amendments'[85] and it was agreed that the report would be distributed to the councils of JUSTICE, NACRO and the Howard League for Penal Reform in order to receive their endorsement prior to its scheduled publication in February 1972.[86] However, by this stage a draft 'Rehabilitation of Offenders Bill' was also beginning to take shape and a draft version prepared by Rupert Townshend-Rose was already in circulation amongst the members of the Committee as early as 25th October 1971 (see Appendix 13).

Conclusion

This chapter has discussed how old criminal records and the problems that they created for PWCs came to the attention of penal reformers in the late-1960s and early 1970s. Prior to this period, a number of official inquiries had reflected upon the difficulties experience by ex-prisoners, particularly in relation to finding employment, but how these had not clearly recognised that it was the issue of *criminal records* and their indefinite disclosure which gave rise to much post-sentence discrimination. The formation of the Gardiner Committee in late 1970 occurred largely as a response to frequent requests from people with old convictions for some sort of action to be taken on this matter. However, when the Committee came to consider the problem in detail, their proposals appear to have been remarkably conservative in that they were not prepared to countenance the actual destruction of any criminal record –

[83] *Ibid*., para 3.
[84] 'Minutes of the 10th Meeting held on 20th December 1971', Joint Working Party on Previous Convictions; para. 1. Source: U DJU/8/13-14.
[85] *Ibid*., para. 3.
[86] *Ibid*., para. 5.

even many years after the original offence had occurred. Moreover, they decided upon a scheme for legal rehabilitation which did not extend to those who had served longer terms of imprisonment. Therefore, this placed a significant number of people with criminal records beyond the scope of legal rehabilitation forever. Nonetheless, the report which the Gardiner Committee eventually published in February 1972 (JUSTICE 1972) was the first significant recognition by the penal reform lobby that some measure was needed to mitigate the often devastating consequences experienced by PWCs. This report is considered in the next chapter.

8. 'A law may be necessary': the Gardiner Report and its reception

In February 1972, the report 'Living It Down: The Problem of Old Convictions' (JUSTICE 1972 – henceforth the 'Gardiner Report') was published. For the most part, it summarised the key issues upon which the Gardiner Committee had agreed upon in its meetings (see Appendix 14 for a summary) and set out the general principles which underpinned the draft Rehabilitation of Offenders Bill (ROB). The ROB, which had been prepared during the last few months whilst the Committee was meeting, was read for the first time in the House of Lords on 20th December 1972. Its passage is discussed in detail in chapter nine.

To begin to account for how the proposed legislation became so contentious and the eventual ROA somewhat limited in scope, this chapter examines how the likely beneficiaries of the Act were presented in the Gardiner Report, how post-sentence discrimination against them was rendered problematic and thus how a legal solution to the 'problem of old convictions' was constructed as necessary. Within this discussion, the notion that certain cases might be regarded as less deserving of 'full' rehabilitation is examined using the case of an individual person with convictions and correspondence between Tom Sargant of JUSTICE and a Member of Parliament. The subsequent reception which the Gardiner Report received is then examined with particular reference to a highly critical review by Morris (1972) and in the context of the more radical penal politics of the early 1970s.

The discursive construction the 'rehabilitated person'

The Gardiner Report[87] suggested that a large number of people 'offend once, or a few times, pay the penalty which the courts impose on them, then settle down to become hard-working and respectable citizens' (para. 8). These individuals were described as 'rehabilitated persons':

[87] Paragraph references in the initial sections of this chapter correspond with those in the report.

> Meaning that they have done, over a number of years after their delinquent phase, all that society can reasonably expect from its respectable citizens. But for rehabilitation to be complete, society too has to accept that they are now respectable citizens, and no longer hold their past against them. At present, this is not the case, for the rehabilitated person continues to be faced with great difficulties, especially in the fields of employment and insurance, and in the courts. (para. 9)

This statement of the problem was preceded by an introduction containing a number of 'true stories' which the Report suggested 'could apply to a million people in this country' (para. 1). These revealed the hardships experiences by 'John', 'Hugh', 'Matthew', 'Charles', 'George', 'James', 'Robert' and 'Joan' – PWCs whose old criminal records had either already caused them difficulties or who otherwise lived in fear of their convictions being brought to light. In some cases these individuals had suffered from having their convictions revealed many years later during civil court proceedings – for instance: 'Eleven years after his last conviction [James] brought an action in the local county court to recover a civil debt, and found himself cross-examined by the defendant's counsel about his old convictions' (para. 1(f)). Alternatively, in the case of 62-year-old Joan, who had been convicted for soliciting in 1929 at the age of eighteen, it was noted that: '[n]either her husband nor her children know of her conviction. She has always known that if, for any reason, she became newsworthy, any newspaper could publish it', thus 'she has lived her whole life under this shadow' knowing that the conviction 'may explode under her feet at any time' (para. 1(h)).

Redeeming the 'respectable citizen'

At the outset then, the Report went to great lengths to elicit the reader's sympathy for the potential beneficiaries of the proposed legislation. Moreover, it sought both to *normalize* these individuals and render them *deserving* of 'complete' rehabilitation. Indeed, a number of discursive themes are at play in these initial sections of the report which defined how – in the

view of the Report's authors - the 'rehabilitated person' might be imagined. For instance, the exemplary rehabilitated person is frequently described as having *'settled down' or 'married':*

> 'Matthew…settled down and in 1961 married a woman of strong religious beliefs' (para. 1(c));
>
> 'Charles…married, settled down' (para. 1(d));
>
> 'James…settled down' (para. 1(f));
>
> 'Joan…married [and]…Two of her three children have married and she now has four grandchildren' (para. 1(h)).

As well as constructing conventional marital and family relationships as central to rehabilitation, the report also constructed rehabilitated people as *'respectable' or 'respected' within their communities*:

> 'Matthew…became a much respected member of the community, doing public work and helping people in trouble' (para. 1(c));
>
> 'Charles…became a respectable and respected member of his community' (para. 1(d));
>
> 'James…ran a respectable business' (para. 1(d));
>
> 'Joan…led the life of a good citizen' (para. 1(h)).

The exemplary rehabilitated person was also presented as *hard-working*, *capable* and, in some cases, as *making an investment in their future*. For example:

> 'Hugh…applied for a job as a postman' (para. (b));
>
> 'Everyone agreed that [Matthew's business]…was very well run and efficiently staffed' (para. 1(c));

> 'Charles…did well in business' (para. 1(d));
>
> 'John…worked and saved, and wants to invest his savings in a small business' (para. 1(a));
>
> 'Robert…found work as a shop assistant. In his spare time he took "O" and "A" levels, a university degree and a professional qualification…Eventually, he secured a lectureship…' (para. 1(g)).

The rehabilitated person was therefore also constructed as having *taken responsibility for their own rehabilitation* and it was suggested that 'they have done…all that society can reasonably expect from its respectable citizens' (p5) and 'may have spent ten, twenty or thirty years doing everything *they can* to live down their past and *rehabilitate themselves*' (p3; emphasis added).

Distinguishing the low-risk case from the recidivist

'Rehabilitated persons' were also constructed within the Gardiner Report as *distinct from recidivists* who, it was made clear, were not the object of concern for any proposed legislation. The Report noted that:

> 'Much of the crime committed in this country is the work of a group of people, sometimes called "recidivists", who spend most of their adult life in and out of gaol, undeterred and unreformed. They present society with an apparently intractable problem, but *they are not the people with whom we are concerned* in this Report… We are concerned instead with a much larger number of people…' (paras. 7-8; emphasis added)

Rehabilitated persons were thus, by definition, 'non-recidivists' and *more typical of those who received a conviction.* They were therefore *not an ongoing threat* to society because they were

unlikely to commit further offences. Indeed, the Report noted that:

> 'the Home Office Research Unit…think that there may be as many as a million people in England and Wales who have a criminal record, but who have been free of convictions for at least ten years. For these people, the chance that they will ever be convicted again is minimal.' (para. 16)

Indeed, rehabilitated persons were also constructed as *not really 'criminals' in the first place* and their brush with the law was explained as part of an *adolescent phase*:

> 'Often, their offences are committed during adolescence, which is a period of emotional instability in even the most normal people, and can sometimes be delayed if they are "late developers…When the phase is over, many of these people grow out of the need to behave delinquently. Mostly, they marry, find work, and settle down, and never offend again.' (para. 8)

Alternatively, their one and only conviction could be explained as *a temporary lapse of judgement* in an otherwise unblemished life:

> Others with whom we are concerned may suddenly commit an isolated crime in later life, such as the trusted clerk who embezzles from his employer through a foolish entanglement with a fast woman or with slow horses. Here again, in the majority of cases such a person will not offend again after he has served his sentence.' (para. 8)

However, these rehabilitated people were also constructed as *hostages to fortune, living a precarious existence* because '[a]t any time, on any day, malice or chance may…expose them to

endless unemployment and misery' (para. 2). Indeed, the Report noted how:

> '[Matthew's]…record was exposed, and he had to abandon all the fruits of his new life, leave the town and change his name' (para. 1(c));
>
> '[Charles's]…old conviction was read out in court and reported in the local press' (para. 1(d));
>
> '…the court was told that [George]…had been convicted of indecent exposure' (para. 1(e));
>
> '[t]he University…[upon learning of his conviction] terminated Robert's appointment, compensating him only for the actual expenses he had incurred. It took him another six years to find a comparable job.' (para. 1(g)).

The need for a tailor-made response

Given this sympathetic construction, the Report suggested that the introduction of a law which protected the status of the rehabilitated person would not just be in society's interests, but also the just thing to do. It argued that:

> The question is whether, when a man has demonstrably done all he can to rehabilitate himself, and enough time has passed to establish his sincerity, it is not in society's interest to accept him again as he now is…In our view, both the interests of society and the requirements of common justice call for reform in this field. (para. 18)

However, it was also indicated that domestic law was some way behind the rest of Europe in this regard:

> Most civilised societies recognise that it is in their interests to accept back into the community a person who, despite one or more convictions, goes straight for a sufficient number of years. For that purpose a law may be necessary, so as to obviate cases like those we have described. The United Kingdom is the only member country of the Council of Europe which has no such law. (para. 3)

In comparing England and Wales with other jurisdictions, attention was paid to the 'broad historical distinction between the laws of Roman law countries and those of common law countries' (para. 22) with the Report commenting that:

> In France, for example, a conviction for a serious crime used to result in some cases in the permanent loss of a man's right to give or receive property, make a will, hold public office, vote, teach, wear medals or join the army. (para. 22)

By contrast, it was noted that:

> In England…the old penalty of attainder (resulting among other things in the confiscation of property) was abolished in 1870, and, while serving prisoners still cannot vote, or carry on business, or conduct litigation without the Home Secretary's approval, these disabilities do not outlast their imprisonment. (para. 23)

It was also recognised that there was perhaps a clearer distinction made between *de facto* and *de jure* consequences stemming from a conviction in English law when compared to continental Europe. Whilst, in England and Wales, there were a range of circumstances where individuals could be 'disqualified' or have various types of occupational licence withdrawn, it was noted that these were 'not usually legal consequences in the sense that by law they

automatically result from conviction' (para. 23; emphasis in original). Thus, there was 'nothing equivalent to the Roman law concept of "loss of civil rights"' (para. 23) in England and Wales. Moreover, a further distinction was made between the domestic situation and other continental European countries which tended to maintain central registers of key events in every citizen's life – including criminal convictions:

> In consequence, the main rehabilitation laws of the Roman law counties have to provide for *the complete expunging of the criminal record* when a certain number of years has [sic] passed since the last conviction, the number of years usually varying with the gravity of the offence. (para. 22; emphasis added)

The Report reiterated this point about 'expungement', noting that:

> The general aim of rehabilitation laws should be to restore the offender to a position in society not less favourable than that of one who has not offended, but most foreign jurisdictions with such laws seem to concentrate mainly on restoring civil rights lost as a result of the conviction, or on the "expunging" or "sealing up" of the record, rather than on obviating the social consequences resulting from the conviction. But all countries which do have rehabilitation laws seem to agree that they fulfil an important social need.' (para. 24)

Keeping 'all the relevant facts'

In consequence, whilst legal rehabilitation was implicitly constructed as the *mark of a civilised society* and of direct benefit *to society as a whole*, the precise mechanism through which it could be achieved was rendered problematic due to the distinctions which existed in the laws, traditions and systems of record keeping between England and Wales and continental Europe. For this reason, the solution proposed in the report advocated the

adoption of a 'spent' model of legal rehabilitation (see chapter one). However, in a particularly telling paragraph, a number of defences were provided to the non-adoption of a European expungement model. The report suggests that the Committee had:

> grave objections to destruction, or even sealing up, of criminal records if that course can be avoided. Criminological research is still in its infancy and *knowledge of all the relevant facts is essential* to such bodies as the Home Office Research Unit and the Institute of Criminology [at Cambridge University]. (para. 26(a); emphasis added)

Thus, it was regarded as vital to protect of the needs of criminological researchers – particularly those at the heart of government - whose need for access to 'essential' criminal record data had been represented by Louis Blom-Cooper at the very first meeting of the Gardiner Committee (see chapter seven). The needs of the judiciary were also given primacy over the possibility that any criminal record might be permanently 'forgotten' with the Report stating emphatically that:

> if a man, however long after a period free from crime, is again convicted of a serious offence, the courts *must have available* the whole of his past record if they are to come to any sensible conclusion about what to do with him. (para. 26(a); emphasis added)

Of course, this argument discounted the possibility that a 'rehabilitated person' who had lapsed back into offending might be sentenced merely upon the facts of the *current* case before the court. Instead, the Report seemed to suggest that they would be regarded as having 'undone' their previous spent conviction which would be resurrected and used to adduce previous bad character for sentencing purposes. It was, however, conceded that such

a possibility should not extend to 'minor' offences which could only be tried summarily (in para. 39). The Report also somewhat undermined the idea that a rehabilitated person was one who had sincerely 'lived down' a spent conviction when it suggested that:

> It is in the interests of the community that these [spent criminal] records should continue to be available to the police, much of whose work can only be done efficiently if they have a pretty good idea of where *known criminals* are living and what they are doing. (para. 26(a); emphasis added)

Thus, whilst a conviction might be 'spent' for the purposes of the legislation proposed, the individual to whom it pertained was still to be regarded as a person of potential interest to the police. On this exceptionality, it was also argued that:

> Other public authorities have a responsibility to supervise *certain areas of known social risk* such as the employment of schoolmasters, the licensing of child care establishments, casinos an gaming clubs, or the appointment of Civil Servants to security-sensitive positions. These bodies too *must have access to all official records – including those of rehabilitated persons* – if they are to do their job properly. (para. 26(a); emphasis added)

Drawing the line somewhere

The policy of exceptionality was explored elsewhere in the Report in a section which addressed whether certain types of offence should be excluded altogether from the possibility of legal rehabilitation. It argued that

> There will be many who will argue that there are some crimes which society should never forget. Some will say that assaults on children fall within this class.

> Others will make a case for offences relating to firearms. Yet others would argue that if a man has once been shown to be violent, the changes are that the streak will persist throughout his life. All of us, even within our Committee, tend to have strong feelings on matters of this kind, reflecting our pet dislikes and the kinds of conduct on the part of others to which we object most strongly. (para. 43)

This statement clearly reflected objections tabled before the Committee by Paul Sieghart and Rupert Townsend-Rose as to the legal rehabilitation of those who had committed offences against children (see chapter five). However, the paragraph also noted the resolution of the Committee that it would be difficult to categorise such exclusions and thus, the length of the sentence should be accepted as a marker of the seriousness of any offence and not the type of crime. With regards to which sentences the Committee deemed 'suitable' for rehabilitation the Report provided the rationale for why two years imprisonment was deemed to be the appropriate cut off point. It noted that:

> Although there is a strong case for saying that all offenders, regardless of the gravity of the offence, should sooner or later be entitled to have their criminal past buried, *we fear that such a proposal would be too radical to command general support*. Accordingly, we think it better to *confine our proposals* in the first instance to those whose past offences have not been so grave as to arouse really strong punitive reactions. We therefore need *to draw a line* somewhere… (para. 33; emphasis added)

In relation to the drawing of this line at a sentence of two years of imprisonment, it was noted that whilst there was 'room for argument':

> we have come to the conclusion that *in current circumstances* this provides a convenient watershed between *redeemable offenders* and *those whom society is likely to regard* either as *hardened professionals*, or as people whose offences have been such that the notion of rehabilitation *evokes strong feelings* of resentment. (para. 36; emphasis added)

Thus, the Report had made clear the Gardiner Committee's view that some PWCs were to remain legally *irredeemable*. However, whilst some members of the Committee had clearly expressed the opinion that certain offences or sentences should not be legally rehabilitated, it is uncertain whether this view arose out of the idea that some people were incapable of individual reform. Rather, as appears to be the case, the Committee took the view that some individuals were irredeemable *because society viewed them to be so*. This view would appear to contradict the rationale behind the proposals in the Report which sought to reduce the extent to which PWCs were subject to indefinite social censure. It was, however, also likely that such a position was adopted based upon the realpolitik of passing the proposed legislation 'in current circumstances' (para. 33; see chapter six) where a more comprehensive approach to legal rehabilitation was, in the opinion of the Committee, 'too radical to command general support' (*ibid.*).

The case of 'D'

This cautious approach towards Parliament regarding legal rehabilitation and to who might be 'suitable' candidate for it was soon put to the test. 'D' wrote to Tom Sargant of JUSTICE[88], just two months after the launch of the Gardiner Report (see the trail of correspondence in Appendix 15). He had a long record of previous convictions which had included some custodial sentences. However, he not been reconvicted for over eleven years and had been in regular employment although he was now experiencing problems obtaining a taxi licence.

[88] Letter from 'D' to Tom Sargant, 22nd April 1972, Source: U DJU/8/13-14

His convictions were such that he would have benefited from the scheme proposed in the Report. Whilst there was no statutory bar in place on the granting of a taxi licence to PWCs, the Metropolitan Police had discretionarily refused 'D's' application. Sargant replied that whilst 'it is clear that you have lived down the past…I can understand the Commissioner being worried by the list [of convictions] and feeling that he has some duty in the matter'[89]. In a later letter he added: 'I have to say that your list of eight convictions must present the Commissioner with a difficult problem, despite the fact that the last one was over ten years ago, since he has to protect the public against risk'[90]. Moreover, when corresponding with 'D's' Member of Parliament on this case, and asking him to make representations to the Metropolitan Police Commissioner, Sargant wrote:

> I asked him ['D'] for details of his convictions and enclose them. Although the last one was over ten years ago and ['D'] appears to have made good since, they are more serious than he had me to believe and I can understand the police having some hesitation in granting him a taxicab licence.[91]

He also added that he tried 'to reserve representations by JUSTICE to *weightier matters* and not to exhaust my credit with the Commissioner' (emphasis added)[92]. Sargant's letter to the MP somewhat misrepresented the honesty with which 'D' had fully disclosed his criminal record and it is clear from the correspondence that 'D' had not in any way 'led Sargant to believe' that the convictions were not serious. Unsurprisingly, the response which Sargant received from 'D's' M.P. was negative. It noted:

[89] Letter from Tom Sargant to 'D', 10th May 1972, Source: U DJU/8/13-14
[90] Letter from Tom Sargant to 'D', 30th May 1972, Source: U DJU/8/13-14
[91] Letter from Tom Sargant to 'D's' M.P., 30th May 1972, Source: U DJU/8/13-14
[92] *Ibid.*

> Justice is not alone, of course, in preferring to reserve its representations to weighty matters. Members of Parliament have the same inclination! …I just do not consider that I would be justified in making representations on the basis of the information you give…If there is anything in the rest of the correspondence which gives good ground for believing that ['D'] is and will remain straight, I would be happy to look at it. Otherwise, I feel that ['D'] ought to be encouraged to think of other jobs.[93]

Sargant responded, noting that he shared the MP's reservations about the case and adding that despite 'D' having no criminal record for the last eleven years: 'He has not told me anything about his employment record during this time, and this would certainly affect my own judgment of his capacity to go straight and my willingness to make any representations on his behalf.'[94] Thus, within months of helping to launch the Gardiner Report, Sargant – as a key member of the Committee which produced that Report - had determined that an individual who fell within the parameters of the Report's definition of a 'rehabilitated person' was not, in fact, a case worth representing further. Moreover, he had aligned himself with an MP's view that some further 'proof' of rehabilitation was required, beyond *over a decade's absence of further convictions*. Whilst Sargant would continue to raise the plight of PWCs with parliamentarians (including at the highest levels as shown later in the chapter), the exceptionality at the heart of the Gardiner Report and exemplified in the case of 'D' would come in for severe criticism.

Reactions to the Report

Coverage of the proposals included an article in *The Readers Digest* (Reader's Digest 1972).[95] This piece, titled 'Help Wanted for the Million Who Live in Fear', was 'adapted from "Living It

[93] Letter from George Cunningham MP to Tom Sargant, 6th June 1972, Source: U DJU/8/13-14
[94] Letter from Tom Sargant to George Cunningham MP, 9th June 1972, Source: U DJU/8/13-14
[95] Source: SIEGHART.

Down"' (p54) and reproduced the stories of those who had suffered discrimination or who otherwise feared that their old convictions might come to light. It also summarised the key recommendations of the Report but can in no way be described as a 'critical' response to the proposals. In *The Guardian*, in an article titled 'In the nick of time', columnist Peter Fiddick also supported the proposals, noting that the report was:

> produced by men who know from hard experience how difficult such [legal] change is to provoke. And since the main problem is acceptability to the public and to Parliament, they have made their proposals limited and flexible but detailed as a law must be…I cannot think that with this work behind it the parliamentary draughtsmen are likely to find it taking up too much of their time. Nor can I see why it should not be given a sympathetic, constructive, and above all businesslike reception by both Houses.[96]

Fiddick's prediction that the process of converting the Gardiner Report's proposals into law would receive a 'sympathetic' and 'constructive' response from Parliamentarians was proved only partially correct (see chapter nine). Moreover, his enthusiastic support for the Report was not universal and did not take account of the changing political climate with regards to punishment and prisons.

The context of radical resistance

As already discussed in chapter six, in response to the increasingly securitized but deteriorating conditions in British prisons (see Fitzgerald and Sim 1979) and against a background of prison disturbances (see Fitzgerald 1977), a more radical form of penal politics had taken hold during the early 1970s. This involved the emergence in 1972 of the Union for the Preservation of the Rights of Prisoners (PROP). Driven by a frustration that the

[96] Source: SIEGHART. The press cutting is undated but responds to the publication of the Report and was clearly written prior to the ROB being placed before parliament.

history of prison reform was 'filled with the largely futile efforts of middle class liberals to improve the conditions inside prisons, without even consulting with prisoners themselves' (*ibid.* p140), PROP was led by an executive committee of ex-prisoners with support from radical academics.

PROP's (1972: 6-8) demands were enshrined in its 'Charter of Rights' and included: an end to the culture of secrecy in prisons and the near universal application of the Official Secrets Act; an end to censorship, particularly in correspondence with legal representatives; the right to take legal action against the Home Office; the right to legal representation at disciplinary hearings and for legal assistance with parole applications (including the demand for a more transparent parole process); the right to choose one's own doctor; the right to marry; and the right to vote in local and national elections. In addition, the charter included '[t]he Right to adequate preparation for discharge', including '[a]n equal right with all other applicants to employment in state concerns whether they be run by central and or local authority' and also '[t]he Right to have all criminal records destroyed within five years of discharge irrespective of the sentence last served' (PROP 1972: 8).

PROP's radical approach was in stark contrast to organisations such as the Howard League for Penal Reform whose secretary, Hugh Klare, had objected to the 'undemocratic' use of strike tactics by PROP in August 1972. These strikes were a response to the failure of the Home Office to acknowledge their demands for improved prison conditions (Fitzgerald 1977: 160). As outlined in the preceding chapter, Klare had been a key member of the Gardiner Committee until June 1971 but critically he had expressed reservations when the scheme of legal rehabilitation which it proposed expanded in scope to cover those who had served sentences of more than six months imprisonment. To reiterate he suggested that 'this would ask for trouble from Parliament and not commend itself to the Home Office'.[97] As Barker

[97] 'Minutes of the 5th Meeting held on 28th April 1971', Joint Working Party on Previous Convictions,

(2012) suggested in an obituary '[t]hough a self-evidently warm man with a genuine interest in the downtrodden, Klare was regarded by many as an establishment figure who preferred to work with the system rather than confront it.'

A critical response

In this context, the conservative approach adopted by the Gardiner Report drew criticism from within the academic community. Morris (1972) provided a stinging criticism of the Report and the presumptions upon which it had been founded.[98] She suggested that because of the proposals to rehabilitate *convicted* lawbreakers, this meant that only a tiny minority of those who engaged in criminal activity would be affected. Morris commented that 'the apprehended, prosecuted and convicted offender, with whom this Report is concerned, is a small group indeed, compared with lawbreakers at large' (p226). Moreover, she argued that of those who *were* apprehended and prosecuted for less serious offences, a class bias existed with regards to whom social control agents such as the police chose to target, noting that:

> the relevant factors in the exercise of this discretion are class, attitude to the police officer, dress, demeanour, etc. Very rarely, except in the serious offences such as homicide, housebreaking, etc., is the offence itself paramount…It is for these reasons that I find the Committee's statement "that any attempt to put a person who has been convicted into the same position as one who has not will involve some degree of artificiality or appear as an unrealistic device", as somewhat naïve. It is this insistence on separateness that is artificial and unrealistic. (*ibid*.)

With regards to the Report's conclusion that to legally rehabilitate 'all offenders regardless of the gravity of the offence' (JUSTICE 1972: para. 33) would be 'too radical to command general

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para. 7. Source: U DJU/8/13-14.

[98] Source: SIEGHART

support' (*ibid*.), Morris (1972: 226) suggested that the Committee 'prefer to follow public opinion rather than to lead it, and they appear to accept the public image of the typical criminal'. She also claimed that the Committee showed 'a total disregard for the research which demonstrates society's own role in creating and increasing deviance.' Citing the early work of Stan Cohen (1967) on the role of the media in 'amplifying' deviance, Morris added that: 'Too often policymakers make statements about deviance on the basis of stereotyped images and misleading facts. This report, where invalid assumptions are frequently made is an example of the latter' (1972: 226).

Morris (1972) continued by taking issue with the assertion in the Report that rehabilitation should be limited to sentences of two years on the grounds that 'Clearly the more serious the offence, the longer it will be before one can be reasonably sure that the offender has reformed' (JUSTICE 1972: para. 34). In response she cited Home Office statistics which demonstrated how those sentenced to more than two years in prison were actually *less likely* to be reconvicted in the five years following release than those given shorter custodial sentences. She also criticised the assertion in the Report that the two-year sentence limit on rehabilitation provided a 'convenient watershed' between 'redeemable offenders' and those whose rehabilitation might provoke resentment (see above). On this claim, Morris suggested that 'the Committee abandon themselves to emotive terms and follow what they think is public opinion' (p.227; emphasis in original) concluding:

> it seems, in the light of the very limited recommendations of the Report, that there has been much ado about little. It is perhaps the conservative nature of proposals like these that is driving the young from Justice, Howard League and N.A.C.R.O., in the [direction of the] more radical and action-oriented P.R.O.P. and R.A.P. The era of the armchair philosopher has passed. (p227)

Conclusion

The Gardiner Report sought to elicit sympathy for the proposals which it contained by constructing *certain* PWCs as respectable citizens who posed a low risk of recidivism. Indeed, it went to great lengths to explain how the Report was *not* concerned with those who might still pose a risk of future offending or where their convictions had led to sentence of more than two years' imprisonment. In making this distinction, the Report can be read as an attempt to establish a new 'dividing practice' between two categories of PWCs who had *both served their sentences*. On the one hand, the Gardiner Committee had sought support for the 'rehabilitated person' who had 'settled down', 'worked hard' and done everything possible to 'rehabilitate themselves'. But in constructing this new legal subject, the Committee had unwittingly reimagined other PWCs as *un-rehabilitated* or even legally irredeemable subjects.

This exceptionality was based not on any particular ill will towards those who had served longer sentences but the concern that any proposal to legally rehabilitate them would be perceived as too radical to command support or as running contrary to public opinion. However, it also made clear the distinction which existed during this period between the somewhat 'elite' figures of penal reform within JUSTICE, the Howard League and NACRO and the more radical and action-oriented abolitionist groups such as PROP and RAP. As the next chapter demonstrates, the Committee had miscalculated the 'dividing line' at which Parliament would deem that that an appropriate 'cut-off point' for legal rehabilitation should be drawn. Moreover, the greatest opposition to the ROB would occur not so much because of who the provisions for legal rehabilitation included, but because of the proposals were constructed by certain vested interests (particularly in the media) as an attack on the free circulation of information.

9. 'Making truth actionable': the Parliamentary passage of the Act

This chapter considers the passage of the Rehabilitation of Offenders Bill (ROB) through the UK Parliament. It discusses not only the debating of the ROB in Parliament but also lobbying of Government ministers and others by the Bill's supporters. The chapter begins with the first unsuccessful attempt to pass the ROB which failed due to a lack of support from the Conservative Government and because it was 'timed out' by the unexpected general election of February 1974. The chapter then considers the 'successful' passage of the Bill during the 'short parliament' of 1974 during which it received the greater support from the minority Labour administration. The emergence of strong opposition to the Bill in several sections of the media is also considered. The chapter concludes with a 'postscript' on the ROA which discusses the gradual erosion of its protections, but which ultimately rejects the orthodox progressivist narrative which has long surrounded of the Act and defined it as an intrinsically liberalising measure.

The first unsuccessful Bill

In September 1972, the Prime Minister, Edward Heath, wrote to Tom Sargant in response to an enquiry about the case of three Plymouth-based PWCs who had either struggled to find work or been summarily dismissed from roles within the public sector (see Appendix 16). Having made enquiries about these cases, Heath noted that some progress had occurred in respect of at least two of the men but added the following view:

> …applications from ex-offenders for jobs in the public sector are considered strictly on their merits. But the present scarcity of jobs for men in Plymouth may well lead private sector employers to be more selective about who they recruit.[99]

[99] Letter from Edward Heath, Prime Minister to Tom Sargant, 4th September 1972. Source: U DJU/8/13-14

Thus, there seemed to be a tacit acceptance from the very top of the UK Government that criminal record-based discrimination was not only *acceptable* within the private sector, but perhaps even *inevitable* during a period of economic downturn. Heath's response indicated that the Rehabilitation of Offenders Bill (ROB) was never likely to enter Parliament as a Government measure. Instead, Lord Gardiner introduced it as a Private Members' Bill and it was read in the House of Lords for the first time in December 1972.

The first debate of the Bill came at its second reading stage in the Lords on 1st February 1973 (see Table 10 for a timeline of the unsuccessful Bill). Setting out the rationale behind the Bill and its provisions in some length (see HL Deb, 1st February 1973, vol. 338 cc708-25) Gardiner received immediate support from several colleagues. A summary of the debate in *The Times* (Friday 2nd February 1973) records that Lord Foot (Labour) considered the Bill 'a major contribution to penal reform', whilst the Archbishop of York suggested that the Bill would 'promote a new social climate in which the returning offender might come to feel that the community was more friendly and encouraging than suspicious and hostile towards his efforts to make good'. However, he also questioned whether 'the stipulation that no one sentenced to over two years' imprisonment could benefit from the Bill's provisions was a little severe, and perhaps the periods of rehabilitation were a trifle long.' On this point, Lord Longford (Labour) concurred suggesting that this cut off point would 'rule out many people in need of redemption and encouragement'.[100]

However, Lord Ballantrae (a former British Army officer and Governor-General of New Zealand who had also acted as a police commander during the British Mandate of Palestine) was 'nervous of the idea of creating a category of people about whom they could not tell the truth, whether in the public interest or that of individuals'. Viscount Dilhorne (Conservative peer and former Lord Chancellor) was also reported as being supportive of Gardiner's objectives but he stated that '[h]e could not accept the provision legalizing perjury. The

[100] 'Danger in wiping out previous convictions after time limit', *The Times*, Friday 2nd February 1973. Source: TDA

proposal was wholly novel, wholly wrong and impossible to justify.' The Home Office Minister, Viscount Colville also suggested that Gardiner and his colleagues 'had a long way to go [with the Bill] before it was satisfactory.' The coverage in *The Times* foreshadowed the paper's future opposition to the sections of the Bill dealing with defamation. Its report was headlined: 'Danger in wiping out previous convictions after time limit'.[101]

Paul Sieghart later remarked that at the second reading debate: '[t]he Home Office reacted absolutely negatively, the Home Office official was specifically briefed to produce nothing but negative arguments'.[102] These consisted mostly of objections based upon the application of rehabilitation periods to court martials and civil service recruitment. It was also noted that 'Colville would present an objection, Lord Gardiner would meet it with an amendment from Paul Sieghart, whereupon the Home Office official would rapidly construct another objection and pass it to Lord Colville.'[103] Regardless, the Bill passed through without a division with the Home Office content that it would not succeed in the Commons without Government backing.

Table 10. Timeline of the Parliamentary progress of the unsuccessful Rehabilitation of Offenders Bill

Date	Progress of the Bill
20th December 1972	First reading of the Bill in the House of Lords (Lord Gardiner)
1st February 1973	Second reading (House of Lords)
8th March 1973	Committee stage (House of Lords)
20th March 1973	Report stage (House of Lords)
29th March 1973	Third reading (House of Lords)
4th May – 20th July 1973	Bill enters the House of Commons but is not taken up by the Conservative government
23rd November 1973	First reading of the Bill in the House of Commons (Kenneth Marks MP, Labour)
25th January 1974	Second reading (House of Commons)
7th February 1974	Prime Minister Edward Heath visits the Queen to request the dissolution of Parliament and schedules a general election for 28th February. The Bill was therefore 'timed out'.

[101] *Ibid.*
[102] Chapman, C. (1977) 'An examination of the legislative history of the Rehabilitation of Offenders Act 1974', Unpublished Dissertation, Thames Polytechnic, p.8. Source: SIEGHART
[103] *Ibid.*

Expanding the scope

When the Bill reached its Committee stage in the Lords, a marshalled list of amendments was considered. These concerned: the treatment of military convictions under the proposed legislation; how questions about previous convictions might be dealt with in court; how probation orders and suspended sentences should be treated; and how the disclosure of criminal convictions by the police might be more effectively regulated. However, Amendment 7 expanded the scope of the Bill by raising the maximum sentence length which could be rehabilitated from two years to thirty months. The amendment was tabled on behalf of Gardiner by Lord Hunt, a former British Army officer who had led the first successful expedition to reach the summit of Mount Everest and who later became the first Chair of the Parole Board. In moving the amendment Hunt concurred with the views of the Labour peer and Methodist preacher Lord Soper:

> who felt that by fixing any limit to the qualifying sentence it could be implied that anyone who had served more than a two-year previous sentence was somehow beyond the pale and irredeemable, and presumably liable for the rest of his life to have his criminal past held against him. The moral and practical injustice of such an inference needs no argument from me. In principle and in fairness, any man should be able to live down his past…When I said to my noble and learned friend Lord Gardiner that I felt that two years, even to start with, was too short a sentence to qualify, he made the quite reasonable point that that would be only a beginning, with the prospect of extending the scope after a period of experiment. I accept that of course. But I adhere to my view about starting with a rather longer term.
>
> (Lord Hunt, HL Deb 8th March 1973, vol. 339, cc1333-34)

The Labour peer Lord (Barnett) Janner concurred, arguing that:

> No one, I suppose, could speak with more authority on this particular matter than [Lord Hunt], and, in consequence, his views are naturally accepted with the greatest respect...I would ask why we have stopped at 2½ years. Some of us think that the limit should be at least three years.
>
> (Lord Janner, HL Deb 8th March 1973, vol. 339, c1336)

The view that the Bill had not been inclusive enough was shared across the House. Viscount Dilhorne, despite his reservations about other aspects of the Bill, agreed with the proposal that the scope should be expanded stating that:

> I should have liked to see…[embodied] in the Bill a power to the Secretary of State to enlarge the period still further by Statutory Instrument. As we get experience of the working of this Bill, it would be tiresome not to have the power to do that and to bring more people within its scope. That is one point. While the object of this Amendment is to bring more people into its scope, I should like to see power taken by Statutory Instrument to bring even more in later on, if the Bill works well, as one hopes it will.
>
> (Viscount Dilhorne, HL Deb 8th March 1973, vol. 339, c1337)

Lord Donaldson (the Labour former Arts Minister and Chair of NACRO) also added his support, but suggested that:

> I think the only reason why this Bill did not ask for much more was that the people framing it did not think they would get it, and I think this is very reasonable. I do not think one wants to ask the public to take more than they are

> prepared to take. When they find that this measure is not abused, which I think is what they will find, it is important that the machinery should be built in to extend it. Philosophically, of course, there is no sense in any limit at all. The point which the Bill is trying to make is that people can change. It is saying that after a certain time it is reasonable to suppose that they have changed. So far as I am concerned, I certainly should not think that a life sentence man who had served ten years of the life sentence and then spent ten years living blamelessly with his wife should not have the same advantage. [But] I do not think that the public want to see this.
>
> (Lord Donaldson, HL Deb 8th March 1973, vol. 339, cc1337-38)

The Bill proceeded with only minor amendments and, emboldened by the supportive comments which the proposals had received in the House of Lords, Gardiner published a piece in the Catholic newspaper *The Universe* which argued that the Bill was in keeping with the 'divine injuction' to 'forgive them that trespass against us'. He also noted that whilst 'a number of technical problems still need to be resolved…I hope that with goodwill on all sides, and especially from the Home Office, it will not be too long before [the Bill] becomes part of the law of the land.' [104]

These 'technical problems' were regarded as largely issues of drafting and were conceded by Gardiner at the Bill's third reading debate on 29th March 1973. Whilst the Bill was passed and sent to the House of Commons, Lord Shackleton (Labour Leader of the Opposition in the House of Lords) suggested that much greater attention was required with regards to the drafting and that the consideration of a Select Committee was perhaps required. For the Home Office, Viscount Colville thanked Gardiner for the efforts which had been made in responding to amendments but concurred with Shackleton, noting that:

[104] 'One slip and they're plagued forever', *The Universe*, 16th March 1973. Source: SIEGHART

> We have done our best and I am glad that we have got the Bill to this stage in this House, but it remains, when all is said and done, an amateur effort, if a skilled amateur effort, and what we must do in Government is to reflect on the principle underlying the Bill which has not been very widely discussed. We must look at the attitudes which have been expressed in the balanced debates in this House – and they have been remarkably favourable to [Gardiner] and his supporters and we shall take this into account.
>
> (Viscount Colville, HL Deb 29th March 1973, vol. 340, c1332)

The Government fails to support the Bill

Having passed through the House of Lords, the Bill required support from the Conservative Government in the form of parliamentary time to allow the necessary debates on the Bill to go ahead. As noted in chapter six, previous Labour Home Secretaries in the 1964-1970 Government had been adept at allowing liberalising (but potentially controversial) legislation a 'fair wind' in parliament. To this end, Tom Sargant of JUSTICE wrote to the Home Secretary Robert Carr MP asking whether time might be found for the Bill to be debated in the House of Commons. In his letter, Sargant suggested that following 'technical amendments' the Bill only required a 'final polish' and he believed Carr would regard the bill 'non-controversial'.[105] Paul Sieghart had also written to the Chair of the 'Society of Conservative Lawyers', Edward Gardner QC MP urging him to support the Bill and suggesting that:

> I am sure you will agree that this is an excellent cause, and I don't need to tell you that the million people directly concerned probably influence something like four times that number of votes, without in the nature of things being able to make a

[105] Letter from Tom Sargant to Robert Carr MP, Home Secretary, 26th March 1973. Source: U DJU/8/13-14

public fuss about their plight.[106]

However, the Home Secretary's response was to the Bill was negative (see Appendix 17), noting that:

> The pressures on Parliamentary time are as acute as ever, and the Bill could be accommodated only at the expense of other *deserving measures* or debates on other *matters that demand Parliamentary attention*. I say this more firmly because, to be frank, I believe that rather more is required than the "final polish" [of the Bill] that you speak of. The Bill raises *controversial issues* which I believe the House of Commons would wish to debate fully. (emphasis added)[107]

Evidently, in keeping with the Prime Minister's response to Sargant the previous year, the legal rehabilitation of PWCs did not appear to be a high priority for the Home Secretary. Somewhat higher on the agenda for Carr and the Home Office at this particular juncture were the highly controversial arrests, charges and trials (on grounds of 'conspiracy') of construction workers who had used 'flying picket' tactics in Shrewsbury the previous year. The convictions resulting from these trials have long been regarded as miscarriages of justice which followed in the wake of the Industrial Relations Act 1971 which Carr himself had introduced when Secretary of State for Employment (see Shrewsbury 24 Campaign 2015). It has been suggested that the use of criminal charges and convictions to suppress trade union activity had, by the early 1970s, become part of a political tactic by the Heath Government to safeguard the business interests of significant Conservative Party donors (see Smith and Chamberlain 2015). Without wishing to stretch coincidence to the point of conspiracy, a Bill which sought to mitigate the long-term consequences of criminal convictions (including the 'denial of employment') is unlikely to have been looked upon favourably by the Home

[106] Letter from Paul Sieghart to Edward Gardner QC MP, 22nd March 1973. Source: U DJU/8/13-14
[107] Letter from Robert Carr MP, Home Secretary to Tom Sargant, 11th April 1973. Source: U DJU/8/13-14

Secretary in these circumstances.

Despite the considerable setback of not receiving government backing for their endeavours, members of the Gardiner Committee continued to promote the ROB through their professional networks and privileged access to parliamentarians. For instance, Tom Sargant wrote to the eminent human rights barrister, legal scholar and Conservative MP Sir John Foster QC (the Vice-Chair of JUSTICE) to raise the disappointing response to the Bill from Robert Carr. In his letter, Sargant related that he and Lord Donaldson (NACRO President) had 'pressed the matter' on Carr at the NACRO Conference that year. He also commented that he was sending a copy of the letter to Labour MP Peter Archer MP (the then Chair of Amnesty International's UK Section).[108] Archer subsequently became Solicitor-General in the next government whilst Foster would become a key supporter of the Bill despite leaving Parliament after the February 1974 general election.

The next month Lord Gardiner again sought to raise the profile of the Bill, and put pressure on the Government to find debating time for it. In the *Sunday Telegraph* Gardiner set out the purpose of the Bill and attempted to garner sympathy for those 'valuable members of the community' who 'go straight' but for whom 'the law does nothing to accept them back into society'. Gardiner suggested that in addition to the one million people in England and Wales that the Bill was likely to help there were also 'wives, children and parents' and thus 'you probably have about four times that number who are directly affected'.[109] However, despite this clear hint as to the number of votes which might be gained from the Bill it was not sponsored by an MP in the House of Commons and made no further progress until the next session began after the State Opening of Parliament on 30th October 1973.

[108] Letter from Tom Sargant to Sir John Foster KBE QC MP, 27th April 1973. Source: U DJU/8/13-14
[109] 'Shadow that stalks 4 million', *Sunday Telegraph*, 20th May 1973. Source: SIEGHART

Legal rehabilitation gets a second chance

The luck of the draw

In the House of Commons, Private Members' Bills are, by tradition, given a second reading on Fridays towards the beginning of each Parliamentary session. On these days, they are given precedence over Government Bills within the Commons schedule. Due to the limited amount of Parliamentary time available, 20 backbench MPs are drawn in a ballot each year to determine which Bills are debated. Typically, the first seven MPs drawn in the ballot are successful in having their Bill read. Where a successful MP is drawn highly in the ballot but does not have a Bill of their own, they are often persuaded to take on Bills sponsored by colleagues who were unsuccessful in the Ballot (Norton 2013; UK Parliament 2016).

In order for the ROB to progress further, its supporters decided to lobby MPs who had been successful in the Private Members' ballot. Kenneth Marks, the Labour MP for Gorton in Manchester, was drawn eleventh on the ballot and was approached by his Party whips to sponsor the Bill which, according to Sieghart 'was having a certain amount of popularity with politicians'.[110] Marks agreed, and the Bill received its first reading in the House of Commons on 23rd November 1973, with a second reading debate scheduled for 25th February 1974. Sieghart then set up a meeting between Marks, Sir John Foster, Lord Gardiner and the Bill's other sponsors with the Home Office Minister Mark Carlisle. Sieghart later reported that whilst, as a member of JUSTICE, Carlisle was privately very supportive of the principles of the Bill he had been pressured by Home Office officials to block it. This was on the grounds that the ROB was perceived as fundamentally interfering with the law of defamation which was at that time under consideration by a Committee chaired by Sir Neville (Justice). Despite this advice, Carlisle would ultimately over-rule his officials and adopt a mostly neutral stance on the Bill at the second reading debate.[111]

[110] *Op. cit.* n.101, p.9
[111] *Op. cit.* n.101, p.10

Heading-off trouble

In preparation for this debate, and possibly wary of the fact that Private Members' Bills could be filibustered or 'talked out' in the Commons, campaigners for the ROB wrote to numerous MPs to ask for support. On 4th January 1974, the Legal Secretary of JUSTICE Ronald Briggs and Tom Sargant wrote to several Conservative MPs asking them to do everything that was in their power to ensure the Bill was passed.[112] The letter enclosed a copy of the 'Living It Down' Report (JUSTICE 1972) and a briefing note on the Bill. Those written to included:

- Sir Robert Grant-Ferris MP - the Deputy Speaker who would chair the debate;
- Sir Peter Rawlinson QC - the Attorney General;
- former Solicitor General Sir Geoffrey Howe QC (Minister of State for Trade and Consumer Affairs) who had been a council member of JUSTICE;
- Ian Gilmour MP, the incoming Secretary of State for Defence;
- Several other Conservative MPs who were either human rights campaigners, legal academics or barristers including: Norman St. John-Stevas, Sir George Sinclair, William Percival Grieve QC, Frederick Vernon Corfield QC (who had studied law whilst a Prisoner of War), Sir David Renton QC (who had helped draft the European Convention on Human Rights), Charles Fletcher-Cooke QC (who had introduced and passed the Suicide Act 1961 which decriminalized suicide attempts), Ian Percival QC (who later campaigned for the reintroduction of capital punishment) and Sir Keith Joseph QC.

Joseph's influence on the future direction of the Conservative Party has already been discussed in chapter six. However, he was not at this stage regarded as being quite as far to the ideological right as he would in later years. Indeed, Wright (2013: 49) quotes his as saying in 1975: 'It was only in April 1974 that I was converted to Conservatism. (I had thought I was a Conservative but I now see that I was not really one at all.)' It is therefore likely that Joseph was written to as a lawyer rather than out of fear that he might

[112] Replica letters from JUSTICE to Conservative MPs, 4th January 1974, Source: U DJU/8/13-14

fundamentally oppose the Bill. However, Sir Rodney Graham Page – who would later sponsor a Bill to reintroduce corporal punishment (see *Hansard* HC Deb, 29th April 1977, vol. 930, cc.1736-98) - also received a letter regarding the second reading debate as did Sir Jasper More - a former magistrate and member of the right-wing 'Monday Club'.

This group was originally set up in opposition to the decolonisation of Africa but also gained a reputation for its hard-line stance on issues of law and order, including supporting the reintroduction of the death penalty. An early member of this group was General Sir Walter Walker whose 'Civil Assistance' organisation would form part of the controversial 'private armies affair' in the summer of 1974 (see chapter six). Walker's activities were later denounced by Labour's Defence Secretary, Roy Mason as a 'near fascist groundswell' (Beckett 2003: 198) (coincidently, Mason was also written to by the Bill's supporters in January 1974). Many years later the Monday Club was eventually expelled from the Conservative Party for its 'unacceptable views' (BBC News 2001b).

Several Conservative MPs and Ministers wrote very brief notes to acknowledge receipt of the letter but remained mostly non-committal on their stance on the Bill. The Attorney General Sir Peter Rawlinson QC replied that he would 'certainly bear much in mind' what had been written[113], Ian Percival QC stated that he would 'give the matter my careful attention' and 'do what I can to help'[114] whilst Norman St. John-Stevas wrote that he would also 'give this matter full attention'[115]. Geoffrey Howe QC provided a slightly more detailed response, noting just a few days before the second reading debate:

[113] Letter from the Attorney General Sir Peter Rawlinson QC MP to Tom Sargant, 7th January 1974. Source: U DJU/8/13-14
[114]Letter from Ian Percival QC MP to Tom Sargant, 7th January 1974. Source: U DJU/8/13-14
[115] Letter from Norman St. John-Stevas MP to Tom Sargant, 8th January 1974. Source: U DJU/8/13-14

> As the Bill raises issues of public policy it is obviously something on which the Government has to take a view. The Bill is clearly in line with the traditions of Justice. But I understand there do remain substantial problems of policy and of administration (not to mention drafting) in giving effect to its intention.[116]

Another raft of letters and briefing notes was sent by Sargant on 24th January 1974. These were mostly addressed to Labour MPs and suggested that a second reading of the Bill would 'achieve a much overdue reform that would relieve much misery'.[117] Again though, care was taken to address the concerns of right-wing Conservative MPs who may have been potential opponents of the Bill and letters were also sent out to Cranley Onslow and Eldon Griffiths. Both Onslow and Griffiths were firm supporters of the death penalty. In Griffiths' case this was due to his lucrative appointment as Parliamentary spokesperson of the Police Federation and he specifically called for the reintroduction of capital punishment for the murder of police and prison officers (see Roth 2001; Langdon 2014).

The potential for MPs to oppose the Bill on populist grounds (see Bottoms 1995; Pratt 2007) was somewhat nullified by the positive press coverage that the Bill received in the lead up to the second reading debate. An article in *The Guardian* on the 'Million with a past they want to hide' explained the merits of the Bill in some detail and argued that the debate was necessary because whilst:

> many members of the public are very likely to be alarmed by the very idea of the Bill or to have doubts about the wisdom of expunging some types of offence (for example, against young children) from the record [the Bill's supporters are

[116] Letter from Minister of State for Trade and Consumer Affairs, Geoffrey Howe QC MP to Tom Sargant, 23rd January 1974. Source: U DJU/8/13-14

[117] Replica letters from Tom Sargant sent to MPs, 24th January 1974. Source: U DJU/8/13-14 (As well as letters to Onslow and Griffiths, letters were also sent to Labour MPs Dick Taverne QC, David Owen, Denis Healey, Michael McGuire, Russell Kerr, James Johnson, Michael Barnes, Hugh Jenkins and William Rodgers).

> anxious for the opportunity to throw the issues open to wider debate.[118]

Coverage in the *Daily Mirror* was equally supportive suggesting that it was 'a useful little Bill that would bring relief to a great number of people who would like to get rid of the skeletons in the cupboards'.[119] On the eve of the debate, an *Evening Standard* editorial argued that:

> In humanitarian terms the proposals deserve to be fully debated and merit every support. Although in certain details the Bill may invite further consideration it is to be hope that MPs tomorrow will find little in it with which to quibble.[120]

On the same day, the *Daily Mail* stated that amongst 'crucial exceptions' to the principle of legal rehabilitation were cases 'where a man has been convicted of offences against children or sentenced to more than 2½ years' (the former example was incorrect). But it also suggested that the Bill 'deserves the support of every fair-minded MP.'[121] Then, on the morning of the second reading debate, *The Guardian* again ran a positive editorial which argued that the Bill 'deserves support' and made the point that '[m]otorists already enjoy the right to have endorsements removed from the licences after three years without a driving offence' and that it was 'time the principle was extended.' However, *The Times* was more circumspect, noting that whilst the Bill was 'expected to have the support of most MPs', the spent conviction model of rehabilitation which it adopted had 'led to criticism that the proposed law would make it legal to lie.'[122]

[118] 'Million with a past they want to hide', *The Guardian*, 20th January 1974. Source: SIEGHART
[119] 'Wiping the slate', *Daily Mirror*, 22nd January 1974. Source: SIEGHART.
[120] 'Criminal record', *Evening Standard*, 24th January 1974. Source: SIEGHART.
[121] 'Living it down', *Daily Mail*, 24th January 1974. Source: SIEGHART.
[122] 'MP's Bill would allow convictions to lapse', *The Times*, 25th January 1974. Source: TDA

The second reading debate

Given his unfavourable ranking in the Private Members' ballot Kenneth Marks, with the experience and support of Sir John Foster, adopted ingenious Parliamentary tactics to ensure that time was found to give the ROB a second reading. The Conservative MP Sir John Rodgers had finished first in the ballot and was therefore given priority in terms of time in the Commons chamber for his Town and Country Amenities Bill. Foster advised Marks to become a sponsor of Rodgers' Bill and to then obtain second place on the order paper behind this Bill on the first Friday of the Parliamentary session devoted to Private Members' legislation. Pressure was then placed on Rodgers to take time out of his debate to devote to the ROB, which he did, providing an hour and a quarter.[123]

During the debate, Marks illustrated the political capital that could be raised from passing the Bill - particularly in relation to the one million people whom the Gardiner Report claimed would benefit. Marks commented that:

> One million people is equivalent to the electorate of 15 parliamentary constituencies. It is more than the difference between the Labour and Conservative vote at the last election. It is 1,575 electors per constituency—more than the majorities, in 1970, of 37 Labour Members, 44 Conservatives, 3 Liberals and a Scottish Nationalist.
>
> (HC Deb, 25th January 1974, vol. 867, c2113)

He also rejected the notion that the Bill somehow 'legalised lying' and positioned it in relation to other legal precedents by suggesting (as *The Guardian* had) that the law already allowed motoring endorsements to drop off driving licences after a period of time. He also noted that section 16(2) of the Children and Young Persons Act 1963 allowed offences committed under

[123] *Op. cit*. n.101, p.10

the age of fourteen to be 'lived down', thus the Bill was merely extending an existing principle.

The Conservative MP for Plymouth Devonport, Dame Joan Vickers, welcomed the fact that the Bill which was 'couched in such sympathetic language' noting that it would remove from many people a second life sentence' (HC Deb, 25th January 1974, vol. 867, c2115). Vickers, who had been copied in to Tom Sargant's earlier correspondence with the Prime Minister on issues of employment for PWCs, noted that in her constituency much employment was through the Ministry of Defence who would 'not accept anybody who has any blemish at all on his past record' and therefore it was left to 'private enterprise to re-employ people, which makes it all the more difficult' (*ibid.*). However, she also expressed the hope that the proposed law might help to reduce crime in future (c2116). This somewhat misunderstood the Bill since its intended beneficiaries were those who had *already* desisted from offending for a long period.

The Labour MP for Birkenhead, Edmund Dell, shared this sentiment and stated that he was 'particularly impressed by the argument' about crime reduction which Vickers had raised (c2117). However, he was also concerned that the rehabilitation periods in the Bill were too long and argued that the powers which the proposed law would grant to the Secretary of State to change these periods should be restricted only to shortening them (c2119) as a 'liberalising' amendment (c2120). The Conservative MP for Ipswich, Ernie Money – a barrister with the smallest constituency majority in the country at just 13 votes – spoke in similarly liberal terms, suggesting that the ROB dealt 'with the case of the person who has genuinely tried to rehabilitate' and argued that the Bill was 'desperately important if rehabilitation is to mean more that merely a pious form of cant' (c2123).

Speaking for the Home Office, Mark Carlisle suggested that the Government supported the intention of the Bill and would not 'attempt to prevent further progress…or advise the House

to reject it' (c2126). As already noted, Carlisle was likely speaking here from his personal standpoint which he had revealed privately to Paul Sieghart as a member of JUSTICE. However, he was also bound by Ministerial responsibility to note that the Government had 'grave reservations about a number of matters', that some of these were of a 'fairly major nature' and that they 'would wish to see fairly major amendments before giving it…enthusiastic support' (*ibid.*). Moreover, when pressed by the Labour MP Samuel Silkin on whether this support might extend to Home Office assistance with drafting amendments, Carlisle was forced to respond that he was 'not in a position' to confirm whether this would be the case (c2127). He also informed the House that one particular reservation which the Government had was the effect that the Bill would have on the civil law due to the clause which would render newspaper reporting on spent convictions liable to actions for defamation. As already noted, the law of defamation was being examined by the Faulks Committee during this period and Carlisle explained that:

> Faulks has written to me, and…has grave reservations about the effect of the Bill…and obviously the weight of that report and the detailed criticisms in it will be matters which the Standing Committee will wish to consider carefully should the Bill receive a Second Reading. I should be misleading the House if I did not say that Mr. Justice Faulks has made it clear that his committee is opposed in principle to the effect that the Bill will have on the law of defamation. (c2128)

The principle objections here were that the Bill undermined long-standing defences against libel such as 'justification' (the 'truthfulness' of a statement) and 'fair comment' (designed to protect the freedom of the press to state opinions on matters of public interest such as government activity or the conduct of public figures). Carlisle argued that:

> The effect of this is to create *a class of persons about whom the truth cannot be told* once the rehabilitation period has elapsed. This will undoubtedly have an effect on journalists who report criminal trials long after they are completed and on historians, biographers and other writers who will have to take account of the provisions of the Bill. Hon. Members will have to ask themselves whether they find that desirable and acceptable. (c2129; emphasis added)

A further objection raised by Carlisle related to the restrictions which the ROB might have on the ability of magistrates to consider spent convictions – either when passing sentence or deciding to send a defendant to the Crown Court. He argued that magistrates would not be able to make appropriate decisions, particularly on the latter issue, if denied access to 'all available information' (c2130).

Samuel Silkin (Labour) spoke of the problem which the Bill sought to address in very different terms and in the tradition of the liberalising 'permissive society' legislation of the 1960s (which often ran contrary to popular opinion). He expressed hope that the Bill would 'change society's attitudes to the convicted offender' (c2133) and argued that he was:

> convinced that that attitude must change and that it is changing, just as society's attitude has changed and is changing in the related field of mental health. I do not underrate the influence of legislation in guiding society's attitudes, but in the end it is society which must become more civilised, perhaps be willing to take greater risks and certainly refrain from branding a man for life because he has offended once against its laws or perhaps against those of its laws which, logically or illogically, provoke a strong response from society. (c2133)

He also recognised the *de facto* nature of much of the discrimination faced by those who had been subjected to punishment, arguing:

> *Society…imposes upon him* on his release [from prison] penalties and risks so great that the weak, the easily tempted and the easily disheartened—and even those who are not easily disheartened—may be unable to resist further temptation. The offender is handicapped in finding employment, in finding a place to live and in securing insurance. Those are just some of the vital areas of handicap. There are many others, *many of which are so implicit in the working of society* that we can only hope that they will disappear through the example set by the Bill even when the Bill does not directly touch them. (c2134; emphasis added)

Sir John Rodgers, the Conservative MP for Sevenoaks who had donated time from the earlier debate on his own Private Members' Bill, also spoke in favour of the proposals. He noted that the intended beneficiaries were those 'for whom no Government Department is responsible' (c2137) and argued that it was the responsibility of Parliament to act on their behalf since:

> They cannot write to the papers, they cannot march in the streets, they cannot demonstrate and they cannot even write to their Members of Parliament, except anonymously. At least, that is my experience. They live their lives in daily fear of exposure of something that happened many years ago which they have long since lived down. They have expiated their crimes. These people represent a frightened, silent minority with no organised voice. (*ibid.*)

Alexander Lyon, one of the Bill's sponsors and Labour's MP for York, then gave unqualified support for the Bill expressing disappointment with the 'somewhat subdued enthusiasm with which the Bill was received by both Front Benches' (c2137-8) and hope that 'when it goes to

Committee, that enthusiasm will be more tangibly expressed' adding that 'there should be no question about the Bill whatever. It is sane. It is sensible.' (c2138). He also objected to the argument put forward by Carlisle on behalf of the Home Office that 'truth' ought always to remain a defence against a suit for defamation:

> We heard from [Carlisle]….the truism about the need for truth to be presented at any stage in civilised discourse. I had to meet criticism of that…for two years when I was a member of the Younger Committee on Privacy. It is about time the myth was exploded. In a civilised society, we recognise that the truth may be more harmful even than lies. In a civilised society, decent people refrain from expressing the truth on every occasion about every person. There is a sensitivity towards the feelings of others which a compassionate person believes ought to dictate to him that in a particular case the truth should be withheld. That is all that is being said on the Bill. If a man has for 10 years gone straight after a previous conviction, it ought to be said of him that he is substantially of good character and should be treated as such. The reservations which we have heard today about whether the Bill goes too far simply hark back to an out-dated attitude towards conviction. If a man has gone for 10 years without any other stain upon his character, why do we not now consider that the whole thing is dead and forgotten and should remain so? (*ibid.*)

In closing the debate, Sir John Foster (Conservative, Northwich) took a similar view on the issue of defamation, arguing that:

> I expect that it will be said that truth should always be a complete defence but that is entirely wrong. Our law is different from that of most other countries. In a prosecution for criminal libel we say that truth plus the public interest must be a

> defence. The reason in civil law why truth is a complete defence is that we feel that a person should not get damages for alleging something to be untrue which is true. However, in those cases I have always thought that the law should be that the defendant who states something which is untrue should not be made to pay damages but he should lose his case unless it is in the public interest or unless the public interest in those cases should be expressed in the form of a legal, moral or social duty. (c2140)

Following these interventions the Bill was then passed unopposed and given its second reading, appearing to be well on the way to becoming law. However, events outside Parliament would dictate that the ROB could go no further at this stage. Since 1st January 1974, Britain had been operating on a 'three day week' due to restricted energy supplies resulting from industrial action by mineworkers. Then, on the eve of the Bill's second reading debate, 81% of members of the National Union of Mineworkers voted to go on full strike having rejected the Government's offer of a 16.5% pay increase. The strike began on 5th February and, just two days later, Heath called a general election (BBC News 2008b). The dissolution of Parliament meant that the Parliamentary passage of the ROB would have to start again – from scratch - when the new Parliament was convened.

Third time lucky

Following the February 1974 general election, Harold Wilson's Labour returned to office forming a minority administration. The impossibility of governing without a Parliamentary majority meant that another general election was almost inevitable. This occurred in October the same year. However, during this 'short Parliament', the ROA was eventually passed at the third attempt. Its passage was eased considerably by the return to the Home Office of Roy Jenkins as Secretary of State. As discussed in chapter six, Jenkins had a track record for supporting liberal measures introduced through Private Members' Bills. However, the Bill

was also assisted greatly by the appointment of Alexander Lyon - one of its former sponsors - as Minister of State. Dalyell's (1993) obituary of Lyon notes that he was 'a very difficult man indeed, obstinate and stubborn and not sufficiently sensitive to the political needs of the hour'. However, he was also 'a man of marked principle' who came from a Methodist background and who was not afraid to vote against his own party if its proposed legislation conflicted with his personal beliefs. Notably he did so in 1968 when, under pressure from Enoch Powell and others, Harold Wilson's Government introduced emergency legislation which ended the freedom of entry of Asians - but not white settlers - from East Africa (Lattimer 1999).

Released from the burden of 'ministerial responsibility', Mark Carlisle for the Conservatives was now free to express his personal opinions on the Bill and agreed to co-sponsor another attempt at passing it through the Commons. At this stage, with the Labour Government and its Home Office Ministers much more receptive to the idea of a rehabilitation law, Lyon contacted Lord Gardiner and Paul Sieghart and offered to take on the Bill as a Government measure. However, this offer was refused on the basis that 'home affairs' legislation was not a particularly high priority for the Government at a period of political and economic uncertainty and therefore any measure was likely to take several years. Conscious of an impending second general election in 1974, they opted instead to continue with the Private Members' Bill route on the basis that the existing proposals had already been thoroughly debated.[124]

An unlikely sponsor

This decision meant that the Bill required a principle sponsor who had drawn a favourable position in the ballot of backbench MPs. The previous sponsor, Kenneth Marks was not successful, but in a letter to Marks, JUSTICE's Legal Secretary Ronald Briggs revealed that an unlikely contender had been approached in the form of Conservative right-winger and death

[124] *Op. cit*. n.101, p.11.

penalty advocate Cranley Onslow who had finished second in the ballot. Briggs telephoned Onslow at home - because he 'happened to know him' - and made the suggestion that he take on the ROB. Whilst Onslow was unaware that he had placed highly in the ballot and did not appear to have a Bill of his own to take forward, he suggested to Briggs that he would 'want a long time to think about it'.[125] Since time was not on the side of the Bill another sponsor was sought and the eventual candidate proved to be another unlikely figure. Piers Dixon, the Conservative MP for Truro and a former member of the right-wing Monday Club, came fifth in the Private Members' ballot (House of Commons Information Office 2010: 19). Dixon had first won his seat in 1970 but had only narrowly held it against a Liberal Party candidate in the February 1974 election. His majority was only 2,561. Dixon was therefore under pressure from more socially liberal voters at a constituency level and he also acknowledged later that:

> It is useful to have a 'right-wing' M.P. backing what might be thought of as a 'left-wing' measure …… it would, I think, always have been more difficult for a Labour M.P. to get the 'Rehabilitation of Offenders' Act through the Commons precisely because it was thought to be a bit 'pink' by some Conservative M.P.s who were perhaps mollified by the thought that its sponsor was their right-wing colleague Piers Dixon.[126]

Under Dixon's sponsorship, the Bill was given its first reading in the House of Commons on 3rd April 1974 and scheduled for a second reading debate one month later (for a timeline see Table 11 below). In this brief debate Dixon commented that the Bill would lead to a 'more agreeable and humane society' and added that an 'almost identical equivalent of the Bill' (HC Deb, 3rd May, vol. 872, c1544) had already gone through all stages of the House of Lords and received a second reading debate in the Commons before the general election.

[125] Letter from Ronald Briggs of JUSTICE to Kenneth Marks MP, 21st March 1974. Source: U DJU/8/13-14

[126] Letter from Piers Dixon to Christine Chapman, 31st January 1977. Cited in *Op. cit*. n.101, p.11.

Table 11. Timeline of the Parliamentary progress of the successful Rehabilitation of Offenders Bill

Date	Progress of the Bill
3rd April 1974	First reading of the Bill in the House of Commons (introduced by Piers Dixon MP, Conservative)
3rd May 1974	Second reading (House of Commons)
12th June 1974	House of Commons Standing Committee considers the Bill (1st sitting)
19th June 1974	House of Commons Standing Committee (2nd sitting) considers and Reports the Bill
28th June 1974	Third reading (House of Commons)
1st July 1974	First reading of the Bill in the House of Lords (Lord Gardiner)
15th July 1974	Second reading (House of Lords)
24th July 1974	Committee stage (House of Lords)
26th July 1974	Report stage and Third Reading (House of Lords)
30th July 1974	House of Commons debate on the Lords' amendments
31st July 1974	Royal Assent

Some concerns were, however, expressed at this stage by the Parliamentary spokesperson for the Magistrates' Clerks Association, Roger Sims MP (Conservative) about whether the Bill might 'restrict justices' discretion' (c1545) when sentencing if they were not given full information about the previous criminal records of defendants. He also expressed the view that whilst a 'well-meaning Bill, some parts may be a little misguided or misinformed' (*ibid.*). Sims was, however, content to support the ROB's progress on the basis that amendments could be made at Committee stage.

Home Office Minister Alex Lyon provided strong support for Dixon, stating that 'The Government accept fully the principle contained within the Bill'. He added that the Government had considered introducing a legal rehabilitation Bill of its own. Instead, they were 'happy to use [Dixon's] Bill as a vehicle for a full discussion of the many difficulties that are enunciated within what is undoubtedly a principle that will command respect from almost every well-meaning person in the community' (c1546).

Placing restrictions on 'truth'?

In contrast to the more positive reception which the ROB was receiving from the new Labour Government, the beginnings of strong disagreement with elements of the Bill began to emerge at this stage. These were prompted by the publication of a specially-written Interim Report of the Committee on Defamation (Faulks 1974). An article in *The Times* previewed this Report suggesting that the Faulks Committee regarded the defamation provisions in the ROB as a 'serious and unjustifiable inroad on the freedom of the individual to tell the truth'. A spokesperson added that they saw 'no valid reason why those who have been convicted under the criminal law should be specially selected out of all those who misbehave for favourable treatment'.[127]

Alex Lyon addressed these points in the Commons during the second reading debate on the Bill. He argued that if – as the Faulks Committee requested – the defamation clause was removed from the Bill altogether, the legislation would be rendered obsolete. This is because 'though a man was not bound to disclose when asked about a previous conviction which had become spent, someone else could disclose it to those who were enquiring about it, [and] no protection would be given by the Bill' (HC Deb, 3rd May, vol. 872, c1547). On the principle that 'truth' should always remain an absolute defence to defamation he added:

> Is it right that in this community what has been true in the sense that a man has been convicted should be regarded for all practical purposes as untrue? I think that that is right. I take the view that truth is not any more paramount than any other principle of civilised conduct in a civilised society. There is also compassion and understanding. For that reason we must balance compassion and understanding against a declaration of truth. I think that Mr. Justice Faulks'

[127] 'Plan for 'spent' convictions criticized', *The Times*, 29th March 1974. Source: TDA

committee underestimated the concern that there is in society about this area of difficulty. (*ibid.*)

Winding up the debate, Lyon conceded that objections raised by the Faulks and his colleagues would need to be considered further but that the Bill would be given 'a fair wind' by the Government (c1548). The ROB was then given its second reading and committed to a Standing Committee for further consideration through which it passed, with relatively minor technical amendments. It was then returned to the House of Lords following its report stage and third reading in the Commons on 28th June 1974.

It was, however, during this period that a hostile media campaign was mounted against the Bill which very nearly blocked it in its entirety. The basis of the criticism was the contentious defamation clause (then clause five) which at this stage read as follows[128]:

5. (1) In any action for defamation begun after the commencement of this Act by a rehabilitated person and founded upon the publication of any words tending to show that the plaintiff has committed, or been charged with, or been prosecuted for, or been convicted of, or been sentenced for, an offence which was the subject of a spent conviction, it shall continue to be open to any defendant, (notwithstanding the provisions of section 2 of this Act), to rely on any defence of absolute or qualified privilege which is available to him:

Provided that for the purpose of this subsection a defence that the words published constituted a fair and accurate report of judicial proceedings *shall not be treated as a defence of privilege unless the publication was contemporaneous with the proceedings*. (emphasis added)

[128] Draft ROB, as introduced to the House of Commons in April 1974. Source: GARD13.

Section 2 of the Bill (referred to) provided that: 'a rehabilitated person shall…be treated *for all purposes in law* as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence forming the subject of his spent convictions' (emphasis added). It added that 'no evidence tending to prove the contrary shall be admissible in any Court or tribunal having jurisdiction in any part of Great Britain'.[129] However, the draft Bill did then set out that the defamation clause would not apply to the publication of *bona fide* textbooks or articles published for educational, scientific or professional purposes or the innocent republication of documents published before the Act came into effect or before the conviction in question became spent.

If passed in this form, the ROA would have meant that only two defences would have been available to an action for defamation concerning spent convictions. This first would be *absolute privilege.* This defence provides legal immunity to Members of Parliament - protecting them from claims of slander if their comments are made within the grounds of the Palace of Westminster. The second defence remaining would have been *qualified privilege* which requires a defendant to have a legal, moral or social duty or interest in publishing a statement (for instance, within an employment reference). A defence of qualified privilege can be defeated if a claimant proves that the defendant was 'malicious' in making their statement because the defendant either knew that it was false or was indifferent to its truth. However, as already suggested, the principle objection raised against the Bill was that it would remove the defence of *justification* (or truthfulness) as a defence against any claim of defamation brought by a 'rehabilitated person'.

In objection, the leading libel lawyer Peter Carter-Ruck claimed that it 'would be most dangerous, both from the point of view of the freedom of the Press, and all who live by the written word, as well as for the private citizen, to tamper in any way with the present

[129] *Ibid.*

defences to an action for libel'.[130] However, he also acknowledged that other countries adopted a different approach. For instance, in France 'truth' did not constitute a defence when an alleged libel concerned the private life of the complainant or where the allegations referred to events which occurred over ten years ago. Similarly, in Spain, it was 'not open to a defendant to plead truth if the allegations are made in respect of the private life of an individual' except in some circumstances where the statement related to 'an officer of the State in his public capacity'.[131] The exact effect which the draft Bill would have had on 'public interest' defences such as these when applied to England and Wales is, of course, impossible to ascertain since common law jurisdictions rely on legal precedents formed through court judgments. However, it is likely that the Bill in the form which it entered the Commons in 1974 would have legally prohibited the press from printing 'revelations' about the spent convictions of those who were not prominent figures.

As one of the principle authors of the Bill, Paul Sieghart circulated a short paper to its supporters which unsurprisingly took exception to the objections raised in the Faulks Committee's Interim Report.[132] He argued that without the defamation clause, the effect of the ROB would be neutered because any information on spent convictions, however old, could be passed on or published by anybody with no right of legal redress for the rehabilitated person. Sieghart also noted that the composition of the Faulks Committee itself was 'preponderantly a Defendants' Committee' comprised of members of the BBC and Fleet Street, a publisher, an author and defence lawyers and argued that '[m]ost ordinary people (who know nothing of the law of defamation) know that there are many things which it is right to leave unsaid, even if they are true.'[133] Moreover, he argued that the courts accepted that there were many cases already where the 'truth' was not always exposed – for instance,

[130] 'Committee on Defamation – Interim Report', *Guardian Gazette*, 22nd May 1974. Source: SIEGHART.
[131] *Ibid.*
[132] 'Notes on the Interim Report of the (Faulks) Committee on Defamation (Cmnd. 5571)', by Paul Sieghart, May 1974. Source: SIEGHART
[133] *Ibid*.

where the Official Secrets Act applied or with respect to the names of juvenile offenders. Sieghart expanded this point as follows:

> The proposition that "truth" must always be paramount is untenable. Any legal system exists so as to balance conflicting values, of which "truth" is only one. The only value which is paramount in our system is justice, and that is what this Bill seeks to achieve.[134]

The negative press campaign begins

These arguments were not accepted by the opponents of the ROB and concerted efforts to both derail and defend the Bill were subsequently played out in the printed media. Mr R.M. Taylor of the Guild of British Newspaper Editors wrote that it was 'absurd…that the House should be about to consider in committee at this same time [as the debate on Faulks' Interim Report] a private member's Bill which would limit in certain circumstance the defences available in an action for defamation!' He also argued that Alex Lyon's support for the Bill - on grounds of compassion and understanding - was 'lamentably lacking in logic', suggesting that if the Bill 'makes truth less than of paramount importance it has all the makings of a rogue's charter, whatever good it may achieve.'[135] Lord Gardiner responded, arguing that he was sorry to see that Taylor had taken a 'dislike' to the Bill after it had received largely positive coverage in editorials when it first came before the House of Commons prior to Faulks' Interim Report. He added that it had wide support within the judiciary, from criminal justice professionals and within Parliament and suggested that if Taylor had properly studied the Bill:

[134] *Ibid*.
[135] 'The law affecting press freedom', *The Times*, 27th May 1974. Source: TDA

> he could not describe as a "rogue's charter" a measure designed to give long overdue help to a million of our citizens who have been shown by the official statistics to be distinctly more law-abiding than the rest of us.[136]

A few days later *The Times* produced an editorial titled 'A Bill To Make Truth Actionable' which further criticised the ROB. It pointed to 'bitter criticism' of the Bill from the Justices' Clerks Society 'on the grounds that a court cannot know how to properly deal with an offender unless it knows the full facts about him'. It also repeated the criticisms of the defamation clause suggesting that this was 'a serious and unjustifiable inroad on the freedom of the individual to tell the truth'. The article also argued that the Bill would prevent newspapers from revealing corruption or misfeasance '[h]owever much in the public interest it might be', adding that the 'right of the press to serve the public interest…should not be taken away' in cases of fraud or company malfeasance where 'a man who has once been guilty of such an offence should certainly not be free to enjoy a good character in soliciting investment.' The newspaper added that: 'Experience has shown that to be the only safe way to protect an often gullible public.'[137]

This climate of negativity appeared to have had an impact on likely supporters of the Bill. Freddie Petney wrote to *The Telegraph* in his capacity as Director of the APEX Charitable Trust which sought employment for those with a criminal record. Petney expressed concern that by answering queries about his clients' convictions from prospective employers he might be fined up to £200. He suggested that this was a 'dangerous nonsense' adding that he 'was very much in favour of the original idea behind the Bill' but that in its present form it would prevent APEX from continuing its employment services.[138] This again prompted a response from Gardiner in which he described Petney's letter as a 'wholly unfounded complaint'.

[136] 'Rehabilitation Bill', *The Times*, 29th May 1974. Source: TDA
[137] 'A Bill to make truth actionable', *The Times*, 1st June 1974. Source: TDA
[138] 'Employment of ex-offenders', *The Telegraph*, 5th June 1974. Source: SIEGHART

Gardiner sought to reassure Petney that the criminal sanctions in the Bill were 'confined to public servants who wrongfully disclose information from official records, and those who persuade, trick or bribe them to do such things'. He added that because the criminal record information provided to APEX came from their clients directly, or from other sources with their consent, they would have no cause of concern.[139] However, Petney remained unconvinced and again wrote that he did not feel the Bill was clear and that he 'would feel more secure if APEX had an established right to disclose all convictions and so avoid the possibility of prosecution later.'[140]

By this stage, others had joined in the criticism. Cliff Moiser, Chair of the Parliamentary Committee of the Justices' Clerks Society, added to the critical editorial in *The Times* by writing to 'protest in strongest possible way' about the 'artificial Parliamentary device' which was the defamation clause. He suggested that the 'provisions in the Bill would represent a shackle on the freedom of the press to comment on the career of public persons.'[141] In *The Telegraph*, columnist Terence Shaw argued that '[f]ew would challenge the view that it is unfair and morally wrong if society is never prepared to forgive and forget' but pointed to 'strong criticism [of the Bill]…from the Apex Trust' and noted that magistrates' and justices' clerks had also 'expressed alarm'. He further argued that the '[c]omplexity of the rules surrounding what is and what is not a "spent" conviction will make it particularly difficult for a person to know whether or not he is committing a criminal offence or risking an action for defamation' and that 'the Bill might be better off if the offence of unlawful disclosure and the changes to the law of defamation were dropped altogether.'[142]

In defence of the Bill Mr A.H. Thornhill, the Secretary of the Catholic Social Service for Prisoners, wrote to *The Times* to object to its labelling as a 'rogues charter'. He argued that

[139] 'Employment of former offenders', *The Telegraph*, 7th June 1974. Source: SIEGHART.
[140] 'The right to disclosure convictions', *The Telegraph*, 17th June 1974: Source: SIEGHART.
[141] 'Making truth actionable', *The Times*, 10th June 1974. Source: TDA
[142] 'When it is time to forgive and forget', *The Telegraph*, 12th June 1974, Source: SIEGHART.

when a person is 'long established on a "straight" course, the slate should be rubbed clean' and that a man's 'remade life should not be in peril of a long past peccadillo being raked up against him.' He added that it was 'high time responsible people realized that once a man has paid his penalty for an offence, it is not only in his, but the public's, interest that he should be allowed to make a new life as a useful citizen'. Thornhill also dismissed concerns that the Bill would restrict the freedom of the press noting that 'the constructive human virtue of forgiveness is a more powerful force for good than the persecution which so often passes for what Mr Taylor [of the Guild of British Newspaper Editors] calls "investigatory journalism"'.[143]

Despite this spirited defence of the Bill, the criticisms showed no sign of abating and two days later the General Secretary of the Institute of Journalists, Mr R.F. Farmer, responded to Thornhill's letter suggesting that 'there are many peccadilloes – and worse' – that did not inevitably lead to prosecution and conviction and which were still not actionable. Revealing something of the conservative social attitudes of the period, Farmer argued that it would still be possible to say that a man has been 'divorced five times or he was once a practising homosexual or…that he was once dismissed for misappropriating funds but employers decided not to prosecute'. He added that whilst such information should not be published 'gratuitously' its publication could be justified 'if, in the first instance, the man has set himself up as a marriage guidance expert, in the second has become a youth club leader, or in the third the treasurer of a major charity?' On this basis Farmer suggested that if such publication were true for conduct that did not lead to a conviction 'it must apply with even greater force to criminal behaviour' and that 'the public surely has a right to know that a candidate for important public office was once a close associate of known criminals'. Farmer concluded that it was therefore a 'modest and sensible suggestion that the Bill should be

[143] 'Making truth actionable', *The Times*, 12th June 1974. Source: TDA

shelved' until the Faulks Committee had completed their final report.[144] More criticism was added the next day by the publisher and member of the Faulks Committee William Kimber who claimed that the publication of spent convictions under the Bill would not just result in civil proceedings but make telling the 'truth' about a person's convictions a criminal offence.[145]

Again, Lord Gardiner was forced to write to defend the Bill, correcting Kimber's point by pointing out that the creation of a summary offence of unauthorized disclosure in the Bill applied only to public servants who wrongly disclosed official records in the course of their duties – something already prohibited under the Official Secrets Act. In response to Farmer's point about those who 'associated' with 'known criminals', Gardiner questioned whether it would be right to hold against someone the fact that they had volunteered as a prison visitor or befriended and found housing and employment for former offenders. However, he indicated that concessions were now going to be made with regards to the defamation clause in the Bill allowing 'everyone to publish what they like about people's old convictions – however long ago – provided that it is true, and that the publication is in the public interest.'[146]

This concession to critics of the ROB was added in the House of Commons Report stage (HC Deb, 28th June 1974, vol. 875 cc1939-42) following the launch of the negative press campaign. In this final Commons debate on the ROB Alex Lyon made a further concession to magistrates and crown court advocates critical of the clause in the Bill preventing consideration of the spent convictions of defendants and witnesses in criminal cases. He did this by moving a new clause which deleted from the Bill any reference to criminal courts and instead asking the Lord Chief Justice to issue a practice direction for crown courts concerning

[144] 'Making the truth actionable', *The Times*, 14th June 1974. Source: TDA
[145] 'When truth is a crime', *The Times*, 15th June 1974. Source: TDA
[146] 'Reference to past convictions', *The Times*, 20th June 1974. Source: TDA

how and when spent convictions might be referred to. Similar instructions were to be issued to magistrates from the Home Office. These instructions would mean that spent convictions could only be used in evidence in criminal courts in exceptional circumstances but would remain available for sentencing purposes in crown courts.

Several objections and numerous points of order from a right-wing Conservative MP were raised during this debate. Ivor Stanbrook, a colleague of Piers Dixon who had attempted to placate him by being invited onto the Bill's earlier Standing Committee, argued that Lyon's amendment was 'nonsense' and 'a typical example of wasting the time of the House on trying to make truth into falsehood and falsehood into truth' (c1967). However, Lyon's concessions were accepted by MPs and the Bill was reported, given a third reading and sent to the House of Lords to be read for the first time on 1st July 1974.

The war of words continues

In the weeks that followed, the negative press campaign against the Bill continued relentlessly. In just one edition of the *Sunday Times*, it was attacked in two separate articles with headlines suggesting that the 'Bill could make court lies legal' and, in Orwellian terms, as 'A dose of Newspeak'.[147] The *UK Press Gazette* suggested that the Bill had 'all the indications of a thoughtless lash-up' and drew parallels between its defamation clause and events in the Profumo scandal (Profumo had sued for damages after allegations about his private life were published). The article argued that Profumo 'knew that he and not the publisher was lying' then enquired 'is it conceivable that Parliament will bestow a licence to embark on the same kind of blackmail on every offender who remains undetected in further crime for five, seven, or ten years?'[148] Concerns were also raised in an editorial in *The Guardian* which questioned

[147] 'A dose of Newspeak' and 'Bill could make court lies legal', *Sunday Times*, 30th June 1974. Source: SIEGHART.
[148] 'So what about rehabilitating the truth?', *UK Press Gazette*, 1st July 1974. Source: SIEGHART.

whether the Bill was 'unduly balanced in the wrong direction' because it created 'the new concept of a "statutory truth" to define what used to be called a lie'.[149]

One of the few examples of positive editorial coverage came in *The Economist* which noted that 'the critics have been slow to make their objections known… [and] it was only after the bill had completed its progress through the Commons that the full strength of the press objections emerged'. Whilst conceding that the drafting of the Bill had some shortcomings which would need to be tidied up in the Lords, the editorial argued that 'to delay the bill until after the Faulks committee on defamation has reported would be quite wrong. It has already been delayed for one parliamentary session by the general election, and if the bill is lost now it may be a number of years before a favourable opportunity recurs'.[150] Support for the ROA was also given by the more specialised *New Law Journal* which, whilst critical of some of the complications created by the various concessions made by Alex Lyon, commented:

> We feel some regret that the provisions of the Bill have not been universally welcomed and we would plead with objectors to look at them in their fully perspective. We clearly have to get rid of the stigma that ours is the only member country of the Council of Europe which never forgets and forgives old offences. The way adopted in the Bill will admittedly curtail some freedoms and create some anomalies, but no-one has suggested a better way. The right to expose someone's past offences, unless it is manifestly in the public interest to do so weights very lightly in the scales against the need of a million or more reformed citizens to have fear removed from their lives, as do the restrictions on the powers of the courts when set against the perversion of justices caused by the reluctance of many vital witnesses to testify in civil and criminal trials.[151]

[149] 'Lies and statutory truths', *The Guardian*, 1st July 1974. Source: SIEGHART.
[150] 'How clean a slate?', *The Economist*, 6th July 1974. Source: SIEGHART.
[151] 'Rehabilitation of Offenders Bill', *New Law Journal,* 4th July 1974. Source: SIEGHART.

However, such liberal viewpoints were far from universally shared in the legal world. David Hirst QC, a libel lawyer and member of the Faulks Committee, provided another critical letter to *The Times* expressing dissatisfaction with Lyon's concession that spent convictions could indeed be published if it was demonstrably in the public interest to do so. Hirst argued that 'publishers will be likely to play safe and either suppress or distort the truth rather than run the risk' and that '[t]he practical results will be disturbing.' He also suggested that the long conviction-free period required for an offence to become spent was not enough to establish whether a person was now of good character adding that for some employment purposes:

> any responsible person would think it essential to disclose the full facts, eg, where the prospective employer is a school and the applicant has a spent conviction for sexual offences, or where the prospective employer requires a high degree of integrity and the applicant has a spent conviction for dishonesty.[152]

This letter was followed up with a column in the *Sunday Times* which suggested Hirst had demonstrated 'what absurdities can be produced by well-meaning "liberal" legislation designed to protect personal privacy.' Clearly, taking issue with Alex Lyon's previous support for a privacy law, the article described as 'particularly chilling' his arguments in support of the right for PWCs to 'declare that a lie is the truth'. It further opined that '[w]hile his good intentions and those of his supporters are not in question, is it too much to say that such a sentiment is offensive to both reason and morality?'[153]

As well as public criticism of the Bill, concerns were also being expressed privately to Lord Gardiner in the days leading up to the second reading debate in the House of Lords. Cliff Moiser of the Justices' Clerks' Society wrote to Gardiner in a state of some confusion about

[152] 'Reference to past convictions', *The Times,* 4th July 1974. Source: TDA.
[153] 'Privacy and the public interest: who decides?', *Sunday Times,* 7th July 1974. Source: SIEGHART.

whether his members might be liable to prosecution if they inadvertently disclosed details of spent convictions to legal advocates. Moiser requested that the criminal sanctions available for unlawful disclosure by public officials be removed from the Bill. However, he admitted that he was 'probably muddled' in his understanding. This confusion stemmed from the fact that there was, at this stage, an ongoing industrial dispute involving print workers at Westminster (and elsewhere) and this, in combination with frequent Government amendments, made it difficult for interested parties to keep up to date with the latest version of the Bill.[154]

Mr C.J.O. Maggs, Assistant Secretary to The Law Society, also contacted Lord Gardiner and other solicitor-members of the House of Lords at the request of the Society's Law Reform Committee. He was also concerned that delays in the publication of Parliamentary Bills and other papers were making it 'difficult to discover precisely what the Bill's provisions now are'. However, he suggested that his Committee was 'much concerned' with the Bill's defamation provisions which, he claimed, would 'limit the ability of newspapers to publish information which it is in the public's interest to know'. Whilst acknowledging that a public interest defence had been added to the Bill as a concession, Maggs argued that the 'freedom of newspapers…will nevertheless be unjustifiably restricted as the determination of public interest is a judgment of value and anyone seeking to rely on the exception will be at risk, even when acting in good faith'. He therefore expressed 'hope that the House will see fit to omit the Defamation Clause' and reiterated his Committee's unanimous support for the conclusions of the Faulks Committee's Interim Report that 'truth' should always remain an absolute defence to claims of libel or slander.[155]

[154] Letter from Cliff Moiser, Chair of the Parliamentary Committee, Justices' Clerks' Society, to Lord Gardiner, 8th July 1974. Source: SIEGHART.
[155] Letter from Mr C.J.O. Maggs, Assistant Secretary, Law Reform Committee, The Law Society to Lord Gardiner, 8th July 1974 Source: SIEGHART.

Elsewhere, the Press Committee of the Society of Conservative Lawyers was briefing its members to oppose the defamation clause. In a 'private and confidential' memorandum the Society suggested that the Gardiner's Report had 'inevitably led to concentration only on one aspect of rehabilitation, namely the possible erasure from records vis a vis the general public of past convictions'. This was seen as 'regrettable since rehabilitation, *in its full meaning*, is something which has sympathetic and wide support' (emphasis added). However, the memorandum does not reveal precisely why the Society felt that the Bill was incompatible with a 'fuller' meaning of rehabilitation or how this meaning might be defined. Instead, it suggested that the ROB had 'given rise to a conflict between the case for rehabilitation (in its restricted sense) and the right to tell the truth'. The memorandum also commented on the 'difficulty of striking a fair and reasonable balance between the right to rehabilitation and the right to privacy on the one hand and the *right to expose evil* and to tell the truth on the other' (emphasis added). The equivalence between reporting on spent convictions and 'exposing evil' meant that the Society also subscribed fully to the Faulks Committee's recommendations that 'truth' should remain an absolute defence to defamation claims and concluded that it would be 'highly undesirable for the Rehabilitation of Offenders Bill, which is primarily concerned with an entirely different subject, to be used as a vehicle for making substantial amendments to the law of defamation'.[156]

Suppressing the truth?

In the last few days before the second reading debate in the House of Lords, the campaign against the Bill intensified. On the 8th July 1974 Conrad Dehn QC described the Bill in *The Times* as a 'pernicious measure'. He continued:

[156] Private memorandum on the 'Rehabilitation of Offenders' from the Press Committee of the Society of Conservative Lawyers to its members, circa July 1974. Source: SIEGHART.

> One can only hope that it will be rejected by the House of Lords. Its object is laudable, but the means it proposes are wicked – the authorization and encouragement of deliberate lying, together with restraints on seeking and telling the truth… Are we now to bring up our children to believe that they should not tell lies – except, where certain conditions are met, about any offences of which they or others have been convicted? ….And are convicted swindlers to be able, after lying low and keeping out of trouble for the specified period, to return to the field of business with no one able to warn shareholders, investors and traders of their record? I suspect it will be men like this who will be rejoicing loudest if this Bill becomes law.

On the same letters page, the publisher William Kimber again took issue with the Bill by suggesting that it would restrict what authors could write about criminal convictions. Kimber (incorrectly) claimed that when a convicted defendant became a rehabilitated person through the passage of time any articles or books mentioned their spent convictions would become defamatory.[157] The next day, Kimber was also cited in the *Daily Telegraph* as having concerns that the public interest defence set out in the latest draft Bill was not an adequate protection for authors, or indeed publishers or librarians. He argued: 'You cannot possibly predict how the public interest is going to be assessed by a court or jury between five and 10 years of time you publish a book'.[158]

In the same edition an editorial under the headline 'Suppressing the truth' expressed concern that 'far worse injustices than those which [the Bill] set out to remedy' might occur 'if the Lords are misguided enough to let it reach the statute book'. Whilst expressing concern that 'punishments should not drag on indefinitely' the newspaper argued that the Bill 'could lead

[157] 'Making the truth actionable', 8th July 1974, *The Times*. Source: TDA.
[158] 'Publishers fear censorship from Offenders' Bill', *The Telegraph*, 9th July 1974. Source: SIEGHART

to endless money-raising litigation of the most discreditable kind' and, repeating Kimber's criticism, that 'publishers of histories and biographies would be put in the severest peril'. It concluded that:

> Society should certainly show more charity than it does to those who have repented and reformed; but the wounds of life cannot generally be healed by lying, Christianity teaches that the past can be redeemed, not that it should be denied.[159]

It was, however, somewhat hypocritical of newspaper editors to criticise the Bill for attempting to 'suppress the truth' or 'make truth actionable' when at this exact moment a number of high profile lawyers wrote to the press in support of the Bill and were either not published at all or had the publication of their letters delayed until very close to or *after* the second reading debate in the Lords. On 9th July 1974, Sir John Foster wrote to confirm his support for the Bill and argued that other than Britain 'there is hardly a civilised country in the world whose legal system will never allow a past conviction to be forgiven and forgotten' and that if legislation 'means that the Press too will have to learn a degree of discretion, that will be all to the good' (see Appendix 18). As a former of MP and distinguished senior barrister Foster might have expected his words to hold some weight but his letter was never published. In another supportive letter Bryan Anns QC, a Council member of JUSTICE, wrote that:

> The Rehabilitation of Offenders Bill has caused anxieties which, as they have been expressed in your columns, arise from an imperfect understanding of its detailed clauses. The emotive expression "suppressing the truth" has been used to increase these anxieties.[160]

[159] 'Suppressing the truth', *The Telegraph*, 9th July 1974. Source: SIEGHART
[160] Unpublished letter from Bryan Anns QC to *The Times*, 10th July 1974. Source: SIEGHART.

Again, this letter did not make it into print. However, the next day *The Times* did find space in the letters column for a contribution from James Comyn, Chairman of the General Council of the Bar who wrote 'on behalf of the Bar Council' to voice 'disquiet about the defamation clause…and to express the hope that the House of Lords…will reject that objectionable provision.' He added that the clause 'not only seeks to suppress truth but actually to legalize and positively encourage lying. The Bar can only regard this as something which strikes at the very root of our system of law and at our whole code of social morality as well.' This prompted a response from, amongst others, Paul Curtis-Bennett – a barrister who later became a judge – who suggested that Comyn's letter was not based upon a thorough test of the opinion of members of the bar. He added that that there were also many barristers who believed 'that persons should be free, after a suitable interval, from the shadow of certain past misdeeds'.[161] Once again though, this supportive letter was not chosen for publication.

On 12th July another letter was sent from P.R.G. Campbell supporting the Bill and objecting to Comyn's assertions. Campbell suggested that if 'the rigours of the Law's punishment are too severe then it will drive a man in many cases to break the law more, rather than stay within in'.[162] This letter was held back from publication until 19th July - several days after the Bill had passed through a second reading debate in the Lords – when it appeared alongside other letters both supporting and opposing the Bill.[163] A further letter to *The Times* from Lord Gardiner, rebutting the points raised against the Bill by David Hirst, William Kimber and Conrad Dehn did not appear in print until the morning of the debate, having been sent to the newspaper a week earlier.[164] However, on the 12th July *The Times* published its strongest attack on the Bill yet. Under the headline 'Charter for a false age of innocence' its columnist Bernard Levin described the Bill as 'uselessly and dangerously, well-intentioned', making

[161] Unpublished letter from Paul Curtis-Bennett to *The Times*, 11th July 1974. Source: SIEGHART.
[162] Letter from P.R.G. Campbell to *The Times*, 12th July 1974. Source: SIEGHART.
[163] 'Rehabilitation of Offenders Bill', *The Times*, 19th July 1974. Source: TDA.
[164] 'Debate on the Rehabilitation of Offenders Bill', *The Times*, 15th July 1974 (dated 9th July). Source: TDA

comparisons to Orwell's '1984' and warning of 'appalling side-effects' if the ROB passed. He also claimed that the Bill 'encourages lying and discourages the telling of the truth'.[165]

Over the next two days *The Times* also published numerous letters critical of the Bill from the President of the Publishers Association, the Chair and Deputy Chair of the Society of Authors,[166] the Vice-Chair of the British Legal Association and the Chair of the Maria Colwell Inquiry (into the physical abuse and killing of a seven-year-old child by her stepfather). This was followed up on the eve of the second reading debate when the *Sunday Times* suggested, somewhat disingenuously, that the 'weight of legal opinion is heavily against the [defamation] clause'.[167]

One relatively rare dissenting voice against this torrent of criticism came from Michael Miller QC who suggested that James Comyn's earlier letter did not carry the authority of the Bar or the Bar Council who had never collectively considered the ROB.[168] Gardiner, incensed at the one-sided coverage of the Bill and the deliberate omission of supportive letters from senior counsel, wrote a further letter to *The Times* on the 14th July (see Appendix 19). Gardiner took particular exception to the words of Mr T.G. Field-Fisher (the Chair of the Maria Colwell Inquiry) who had wrongly claimed that the Bill would suppress the disclosure of criminal records in proceedings relating to the guardianship of children. He suggested that Field-Fisher 'cannot have taken the trouble to read [the Bill] before launching a public attack on it' and added:

[165] 'Charter for a false age of innocence', *The Times*, 12th July 1974. Source: TDA.
[166] 'Making truth actionable', *The Times*, 12th July 1974. Source: TDA
[167] 'Row grows over 'legal lies' Bill', *Sunday Times,* 14th July 1974. Source: SIEGHART.
[168] 'Rehabilitation of Offenders Bill', *The Times*, 13th July 1974. Source: TDA.

> That kind of irresponsibility characterises, I fear, not only his objection, but also that of many others which you have printed in the last week, including those of Mr. Levin. Happily, not only the sponsors, but the other members of both Houses of Parliament who have now debated this Bill on nine separate occasions do their homework more thoroughly.[169]

Confirming the 'truth'

Gardiner's letter was not published although he had more success getting a 'right of reply' in *The Telegraph* on 15th July where he once again attempted to rebut criticisms of the Bill made in an editorial a week earlier. Gardiner pointed to earlier supportive coverage of the Bill in January and suggested that the plea to ditch the defamation clause was to ask Parliament to 'at the last moment desert a principle which both of its Houses have already approved after full discussion merely because one section of the Press has suddenly decided that it disagrees with it'.[170] Later that day, Gardiner mentioned the selective press coverage of the Bill during its second reading debate in the House of Lords. He did so with the backing of the Home Office Minister Lord Harris and the support of other peers, notably Lord Wigoder, a QC and member of the Council of JUSTICE, who in his maiden speech described the Bill as:

> a humane and a civilised gesture of assistance by society towards some of the members of our community who have shown by their own strength of character and determination that they are worthy of all the assistance we can give them.
>
> (HL Deb, 15th July 1974, vol. 353, c896)

The Lord Bishop of Rochester also defended the Bill against its critics noting that 'what we should surely be attacking is the continuing assumption that society can exclude former

[169] Unpublished letter from Lord Gardiner to *The Times*, 14th July 1974. Source: SIEGHART.
[170] 'Rehabilitating the offender', *The Telegraph*, 15th July 1974. Source: SIEGHART

offenders as permanently unworthy or incapacitated for civil life and responsibility' (cc905-906).

The Bill passed without division, largely because – as several peers pointed out – it had already passed through the elected House of Commons unopposed. However, whilst not opposing the Bill, the Conservative Viscount Colville suggested that whilst 'disturbed about the purity of this defence of truth' in the debate, a 'rival concept' was that of justice and that the two – truth and justice - were essentially in 'conflict' with each other in the Bill (c928). This prompted a philosophical letter to Colville from Paul Sieghart the following day explaining how he had sought to resolve this conflict for himself.[171] In it, Sieghart argued that 'truth' was just one value amongst many others including 'charity, patriotism, loyalty, the protection of innocent life, the avoidance of cruelty, and so on' and that it was when these values came into conflict with each other that 'moral dilemmas appear' requiring the values to be 'balanced' against each other to decide which would prevail (see Appendix 20).

Whilst the Bill proceeded to Committee stage in the Lords, Piers Dixon MP - its sponsor in the Commons - also wrote to The Times on the topic of this 'conflict', suggesting that the Bill saw 'a handful of articulate and powerful interests arguing the philosophical merits of "truth", in confrontation with a million families silently asking for compassion'.[172] The Chair of NACRO, Anthony Christopher, also managed to publish a brief but supportive letter in *The Times*, noting that:

> If it is really necessary to measure the merits of the [Bill] by some yard-stick of self-interest it is to be hoped that Parliament will look beyond the narrow spectrum of that pressed upon us by journalists and publishers who are most certainly very much better able to take care of themselves than the thousands of

[171] Letter from Paul Sieghart to Viscount Colville, 16th July 1974. Source: SIEGHART
[172] 'Rehabilitation Bill', *The Times*, 18th July 1974. Source: TDA.

> sometime offenders whose efforts to build a new life are constantly frustrated, if not rendered hopeless, by the inevitable recalling of the past.[173]

However, Christopher also noted that the Bill did serve the 'self-interest' of society because it would offer a 'hard-headed, practical, approach to the prevention of crime'. Such arguments did little, however, to convince ardent opponents of the Bill. First David Hirst QC[174], then William Kimber[175] and then Peter Carter-Ruck[176] resumed their attack in the letters pages of the press. Hirst argued that the 'injustices' which it might cause to publishers, authors, librarians and employers would be 'surely too high a price to pay for the deserved benefits conferred by the Bill upon rehabilitated persons'. Kimber cited an earlier speech in the House of Lords where Gardiner had said in relation to libel that "If you say what is true, you cannot be touched". Kimber argued that it was 'in the best interests of the community as a whole that this principle should remain intact'. Carter-Ruck argued that the Bill would 'erode the time honoured defences to a civil action for libel or slander…thus taking away from newspapers and other publishers a defence which has been open to them for nearly 200 years'. All three men called for the omission of the defamation clause at the Committee stage of the Bill.

Enough damage had finally been done with regards to the perception that the defamation clause was unworkable. At the second Committee stage on 24th July 1974, amendment number 34 was moved by the Law Lord, Lord Diplock in an attempt to find a compromise on the Bill's interference with existing defences to defamation. It proposed that 'a defendant in [a claim for defamation] shall not…be entitled to rely upon the defence of justification if the publication is proved to have been made with malice'. The meant that all existing defences to defamation available to authors and publishers were retained and the onus was, instead,

[173] 'Rehabilitation Bill', *The Times*, 22nd July 1974. Source: TDA.
[174] 'Injustices in Offenders Bill', *The Telegraph*, 19th July 1974. Source: SIEGHART
[175] 'Rehabilitation of offenders', *The Telegraph*, 19th July 1974. Source: SIEGHART.
[176] 'Rehabilitation Bill', *The Times*, 24th July 1974. Source: TDA.

placed upon rehabilitated persons to prove in court than any subsequent publication of their spent convictions had been motivated by malice. The amendment was put to a division and was passed by 42 votes to 25 (see Appendix 21).

Following this amendment the Bill was passed through Committee and only two days later proceeded through its Report and Third Reading stage without major incident. At this point, Parliament was nearly entering its summer recess which necessitated the House of Commons finding time for the Lords Amendments to be considered quickly in order for Royal Assent to be given. On the 30th July – the last day of the Parliamentary session on which Private Members' Bills could be debated – at 4.08am - Piers Dixon proposed the motion that the Commons agreed with the Lords' amendments (HC Deb, 30th July 1974, vol. 878, cc748). This should have been a mere technicality, but Hansard records that the new Conservative MP and future Home Secretary, Leon Brittan rose to object to the Bill and table a further amendment to the defamation clause on the grounds that not all of the objections raised by the Faulks Committee's Interim Report had been met by the Lords. His lengthy speech was clearly an attempt to 'filibuster' or 'talk out' the Bill. Alex Lyon intervened to plead with Brittan not to press his amendment because 'the result would be to wreck the Bill, which has been through both Houses twice' (c752). However, an alternative account notes that:

> What Hansard does not indicate is that Alex Lyon could not call for a vote to be taken on the bill because the House at that time in the morning was plainly inquorate. The supporters of the Bill were further unable to find enough members to fill the House. Eventually, however, they found a senior member of the Conservative party who prevailed upon Leon Britan [sic] to withdraw his objection – which he promptly did.[177]

[177] *Op. cit*. n.101, p.16.

The Bill passed the final amendments stage at 4.35am on 30th July 1974 and received its Royal Assent the following day.

Conclusion

Thus far, Part Three of the thesis has described in detail the emergence of legal rehabilitation in England and Wales via the introduction of the ROA. In keeping with the Foucauldian approach to writing history, it has drawn upon long-neglected archival sources to reveal the contingency of events leading up to this landmark legislation. In so doing, the last three chapters have unearthed a number of 'subjugated knowledges' by charting the conception, negotiation, contestation and controversies which surrounded the Act. This has revealed that the ROA did not merely arrive as a fully-formed liberal intervention into the penal politics of the early 1970s but as the end product of a struggle between competing claims about how the 'rehabilitated person' might be defined and information about their previous convictions circulated. As a postscript to the last three chapters, it is worth commenting briefly here on the 'fate' of the ROA before proceeding, in the final chapter, to the more radical reconceptualization of the original Act with which the thesis concludes.

The ROA was scheduled to come into force on 1st July 1975 and received a mixed reception. A few days earlier *Private Eye* described it as 'a startling piece of legislation' noting that, for investigative journalists, it would become 'more dangerous to discover and publicise details of past convictions'. The article also took advantage of the fact that the Act's defamation clause did not apply to publication of spent convictions which took place before its commencement by adding a list of high profile figures with previous convictions. This included corrupt financiers, police and lawyers, members of the National Front and pop stars with convictions for drug possession whom the article described collectively as 'the sort of people who may feel well disposed to the Bill.'[178] By contrast, and despite the negative campaign that it had mounted against the ROA, *The Times* – no doubt satisfied that the

[178] 'Lyon's Crook Brew', *Private Eye*, 27th June 1975. Source: SEIGHART

defamation clause in the Act has been reined back – provided a relatively neutral description of the Act on the day it came into effect[179] and offered legal commentary on the Lord Chief Justice's Practice Direction on the consideration of spent convictions in the criminal courts.[180]

The Guardian provided very positive coverage of the Act, noting that '[a]bout one million people woke up this morning no longer having to fear their criminal record'.[181] However, *The Telegraph* - under the headline '1m ex-criminals can keep their past secret' - viewed this development somewhat differently and also noted that 'critics of the Act regard it as absurdly complex and doubt its effectiveness in helping ex-offenders get jobs or in preventing their past being used against them.'[182] The most negative coverage was reserved for the *Daily Mail* which described the Act as a 'disturbing and even frightening new piece of legislation' with a title that 'could not be more benign'. Whilst recognising that at the end of a prison sentence 'the offender's punishment is far from over' the article argued that the Act 'like so many other pieces of so-called 'progressive' legislation will do little or nothing to correct that situation, and much to put at risk those who need protection from the criminally minded'. It further complained that 'everyone realised that the original idea…[in the Gardiner Report] was a wildly Utopian piece of undigested waffle'.[183]

As several of these articles noted, however, the ROA had not taken effect in the form in which it received its Royal Assent eleven months earlier. Rather, it had been appended by the *Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975* which listed a number of occupations deemed appropriate for exclusion from the ROA. In moving this Order in the House of Lords, Home Office Minister Lord Harris commented that:

[179] 'Previous convictions law in force', *The Times*, 1st July 1975. Source: SIEGHART
[180] 'Spent convictions', *The Times (The Law Report)*, 1st July 1975. Source: SIEGHART
[181] 'Convicted people free of past', *The Guardian*, 1st July 1975. Source: SIEGHART
[182] '1m ex-criminals can keep their past secret', *The Telegraph*, 1st July 1975. Source: SIEGHART
[183] 'At midnight, a million people lost their past', *Daily Mail*, 1st July 1975. Source: SIEGHART

> ….we all accepted when the Act was before your Lordships' House that there would be some situations in which information about spent convictions ought to remain available and usable. In particular…the need to safeguard national security, and to protect vulnerable members of society, such as children, the sick or handicapped and old people. (HC Deb, 19th June 1975, vol. 361, c.1068)

Harris argued that the Exceptions Order steered 'a reasonable middle course between the twin dangers of drawing the exceptions from the Act so widely that its aim would be nullified, and restricting them so narrowly that the risk of undesirable consequences would be too high' (*ibid.*). In explaining why – if exceptions were needed – they could not be restricted to specific convictions where a close nexus existed between the original offence and the occupation in question, he explained that:

> …to do it in this way would have resulted in an immensely complicated and tangled scheme. Moreover, one cannot often define with any confidence which particular offences might be relevant. So, where there is an exception in the Order…it relates to the whole of a man's record. (c.1069).

In the House of Commons, Alex Lyon suggested that it had 'not been an easy task to draw the line between what was required to protect the ex-offender and to justify the public interest' (HC Deb, 23rd June 1975, vol. 894, cc.169-70). However, having vigorously defended the ROA against its critics only a year earlier, Lyon now accepted that cases where a person worked with young people were 'an obvious area for exemption' (c.170) as were 'occupations which have close contact with other people who would be vulnerable to someone who was evilly disposed' (*ibid.*). Thus, exemptions were granted for teaching, childcare and most medical professions. They were also granted for occupations involved in the administration of justice where it was deemed that 'the public are entitled to expect that there shall be no hint that any

criminal behaviour in the past has not been brought to the attention of the authorities' (*ibid.*). Other exemptions were applied to dental professions, opticians, firearms dealers, occupations regulated by the Gaming Act 1968 and in the insurance industry although not, the banking industry, the Stock Exchange, the London Diamond Bourse or Hatton Garden 'which applied for exemption on the basis that there might be serious danger in their public capacity if they employed ex-offenders' (c.172) (several exemptions were later added for occupations in the financial sector). Lyon also noted that he had received an application 'from the Ministry of Defence, which wanted to exempt all members of the Armed Forces' (c.173). However, he also commented that:

> although the number of exemptions looks quite large, it is substantially less than the number of application for exemption which we received. We were quite firm that we would not allow exemptions merely because a profession or employer believed that there would be personal danger to him if an ex-offender were employed. (c.171)

Indeed, considerable lobbying of the Home Office had clearly taken place from numerous interest groups causing the Chair of the Society of Labour Lawyers, Bruce Douglas-Mann MP to comment that he could 'well imagine the pressures which are brought to bear on the Minister from the Civil Service, the local authorities, the nationalised industries, the bodies which are listed in the order, and the learned professions' (c.177). However, Douglas-Mann did not share Lyon's view that sufficient restraint had been exercised when granting exemptions and expressed concern at the apparent dismantling of the ROA which was already taking place. He further noted that many of the exemptions applied to occupations which required a high degree of erudition:

> A good case could perhaps be made against the original Act. It may have been a bad Act: it may have been a good Act. What is not legitimate is…repealing its provisions in respect of the learned professions and leaving it in existence for the rest of society….We shall destroy the purpose of the Act if the order is approved in this form. (*ibid.*)

As discussed in chapter one, the present form of the ROA incorporates a much wider range of exemptions than that originally sanctioned in 1975 (see Table 3). Moreover, the apparatus of criminal records checking and disclosure has also expanded – often in response to tragic, high-profile murders of children or assumptions that more vigorous checking of criminal records for employment purposes would result in greater public protection.

This expansion began in earnest in 1985 when Home Secretary Leon Brittan (who, as noted earlier, had nearly derailed the ROA in its entirety as a new MP) instigated an inter-departmental review of criminal record disclosure for those with access to children (Home Office and Department for Health and Social Security 1985) following the murder of four-year-old Marie Payne in 1984. The case received considerable media coverage after it emerged at the trial that her killer had a string of previous sexual offence convictions but had been introduced by his probation officer to a Christian voluntary organisation without informing them of his record. This led several social work agencies and users to place trust in the perpetrator which in turn enabled him to set up a babysitting organisation (although this was unrelated to the murder) (see Aldridge 1999).

Several years later, the system of disclosures was expanded further following proposals in the Conservative Government's green paper on 'Disclosure from criminal records for employment vetting purposes' (Home Office 1993) and white paper 'On the Record' (Home Office 1996) which concluded that:

> Criminal records checks cannot in themselves ensure that individuals will be reliable and trustworthy but their wider availability should *make it more difficult for those with a criminal record* to obtain positions of trust *to which their record suggests they are clearly unsuited*. (p.21; emphasis added)

These preceded the introduction of the Police Act 1997, Part Five of which established the Criminal Records Bureau (CRB) (discussed in chapter one). The introduction of the CRB also coincided with the introduction of a UK 'sex offenders' register' which required those convicted of sexual offences to register their whereabouts with the police (see Thomas 2005; 2011). The 'notification periods' for this register were chosen to match the rehabilitation in the ROA (see Table 2). As a result, those who had been sentenced to more than 30 months for a qualifying sexual offence became subject to indefinite notification. This has remained the case despite recent amendments to rehabilitation periods under the ROA (see Table 4).

As explained in chapter one, the Soham murders in 2002 would further contribute to the expansion of criminal background checking for employment purposes following a public inquiry (Bichard 2004) and the passage of the Safeguarding Vulnerable Groups Act in 2006. This followed the murder of Sarah Payne in 2000 by a man with previous convictions for indecent assault on a minor – an event which would further exacerbate the climate of fear concerning 'paedophiles' (see Bell 2002; Critcher 2002; Thomas 2005, 2011). This high-profile case led to a long-running campaign for greater public disclosure of information about those with convictions for sexual offences which eventually materialised in a limited form through the Child Sex Offender Disclosure Scheme (see Kemshall *et al*. 2010, 2012). A similar scheme soon followed in relation to domestic violence offences (Strickland 2013).

This increase in exemptions from the ROA and expansion of the apparatus of criminal record disclosure has clearly resulted in a *narrowing* of the parameters of legal rehabilitation. This has proved contrary to the Whiggish assumptions made by those elite figures that sponsored

or supported the 1974 Act during its passage through Parliament. To reiterate, several Parliamentarians suggested that the scope of the ROA should, in fact, be *broadened* to include more PWCs within its scope but they were content that if the Act was passed in an initially partial and somewhat 'experimental' form, it would ultimately prove successful and pave the way for further liberalisation.

It may, therefore, seem appropriate to speak of an 'erosion' of the ROA due to the growth of exemptions allowing consideration of even 'spent' convictions in many circumstances. Indeed, this growing exceptionality has been a continuous, ongoing process spanning several decades. Yet to think in terms of an 'erosion' of the principles of legal rehabilitation is make the fundamental assumption that the *original* Act was an intrinsically liberalising measure. Whilst it was certainly *intended* as such this assumption is problematic since, as noted earlier, the Act placed a large number of PWCs outside the scope of its protections. It also left the proverbial door wide open for its protections to be undermined by any professional group who could stake a claim as being a 'special case' requiring exemption. Moreover, *during the very inception* of the Act its 'architects' came into dispute about precisely where the 'dividing line' should be drawn between those who might benefit from its protections and those who ought to be regarded as 'hardened criminals'.

For this reason, the final chapter seeks to disrupt the now orthodox criminological narrative that the ROA was a fundamentally benign and liberal measure from a more progressive era which was only undone at a later stage by the social discontinuities of the 'precautionary culture' (Furedi 2009), 'risk society' (Beck 1992; Hudson 2003), 'exclusive society' (Young 1999) or 'culture of control' (Garland 2001). Instead, it is argued that *from the very beginning* the Act was - albeit unwittingly - a profoundly biopolitical event which can better be interpreted with reference to both historical *continuities* in social attitudes towards former lawbreakers and the hybrid governmentalities which have marked the last four decades.

10. Criminal records and the biopolitics of life chances

In a reconsideration of the 'disposition towards the governance of crime' in the mid-twentieth century, Loader (2006: 561) describes a 'liberal elitism' which dominated policy-making. He deploys the term 'Platonic guardians' to describe the civil servants, Home Office researchers and penal reformers who shared the common view that responses to crime and the public anger which it arouses should be guided, above all, by the preservation of 'civilised values' (p.563). Garland (2001: 35) has noted that between the 1890s to mid-1970s such values would take the form of 'penal-welfarism' in which rehabilitation became the dominant 'organizing principle' in the governance of crime. However, as noted in chapter five, this notionally 'liberal' consensus came under attack from the 'nothing works' pessimism of the mid-1970s. Then, following the period of political crisis described in detail in chapter six, came the rise of 'law and order' policies grounded in an 'authoritarian populism' (see Hall *et al*. 1978; Hall 1979, 1988) which set the tone for penal policy during the 1980s and early 1990s (Ryan 2003). Such policies continued under a Labour government at the turn of the millennium (Downes 1998; Downes and Morgan 2001).

Within this context, the ROA might justly be considered as the 'last hurrah of the Platonic guardians' given that it was preceded by numerous other 'patrician liberal' interventions into social and criminal justice policy (see Table 5 in chapter six). However, as Sim (2009: 15) has argued:

> it has become a matter of criminological common-sense to identify the mid-1970s as a moment of profound rupture and epochal change when the state shifted its ideological and material gear and moved onto new penological terrain in terms of crime and punishment. [But w]hat transpired is perhaps better understood as an *intensification* in law and order processes which were already deeply embedded in the political and cultural institutions of the state and civil society. (emphasis in original)

Indeed, the social exclusion or marginalisation of PWCs in the present is certainly not a 'new' phenomenon but *a form of historical continuity* in keeping with the long-standing notions of non-superiority described by Mannheim (1939) which were discussed in chapter four. It is therefore more appropriate to think of the more recent 'pains of criminalisation' as an intensification of the non-superiority principle in the present, rather than as a form of historical discontinuity from a more liberal and inclusive era preceding the mid-1970s. Moreover, as Kearon (2005: 6) suggests, we have perhaps never been 'liberal' insofar as 'the development and maintenance of defensible liberal sensibilities have throughout modernity been predicated on the continued existence of a symbolically-constructed and imagined subaltern other'. That is, the 'penal-welfarism' described by Garland (1985; 2001) and 'Platonic guardianship' which Loader (2006) has skilfully deconstructed were contingent upon the symbolic construction (and criminalisation) of 'deviant Others' who became objects of concern for a whole swath of middle-class 'liberals' – whether in the penal reform lobby, the Home Office Research Unit or criminal justice agencies such as the probation service.

Indeed, as chapter five discussed, the various transformative penalities which have sought to 'correct', 'reform' or 'rehabilitate' lawbreakers each gave rise to their own distinct modalities of subjection meaning that, in the present, a complex and hybridized subjectivity has positioned lawbreakers as variously idle, immoral, undeserving, pathological, risky or dangerous individuals. As the preceding chapters have revealed, the introduction of the ROA did not so much resolve this subjectification of the convicted lawbreaker as add a *further layer of complexity* through the socio-legal construction of a new subject position – that of the 'rehabilitated person'. Thus, PWCs now face being constructed not only in relation to the historically-contingent imaginaries through which 'criminals' or 'offenders' have long been defined as subjects, but also in relation to the dividing practice of 'spent' and 'unspent' convictions which the 1974 Act created.

As chapter nine revealed, the liberal elitist supporters of the ROA anticipated that the

legislation would prove to be merely an initial, experimental period in the requalification of lawbreakers which – after the assumed success of the Act was proven – would lead to a considerable expansion of the principles of legal rehabilitation. In reality however, it was the *exceptionality* of the ROA which expanded in the years which followed – partly through the addition of further exemptions to its provisions, but also through the process of 'sentence inflation' under which longer custodial terms have been passed (Easton and Piper 2009; Ashworth 2010). These have meant that more and more PWCs fall outside of the scope of the Act's limited protections. Crucially, as the last few chapters have revealed, this exceptionality was *present from the very conception and introduction of the ROA*. From the preliminary discussions about where the 'line should be drawn' in the legislation through to the granting of powers to the Secretary of State to introduce exemptions from the Act, a principle of exclusion from 'full' rehabilitation has actually been *intrinsic* to the ROA.

It is on this basis that the thesis rejects the intuitive appeal of a Whiggish reading of the ROA as a self-evidently 'liberal' measure only later 'undone' by an expansion in the number of exceptions. Instead, this final chapter argues that the Act was not so much a definitive liberal moment from a more progressive era, but – unwittingly - a profound *governmental* moment which looks very different when considered from a Foucauldian biopolitical perspective. It is argued that both the 'unspent' criminal record and the apparatuses of disclosure which can reveal *all convictions* utilise prior criminal history as a dividing practice in society. In an era of 'government at a distance' (Miller and Rose 1990: 9) and when over 10.5 million people in the UK have a criminal record (Unlock 2014a) this has considerable utility in the subtle administration of the population's life chances. Thus, the original and 'official' reasons for the collation and use of criminal records by the state (i.e. the prevention and detection of crime, the administration of justice and the maximisation of public safety) are now supplemented by other unofficial and quasi-penological functions concerned with social administration.

The hybridized governmentalities of the present

As chapter three discussed, Foucault's turn to the study of 'governmentality' marked an attempt to provide a 'genealogy of the modern state and its different apparatuses' (Foucault 2007: 354). This involved retracing the history of the 'art of government' (Foucault 2008: 1) or 'the way in which one conducts the conduct of men' (*ibid.* p.186). Foucault's studies of governmentality chart the evolution of different *rationalities of government* (the 'ways of thinking' about the problem of government) in conjunction with the deployment of various techniques or *technologies of government.* As Dean (2010: 269) notes these are the 'means, mechanisms and instruments through which governing is accomplished' and 'might include forms of notation, ways of collecting, representing, storing and transporting information'. Thus, the state's apparatus for collating, retaining and disclosing criminal records sits firmly within the definition of a technology of government.

Chapter three also described how this turn to the study of political government required a reconceptualization of the exercise of power and a refinement of Foucault's (1977) earlier distinction between sovereign and disciplinary power. To recap, sovereign power acts through the deduction (of time, money and even life itself) and finds its institutional form in the law and juridical systems. By contrast, disciplinary power targets individual bodies – often in institutions such as schools, hospitals, military barracks and prisons – and, where these bodies deviate from expected norms – this power works by subjecting people to corrective instruction or 'treatment'. However, Foucault later refined this conception of power by making a distinction between juridical or sovereign power and two distinct levels of *biopower* (power over life). This comprised a disciplinary 'anatamo-politics of the human body' which targeted individuals and a 'biopolitics of the population' (Foucault 1978: 139) constituting regulatory controls and interventions.

Foucault's studies of governmentality (see Foucault 2007, 2008) focussed predominantly on the emergence of classical European liberalism from the 16th century onwards (see Garland

1997: 176-178). Whist his death in 1984 cut short this project, other scholars have subsequently applied his perspective to the study of government in the decades which followed. This section proceeds by briefly discussing neoliberal and the authoritarian governmentalities before turning to the rationalities through which 'crime control' has been 'governmentalized' in the present.

Neoliberal and authoritarian governmentality

The government of advanced liberal democracies is often seen as synonymous with neoliberalism. This was particularly so in the UK during the premiership of Margaret Thatcher (Kavanagh 1987). The politics of the so-called 'New Right' espoused by Thatcher was strongly influenced by the work of Freidrich von Hayek (1944, 1960) and Chicago School economists such as Milton Friedman. Harvey suggests that in theory the neoliberal state:

> …favour[s] strong individual property rights, the rule of law, and the institutions of freely functioning markets and free trade. These are the institutional arrangements considered essential to guarantee individual freedoms. The legal framework is that of freely negotiated contractual obligations between juridical individuals in the market-place. The sanctity of contracts and the individual right to freedom of action, expression, and choice must be protected. The state must therefore use its monopoly of the means of violence to preserve these freedoms at all costs. (2005: 64)

Dean (2010) notes that in relation to the forms of power through which such government is achieved:

> Liberalism…takes the form of a bio-politics of the administration of life and a form of sovereignty that deploys the law and rights to limit, to offer guarantees, to make safe and, above all, to legitimate and justify the operations of bio-political programmes and disciplinary practices. (p.156)

Thus, whilst neoliberal governmentality is predicated on notions of autonomous citizens acting as rationally-calculating decision makers exercising their freedom of choice in competitive market systems, a backstop of *sovereign* power often remains in place. This underpins the biopolitical programmes through which governments seek to guide the population and can take on illiberal qualities when governmental strategies fail or where the 'compliance' of individuals is not forthcoming. This illiberality may arise from 'practices and rationalities that…divide populations and exclude certain categories from the status of the autonomous and rational person' (Dean 2010: 156). Such subjects are typically 'those held not to display the attributes of responsibility and autonomy' (*ibid.* p.157).

Nadesan (2008: 223-224) notes how two distinct biopolitical subjects emerge from the knowledges generated by technologies of the market (through which individuals supposedly become 'free', enterprising individuals who self-govern and thus require only limited direct governance by the state). On the one hand, there is a rational and reflexive subject deemed capable of monitoring their own health, wealth and well-being. By contrast 'bad subjects' also emerge and are deemed incapable of effective self-government. They are also constructed as posing particular 'risks' to the general welfare and as requiring increased levels of surveillance and monitoring from biopolitical authorities. Whilst Nadesan uses public-health officials and foreign-aid workers as examples of such authorities, an organisation such as the DBS may also fulfil a biopolitical function. Moreover, information systems such as the PNC may operate as market-based technologies of biopolitical government. Thus PWCs – as 'bad subjects' - become potential candidates for repression or intervention.

To speak of state agencies as 'biopolitical authorities' is not, however, to locate them solely within the public rather than private-sector. Neoliberalism is characterised by a vigorous privatisation of assets with the absence of clear property rights in relation to social goods such as housing or healthcare seen as an 'institutional barrier to economic development and

the improvement of human welfare' (*ibid*. p.65). In the neoliberal state the delivery of human services is seen as best delivered through processes of privatisation and deregulation. Thus, the rolling back of the Fordist-Keynesian pact in which the state created and managed systems of social security is seen as integral to processes of neoliberalization. Whilst often monopolistic in outcome, the intention is to create notionally 'competitive' market systems in which individuals may exercise their freedom by choosing a preferred service provider. This is not, of course, to confuse neoliberalism as a fully-realized political project of private ownership. Indeed, numerous vestiges of the state-operated network of social security (such as the NHS) remain in place in the UK. However, these have often been transformed by the 'establishment of 'quasi' or artificial markets in areas of the previously public provision of services' (Dean 2010: 73). They are also often invested with distinctly biopolitical functions as discussed above. As chapter one noted, the DBS and its forerunner the CRB were both run by the state in conjunction with private-sector interests.

The notion of exercising 'choice' relies, of course, on individual subjects having sufficient economic independence. This raises questions about how the denizens of neoliberal states are protected from the 'sanction of the market' when exposed to the risk of illness, unemployment, homelessness or criminal victimisation. These questions form the basis of many contemporary critiques of neoliberalism (see Harvey 2005; Standing 2011). For instance, Wacquant (2009) suggests that a central motif of neoliberalism – particularly in the US - has been the penalization of poverty, justified by a 'cultural trope of individual responsibility' (p.307) and marked by a distinct atrophy of the welfare state and corresponding hypertrophy of the penal state. This has given rise to record prison populations, 'zero tolerance' policing of relatively minor infractions and a rampant demonization of subaltern 'others' such as 'supercriminals', 'welfare mothers' and 'sex predators'.

Similarly, Dean (2010: 159) notes that in the long history of liberal governmentality there are

many types of subject who are constructed as incapable of bearing the freedoms and responsibilities of citizenship and who have therefore been exposed to a range of sovereign or disciplinary interventions (see also chapter five). Using as an example the Benthamite 'less eligibility' principle and the administration of pauperism in the nineteenth century, Dean suggests that this demonstrates 'the compatibility between a liberal governmental economy and exceedingly illiberal and non-liberal forms of rule' (2010: 159). However, as chapter four discussed, whilst less eligibility set the upper threshold for conditions of institutions such as workhouses and penitentiaries, Mannheim's (1939) articulation of a non-superiority principle – which sought to delimit the social position of the lawbreaker *after* they had paid the penalty for their crime - required 'an application of *sociological* ideas which requires the knowledge of objective standards, instead of more or less vague psychological hypotheses' (p.58). Therefore, if less eligibility might be thought of as a distinctly *disciplinary* rationality based on the deterrence of individuals, non-superiority should be regarded as a *regulatory* and thus *biopolitical* rationality.

Given the historical continuity of distinctly non-liberal facets of governmental rationality it is perhaps, therefore, inappropriate to speak of neoliberalism as the hegemonic governing principle of the present. Rather it is one element of a mutually-constitutive hybrid of neoliberal *and* authoritarian rationalities existing in a state of philosophical conflict with extant governmental programmes of a more Keynesian orientation. It would not be true to say, however, that the exercise of disciplinary or regulatory power by the state necessarily stems from explicitly authoritarian beginnings. Indeed, as Dean (2010: 156) notes, in many liberal-democratic states 'it is remarkable how much of what is done of an illiberal character is done with the best of bio-political intentions.' In keeping with this statement, whilst this chapter interprets the ROA as a profoundly biopolitical intervention into the social realm, it *does not suggest* that the Act was created with the aim of producing authoritarian power effects. Rather, following Merton (1936), these are interpreted as the unintended, though

possibly foreseeable, consequences of a form of legal rehabilitation which adopts the 'spent model' described in chapter one.

The contemporary governance of crime

Before proceeding to a discussion of precisely how the ROA fulfils a biopolitical agenda, it is necessary to examine briefly the contemporary governance of crime and the rhetoric which accompanies it. This is important because, whilst the chapter's argument is that criminal records serve quasi-penological functions not directly related to the objectives of the criminal justice system, the *legitimation* of the biopolitics of life chances which the chapter goes on to describe is achieved through the official discourse of crime control. This highly politicised discourse of criminal justice (see Drake and Henley 2014) often takes a punitive, populist and moralistic tone (see Bottoms 1995; Pratt 2007) and taps into social attitudes which have been described as 'exclusive' (Young 1999) or even 'vindictive' (Young 2003). However, the rhetorical separation of 'good citizens' from censured lawbreakers not only provides an opportunity for politicians to demonstrate their responsiveness to supposedly 'majority' preferences. It also reinforces the less eligibility of criminalized 'bad subjects' and justifies their exposure to less favourable treatment - including whilst subject to disciplinary programmes of normalisation but also beyond the sentence through the effects of the non-superiority principle.

Indeed, as Garland notes 'the interests of convicted offenders, insofar as they are considered at all, are viewed as fundamentally opposed to those of the public' since a new assumption has emerged in which 'there is no such thing as an 'ex-offender' – only offenders who have been caught once before and will strike again' (2001: 180-181). This situation stems from what Garland (2001:12) has described as the 'culture of control' in late-modern society within which 'a new and urgent emphasis upon the need for security' has emerged. This quest for 'security' demands 'the containment of danger, the identification and management of any kind of risk' has become 'the dominant theme of penal policy' (Garland 2001: 12).

Beck (1992) argued that an adverse consequence of technological and economic progress and its negative 'side-effects' (e.g nuclear accidents and stock market crashes) was a rising cultural prevalence of 'risk' which pervades the governance of the social sphere. Thus, whilst previously, in the industrial or class societies of the Fordist-Keynesian era governments were concerned with the social distribution of 'goods' to the populace (i.e. healthcare, housing and employment), in the 'risk society' they have become preoccupied with social protection against 'bads' such as pollution and, increasingly, the threats posed by crime and terrorism (Mythen and Walklate 2006). The destructive potential of 'manufactured' risks (e.g. the Chernobyl nuclear disaster) has undermined the extent to which societies and the state have previously attempted to predict and manage the potential for harm via insurance policies, welfare practices and legal constraints on individual behaviour.

The sense that long-standing methods of institutional regulation of risk (see Defert 1991 on 'insurance technology') have become inadequate has, Beck (1992) argued, led to a transformation in the nature of governance - a process bolstered by a diminished faith in 'expert' knowledge. Hudson (2003: 44) has suggested that criminal justice practitioners are by no means exempt from this process with failures of parole assessments and stubbornly high rates of re-offending appearing as 'general failures of penal treatments, of courts and of the whole political-professional criminal justice complex'. However, O'Malley (2010: 12) has highlighted the irony inherent in a situation where 'the more that risk becomes the framework for dealing with problems, the more that new risks are revealed, thus generating a vicious circle of fear and securitization'. Zedner (2009: 73), on the other hand, has argued that a 'post-crime logic of criminal justice is increasingly overshadowed by the pre-crime logic of security'.

Garland (1996) argues that governments have responded to the limitations of traditional 'sovereign' crime control strategies through the deployment of an 'official' criminology that is both dualistic and polarising (p.461). This consists of a 'criminology of the self' that

characterises lawbreakers as rationally calculating actors who make a choice to engage in crime and a 'criminology of the Other' that treats lawbreakers as threatening and excluded outcasts. As per neoliberal strategies of responsibilisation, the 'criminology of the self' is invoked to guide citizens into making reflexive choices to mitigate their risk of victimisation through appropriate preventive action. This form of 'government at a distance' (Rose and Miller 1992) implicitly constructs crime as a routine, everyday activity (Felson 1994) that can be anticipated and controlled through situational measures (Cornish and Clarke 1986). By contrast, the 'criminology of the other' demonises lawbreakers by suggesting that they cannot be controlled through routine measures and must, therefore, be incapacitated by the penal system. Garland (1996; 2001) suggests that this characterisation of lawbreakers as 'other' has been effective in raising public hostility to lawbreakers which, in turn, has garnered support for state interventions and punishments which marginalise certain individuals by marking them out as 'risky' or 'dangerous'.

Feeley and Simon (1992: 368) describe a 'new penology' in which the criminal justice system is no longer concerned primarily with punishing or rehabilitating individuals, but with 'identifying and managing unruly groups' who are to become the targets of long-term controls. They highlight an increasing reliance on actuarial or 'statistical techniques for assessing risk and predicting dangerousness' and note that the technologies of control which follow such predictions 'are not anchored in aspirations to rehabilitate, reintegrate, retrain, provide employment or the like. They are justified in more blunt terms: variable detention depending upon risk assessment' (p.370). More recently, Simon (2007) has commented on the extent to which the rationalities of the 'War on Crime' have 'spilled over' into the institutions governing daily life in the US.

The state's mobilisation of technologies which enable the classification of those whom it deems as 'risky' or as 'threats to security' has long been controversial. Hillyard (1993) developed the notion of 'suspect communities' in relation to impact of the *Prevention of*

Terrorism Act (Temporary Provisions) 1974. This referred to the process by which threats are identified based on signs of abnormality and how these signs are then used to legitimate a politics of exception put in place by the state. Given contemporary anxieties about the risk of victimisation (particularly from sexual crimes – see Kitzinger 1999) and the ascendant need for 'safeguarding' of vulnerable groups, it might be argued that PWCs constitute another form of 'suspect community' due to their categorisation as 'risky' or potentially 'dangerous'. However, their exclusion often rests upon biopolitical and regulatory technologies such as the PNC and systems of 'disclosure' and 'vetting'. This contrasts with 'sovereign' strategies such as internment which have historically been adopted in relation to the perceived threat of terrorism.

The creeping securitization of the state, the increasing prevalence of 'risk' and the moralistic and populist tone in which lawbreakers are spoken of in contemporary political discourse all go some way to explaining the increased demand for exemptions from rehabilitation laws such as the ROA. Arguably, as members of society seek to make reflexive decisions about how best to mitigate the 'risks' which they might perceive PWCs as posing, the prospects for legal rehabilitation as a bulwark against post-sentence discrimination become bleaker.

A law of unintended consequences?

As chapter four argued, society has long lacked a clear conception of how and when to cease processes of punishment and control. The avoidance of risk, the maximisation of security and the political capital which be garnered through the rhetoric of penal populism continue to render this expiry of punishment ambiguous. However, a biopolitical reading of this situation enables us to understand the failure of legal rehabilitation to mitigate this problem in a profoundly different way. That is to say that the new 'dividing practice' established by the ROA has facilitated an *exploitation* of the historical ambiguity surrounding the question of penal expiry. It doing so, it has produced 'unofficial' and quasi-penological power effects which impact upon the criminalized denizens of neoliberal imaginary.

Garland (1996: 451) suggests that as part of the new 'criminology of everyday life', the state and its agencies are no long the primary actors with regards to crime control. He suggests that insofar as this criminology 'depicts a criminal subject, this figure is no longer the poorly socialized misfit in need of assistance, but instead an illicit, opportunistic consumer, *whose access to social goods must be barred*' (p.451; emphasis added). This phraseology conveys not merely an incapacitation of lawbreakers through the state apparatus of criminal justice but a much broader *restriction of life chances* exercised through more routine, everyday power relations. Weber (1978 [originally 1922]) utilised the notion of 'life chances' (*lebenschancen*) within his sociology of class stratification, noting that:

> we may speak of a 'class' when (1) a number of people have in common a specific casual component of their life chances, insofar as (2) this component is represented exclusively by economic interests in the possession of goods and opportunities for income, and (3) is represented under conditions of the commodity or labour markets (p.927)

Similarly, Merton (1938: 679) suggested that 'differential access' to legitimate opportunities of achieving culturally valued goals was a structural determinant of anomie and thus of criminal offending (see also Dahrendorf 1979). However, Merton (1936) also recognised that unanticipated or unintended consequences could emerge from purposive social actions intended to cause beneficial social change. As already suggested, the ROA can be interpreted as just such an action. It was *intended* to alleviate the life-long censure of former lawbreakers by making certain convictions 'spent' in law. However, in doing so, its authors unwittingly created a new biopolitical 'dividing practice'. Whilst certain people became classified as 'rehabilitated persons' in law, this had the reverse effect of also classifying those with 'unspent' convictions as 'un-rehabilitated persons', thus legitimising certain regulatory outcomes in the present which have stemmed from the distinction.

The resultant biopolitics of life chances draws upon discourses of rehabilitation, moral desert and popular (mis-)understandings of what it means to be a 'reformed character'. However, it can also encompass the more exclusive rhetoric of 'zero tolerance' and personal responsibility, thus distinguishing a 'law-abiding citizenry' - constructed as 'deserving' of access to social goods and opportunities - from a 'denizen class' of PWCs who may, by contrast, be constructed as 'bad subjects'. The 'punishment' of these bad subjects is subsequently perpetuated through their exposure to a range of exclusionary conducts when attempting to access various social goods.

Logically, this process has the *reverse effect* of optimising the life chances of un-convicted 'good citizens' who are constructed, for example, as preferable candidates for employment or as better lending or insurance risks. Thus, longer-standing ideas such as 'less eligibility' and 'non-superiority' take on new meanings which contribute to the further marginalisation of those with criminal records. However, given the claim that the social marginalisation of PWCs rests largely on biopolitical imperatives rather than juridical requirements (see the distinction made in chapter two between the mostly *de facto* rather than *de jure* 'pains of criminalisation') the distinction between the biopolitics of legal rehabilitation and the ROA as a legal instrument (and thus a *juridical* exercise of power) requires further clarification.

A contemporary right of rejoinder

Foucault (1978) described sovereign or juridical power as a 'right of rejoinder' through which rulers in the ancient world could 'dispose' of the life of political enemies who rose up against them or transgressed their laws. However, the sovereign 'exercised his right of life only by exercising his right to kill, or by refraining from killing' (p.136). This juridical 'power of life and death' operated as a means of deduction (*prélèvement*) through which the sovereign could seize 'time, bodies, and ultimately life itself…[seizing] hold of life in order to suppress it' (*ibid.*). A key institutional form of sovereign power in the present is, of course,

the law which restricts possible courses of conduct through strict prohibition. As discussed in chapter three, Foucault explained how the exercise of sovereign power has since been supplemented by disciplinary and regulatory forms of biopower which target individual bodies and the population respectively. This reconceptualization of power was described as Foucault's 'expulsion' of law from his analyses (see Hunt and Wickham 1994). However, Foucault later clarified that his turn to the study of governmentality was:

> not to say that sovereignty ceases to play a role from the moment when the art of government begins to become a political science. On the contrary…[the art of government] involved an attempt to see what juridical and institutional form, what *foundation in the law*, could be given to the sovereignty that characterizes a state. (2002c: 218; emphasis added)

Thus, the ascent of regulatory forms of governmentality was underpinned by and mutually constitutive with the institution of law.

Certain symbolic elements are central to Foucault's conception of sovereignty. Foucault (1978: 136) comments, for instance, on the symbolism of the sword as the means of 'taking life'. Dean (2010: 166) also suggests how blood takes on a symbolic function – particularly within rigidly authoritarian forms of political rationality such as National Socialism. Indeed, as chapter four noted, the ancient doctrine of attainder which brought about the 'civic death' of those scheduled for execution contained a 'corruption of blood' principle through which the condemned relinquished to the sovereign any titles which their offspring might have otherwise inherited (Saunders 1970: 989).

The condition of being constructed as an 'outlaw' has, therefore, long functioned as a sort of 'weapon of impugnment' which disqualifies claims of equal merit on the part of (former) lawbreakers. Moreover, the 'civic death' of those with convictions is retained with respect to several of the pains of criminalisation as chapter two revealed. Thus, a form of historical continuity can be observed in the evolution of the sovereign's 'right of death' into the present-

day exercise by the state of its juridical 'right of exposure to civic death'.

The authors of the ROA did not, of course, desire the continuation of these power effects in the case of people with unspent convictions. Indeed, as chapter nine revealed, numerous supporters of the Act anticipated an expansion of its principles and believed that it would cover ever larger numbers of PWCs. However, the 'negative' or exclusionary power effects of the ROA were, arguably, foreseeable. This is precisely because, as noted in chapter one, even if a decision had been made to include all PWCs from the outset of the legislation, the 'spent conviction' model of legal rehabilitation exposes former lawbreakers to potential discrimination *whilst they are waiting for their conviction to become spent* (a 'civic purgatory' effect). Therefore, by adopting the 'spent model' the ROA could not give rise to anything *other than* a juridical dividing practice which separated PWCs from the remainder of the population and thus affected their life chances.

From redemption to regulation

By contrast to the unintended *sovereign* power effects on life chances brought about by the artificial state of 'civic death' or 'purgatory', a broader regulatory and biopolitical impact on life chances has also followed the ROA. These effects are not enacted through the juridical status ascribed to PWCs but through the subtle activation of social censure which governmental technology of disclosure induces. That is, practices of 'background checking' and 'safeguarding' draw upon the reflexive decisions and policy-making of autonomous 'free' individuals and collectives (such as employers, landlords and insurance companies) and induce them to apply the utilitarian calculus of non-superiority in their dealings with PWCs. This then guides decisions about recruitment, the offer of tenancies and the calculation of appropriate insurance premiums which have a direct impact upon the life chances of those with criminal records. Such practices, in turn, cultivate a market system in which criminal records are commodified and where demands for access to more and 'better' data are met through processes of state-sanctioned disclosure. Thus, whilst 'acting at a distance' (Rose

and Miller 1992) by facilitating the choices of 'free' actors to participate in the practice of criminal background checking, the state once again engages in a subtle regulation of the life chances of PWCs. Moreover, discriminatory 'ways of acting' (including decisions to expand the number of statutory exclusions from the ROA) are justified by governmental rationalities which regard members of society who have contravened the law as having made a rational choice to do so (and thus of actively forfeiting the life chances which are compromised). PWCs are therefore rendered vulnerable to the exercise of a subtle regulatory power which either 'fosters' or 'disallows life' (Foucault 1978: 138) through exposure to the potential for less favourable treatment. Thus former lawbreakers are placed in a social position of relative precariousness when compared to others (see Standing 2011).

Within this context, the rationale for retaining highly detailed information about criminal history within the PNC (see Larrauri 2014b) expands beyond the 'official' purposes of policing and the administration of justice. Rather, such information is retained because it legitimises the politics of exceptionality which applies to PWCs. Indeed, criminal records have considerable utility as a *moral apparatus for the regulation of life chances* which helps neoliberal governments to responsibilise 'bad subjects' for their conduct. However, discriminatory practices against PWCs also have the effect of improving the relative life chances of 'good subjects' by ensuring that they receive a strategic advantage over those with criminal records when competing for employment or other opportunities for self-advancement. Moreover, when 'structural unemployment' and 'labour market flexibility' exist as central tenets of neoliberal globalized economies (Standing 2009) it is easy to envisage how criminal records produce unofficial and quasi-punitive power effects.

Indeed, previous convictions may now operate not just as markers of potential 'risk' or danger as many scholars have noted (see *inter alia* Castel 1991; Hudson 2003; O'Malley 2010; Mythen 2014), but also as *indices of relative desert*, through which governments can guide the conduct of private actors towards the previously convicted population, thus restricting their

capabilities and potential courses of action in the pursuit of social goods. This process can be administered through various legal and policy instruments which, for example, adjust the period of time it takes for a conviction to become 'spent' or, more commonly, expand the circumstances under which certain convictions can be considered for employment purposes. This administration of the boundaries of redemptive possibility can occur in response to either shifting penal sensibilities or due to conditions of economic 'necessity'.

The designation of denizenship

The biopolitics of life chances also has implications with regards to the meaning and enjoyment of citizenship for PWCs. In Marshall's (1950) classic essay, citizenship was conceived of as a status bestowed on those who are *full members* of a community. For Marshall, citizenship involved an evolution of rights: from *civil* rights in the eighteenth century (e.g. the right to life and liberty, due process and equality before the law); *political* rights in the nineteenth century (e.g. the right to vote, stand in elections, participate in political life and civil society); and *social* rights in the twentieth century (e.g. the right to an adequate standard of living and social protection).

After the Second World War, frameworks for rights emerged such as the Universal Declaration of Human Rights in 1948 and, in 1966, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. Whilst these frameworks and theoretical approaches sought to assert the principle of *universal* rights, the actual enjoyment of rights has tended to be experienced as a facet of *national* citizenship. Indeed, Bobbio (1990) has described how national identity has involved a 'melting' of the notion of rights with modern citizenship. That is, of citizenship entailing one's belonging to an entity such as a sovereign nation and one's entitlement to rights being a function of that belonging.

The conditionality of one's enjoyment of rights upon *national* citizenship has clear implications for migrants and refugees. In his work on the emerging 'precariat' class, Standing (2011: 14) deploys the notion of the *denizen* to convey the idea of a person who 'for

one reason or another, has a more limited range of rights than citizens do'. He also notes how, in Roman times, the idea of the denizen 'applied to foreigners given residency rights and rights to ply their trade, but not full citizenship rights' (*ibid.*). However, Standing also suggests that, whilst *most* modern denizens are still migrants, 'one other category stands out – the large layer of people who have been criminalised, the convicted' (*ibid.*). As already alluded to, this partial enjoyment of rights occurs within the context not only of an elevated concern with 'risk' but also an increasingly politicised law and order discourse which implicitly constructs 'offenders' as having actively forfeited their rights to equal life chances (see Drake and Henley 2014). Moreover, ideological shifts in political discourse about 'criminals' have advanced the view that somehow granting rights too liberally will be to the detriment of 'victims' or the 'law-abiding', further polarising our understanding of what it means to be a citizen (*ibid.*).

Kivisto and Faist have suggested that citizenship '*confers an identity* on individuals by binding them to and defining them as members of a political community' (2007: 49; emphasis added). Processes of criminalisation have the effect of weakening this bond and the convicted individual's membership of the community because a restriction of liberty and suspension of 'full' citizenship has traditionally been justified on the basis that lawbreaking 'breaches the social contract'. Consequently, lawbreakers are placed within the ambit of what Foucault (1977: 11) described as 'an economy of suspended rights' involving, for instance, a restriction of normal engagement with civil society. What remains ambiguous, however, is precisely when and how this 'suspension' of rights comes to an end and when 'normal' citizenship, if indeed it was ever present in the first place, can be resumed and on what terms.

In *A Theory of Justice*, Rawls (2009 [1971]) reworked traditional social contract philosophy to resolve the problem of distributive justice (that is, of how to achieve a socially just distribution of goods in a society). Within his theory, Rawls derived two principles of justice: the liberty principle and the difference principle. The liberty principle supported an 'equal

right to the most extensive basic liberty compatible with a similar liberty for others' (p.53) such as, for instance, the right to run for public office. The difference principle, on the other hand, proposed that social and economic inequalities could only be justifiable to the extent that they are to the benefit of the least advantaged. Within this framework, the achievement of a Rawlsian conception of 'Justice as Fairness' for the sizeable population of PWCs is problematic when it so clearly conflicts with the utilitarian principle 'non-superiority'. That is, the possession of a criminal record in modern society poses difficult questions about the extent to which meaningful citizenship can be enjoyed precisely because the denial of full citizenship is no longer given effect merely for the duration of an individual's sentence, but through the as yet uncharted and expanding array of exclusions and forms of discrimination which continue into *post-sentence* life.

Conclusion

This thesis has offered a Foucauldian problematisation of the social practice of legally rehabilitating lawbreakers in England and Wales. It commenced with an historical overview of the development of criminal record repositories and systems of disclosure and discussed how, in recent decades an expansion of non-police access to information on criminal background has occurred. The 'spent model' of dealing with old criminal records – which allows them to be disregarded or set aside for some purposes – has been compared with other potential methods of legal rehabilitation. However, as the thesis has examined in detail the spent model provides the basis of domestic legal rehabilitation through the Rehabilitation of Offenders Act 1974 (the 'ROA') and the various provisions of the ROA were set out. This legislation has received criticism for its partiality, given that it does not apply to anybody sentenced to a term of imprisonment of more than four years. Moreover, its limited protections are restricted by the wide application of a significant number of exemptions to its effect.

The consequences for people with convictions (PWCs) of a limited and partial form of rehabilitation were also examined by the thesis. Following Sykes (1958) these were described as 'pains of criminalisation' to distinguish their impact from the broadly used concept of the 'collateral consequences of conviction' which pervades much criminological analysis of post-sentence discrimination against PWCs. It was argued that this change of terminology is appropriate because many PWCs encounter discrimination after their formal sentence has ended as a punitive, and thus painful, experience in its own right, even if the reasons for their exclusion or less favourable treatment are not driven by explicitly penological motives. The pains of criminalisation are thus socially harmful aspects of the present and arguably require detailed and equal consideration to other forms of 'punishment'. They were considered in this thesis in relation to functionalist and interactionist perspectives (including the sociology of labelling and stigma). However, it was

argued (following Sumner 1990, 1997) that they are most appropriately analysed as 'censures'.

Following discussion of the methodological approaches of Michel Foucault, whose work on discourse, power and government have been utilised by the thesis to write a 'critical history of the present' with regards to legal rehabilitation, the thesis then set out to provide the context for the emergence of the ROA as a piece of legislation. It did so, firstly, by examining the long-standing historical ambiguity which has existed in English penality with respect to the actual *expiry* of state punishments. Here the thesis concluded that, from early forms of punishment which targeted the bodies and lives of lawbreakers, through to the emergence of a state-operated network of penitentiaries in the nineteenth century (and, indeed, into the present) there has always remained a fundamental uncertainty about precisely when the effects of punishment should cease. This was explained by the gradual displacement of the question of penal *expiry* (particularly in the post-Enlightenment era) by a pursuit of penal *efficacy*. The Benthamite doctrine of 'less eligibility' was seen as particularly influential with regards to this displacement, however the thesis has also begun to explore Mannheim's (1939) notion of 'non-superiority' with regards to the status of former lawbreakers. This under-utilised concept conveys the idea that the position of lawbreakers when they have paid the penalty for their crimes should not be superior to that of non-lawbreakers. This principle holds considerable utility for examining the less-favourable treatment of PWCs in the present.

The thesis then examined the history of what are described here as 'transformative penalities' – a term used to convey the various methods of punishing which have attempted to 'normalise' lawbreakers through practices of 'correction', 'reform' or 'rehabilitation'. However, it was argued that the emergence of transformative penalities may exacerbate the censorious effects of punishment by subjectifying lawbreakers as variously 'idle', 'immoral', 'risky', 'dangerous' or 'pathological'. These negative subject positions thus mark former lawbreakers as suitable targets for less-favourable treatment at the hands of both state and

non-state actors. The social characteristics of those subjected to transformative penalities in the present were then explored in some detail. Unsurprisingly, this revealed an over-representation of poorer and socially disadvantages lawbreakers, often with mental illnesses and histories of low educational attainment who were also disproportionately from black and minority ethnic backgrounds. The gendered aspects of rehabilitation were also discussed briefly.

As a prelude to the chapters which followed, the thesis then examined the 'surfaces of emergence' (Foucault 1972: 45) for the ROA by considering the broader social, economic and political contexts in which it was created. This conjunctural analysis considered the emergence of the modern 'welfare state', the 'permissive society' of the 1960s and the biographies of Lord Longford, Roy Jenkins and Lord Gardiner as 'elite' but pivotal figures in a post-war era of penal reform. However, the years of 'crisis' in the early 1970s were also examined in detail, since these led to a fracturing of the post-war political consensus which subsequently paved the way for more neoliberal and authoritarian governmental rationalities to come to the fore. Following this contextualisation, the thesis then provided – in greater detail than has ever been available previously – an account of the development of the ROA as a piece of legislation. This was drawn from a wide range of previously unexamined archival sources, including the papers of penal reform organisations and several of their prominent members. It encompassed the original conception of the Act by a group of somewhat elite penal reformers in the late-1960s and early 1970s. It also considered the influential 'Gardiner Report' (JUSTICE 1972) which set out the rationale for the ROA, including a contemporaneous critique of the Report which took issue with the conservative nature of the proposals contained within it. The thesis also set out in detail the passage of the legislation through both Houses of Parliament, charting both support for and opposition to the proposals from senior government figures. A vigorous attack on the proposals from certain sections of the media and attempts to counter this attack were also examined in some depth. These

chapters concluded with a 'postscript' to the eventual passage of the ROA which briefly discussed the 'erosion' of the Act through the addition of numerous exemptions from its application.

Having examined the history of the ROA in some detail, the thesis then rejected the possibility of a Whiggish, progressivist reading of the Act which would have situated the legislation as a benign and inherently liberalising measure. This was because, whilst the ROA has been created with the best of liberal intentions, it had unwittingly created the basis of a new and exclusionary form of 'dividing practice' (Foucault 2002a: 326) in society based upon the distinctions which it drew between 'rehabilitated persons' and those with unspent criminal convictions. The thesis therefore argued, in the final chapter, that the Act is best understood as a profoundly biopolitical intervention into the social realm. It is suggested that through the subjectification of the 'rehabilitated person' within the ROA, a new biopolitics of life chances is applied to PWCs which renders certain forms of exclusionary conduct thinkable and practicable. These 'ways of acting' are underpinned by neoliberal (and authoritarian) governmental rationalities which stress competition, 'zero tolerance' and personal responsibility, thus distinguishing a 'law-abiding citizenry' - constructed as 'deserving' of access to social goods and opportunities - from a 'denizen class' of PWCs who are, by contrast, constructed as 'bad subjects' whose 'punishment' is then perpetuated through their exposure to a range of exclusionary conducts. This biopolitics has the reverse effect of optimising the life chances of un-convicted 'good citizens' who are constructed, for example, as preferable candidates for employment or as better lending or insurance risks. Thus, longer-standing ideas such as 'less eligibility' and 'non-superiority' take on new meanings which contribute to the further marginalisation of those with criminal records. It is argued that through the careful administration of 'rehabilitation periods' and exemptions to the application of the ROA, the state delimits the boundaries of redemptive possibility for PWCs and thus 'disallows life' (Foucault 1978: 138) as it deems appropriate.

One obvious critique of such an argument is to ask why the ROA has not simply been repealed if contemporary governmentality is as authoritarian and exclusionary in its power effects as the ascent of a 'biopolitics of life chances' might suggest. In relation to this point, it is sufficient to say (following Gramsci 1971) that the process of creeping authoritarianism and neoliberal hegemony is not *and can never be* a completed one. Neoliberal governmentality, whilst dominant in many advanced democracies is but one form of order in competition with other potential courses of action where less punitive and more socially 'liberal' sensibilities remain. Moreover, due to the unintended consequences of the ROA described here, the Act is arguably of such *utility* to the governmental administration of PWCs in the present that it is hard to envisage it being dispensed with since it provides such a convenient metric for determining the rights and entitlements of those classified as either 'deserving' 'undeserving' subjects. To reiterate the judgment in *T.Q. v. Criminal Injuries Compensation Authority [2015]*, a tribunal recently reached a decision to deny compensation to a woman with unspent convictions based on the reasoning that: '[i]n numerous areas of government policy making, it is *legitimate and appropriate for those with unspent convictions to be treated differently* to those with spent convictions' (para. 76.5; emphasis added).

A further criticism of the critique of the more authoritarian power effects of the Act contained in this thesis might centre around the *expansion* of legal rehabilitation offered by the 'reforms' contained within the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 (see chapter one). However, in relation to this point it is worth noting that when sentence inflation in the forty years since the ROA first took effect is accounted for (see Easton and Piper 2009; Ashworth 2010) and the (by now) *very* broad range of exemptions from the Act is considered, little if any difference in the social status of PWCs is achieved. Indeed, the myriad exemptions ensure that PWCs are effectively channelled into a very narrow range of (lower paid) potential employment. Moreover, the amendments did not go anywhere near as far as those originally proposed (see Home Office 2002) which even then would have excluded those sentenced to indeterminate terms from the limited protections of

the Act. The 'reforms' of the LASPO Act 2012 might therefore be regarded as mere technical adjustments to the 1974 Act and thus as fully in keeping with the theory of biopolitical regulation which has been tentatively espoused here.

One final criticism of the thesis might be that no viable alternative to the current practice of legal rehabilitation in England and Wales is offered. However, this thesis has not set out from the starting point of seeking a possible solution to the problem of legal rehabilitation. As Foucault remarked of his own problematizations of modernity:

> I am not looking for an alternative; you can't find the solution of a problem in the solution of another problem raised at another moment by other people. You see, what I want to do is not the history of solutions, and that's the reason why I don't accept the word "alternative." I would like to do genealogy of problems, of *problématiques*. My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper- and pessimistic activism. I think that the ethico-political choice we have to make every day is to determine which is the main danger. (Foucault 1983: 231-232)

To paraphrase Foucault, this thesis concludes not that the ROA and other practices of legal rehabilitation are 'bad' but that they are often potentially 'dangerous' since, as has been demonstrated here, the liberal intentions of such practices can all too often give way to the exclusionary biopolitical imperatives of the present. The task then for future research is not to proffer alternative methods of dealing with the 'problem of old convictions' but to explore further the contemporary boundaries of redemptive possibility by exposing to critical scrutiny both existing and new 'pains of criminalisation' and further interrogating the unresolved problems created by the twin doctrines of 'less eligibility' and 'non-superiority' in the present.

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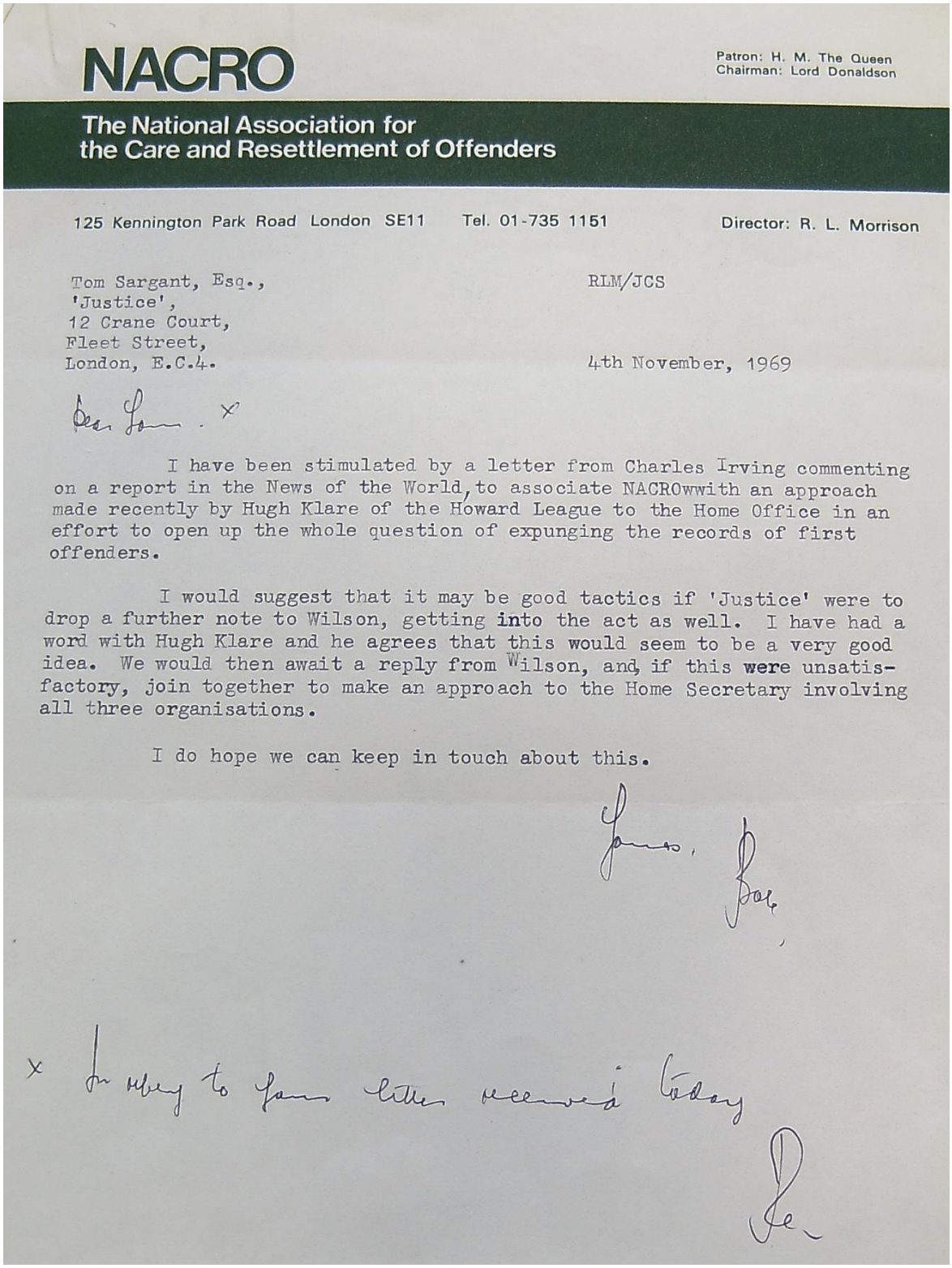


NACRO

Patron: H. M. The Queen
Chairman: Lord Donaldson

The National Association for
the Care and Resettlement of Offenders

125 Kennington Park Road London SE11 Tel. 01-735 1151 Director: R. L. Morrison

Tom Sargant, Esq.,
'Justice',
12 Crane Court,
Fleet Street,
London, E.C.4.

RLM/JCS

4th November, 1969

Dear Tom. x

I have been stimulated by a letter from Charles Irving commenting on a report in the News of the World, to associate NACROwwith an approach made recently by Hugh Klare of the Howard League to the Home Office in an effort to open up the whole question of expunging the records of first offenders.

I would suggest that it may be good tactics if 'Justice' were to drop a further note to Wilson, getting into the act as well. I have had a word with Hugh Klare and he agrees that this would seem to be a very good idea. We would then await a reply from Wilson, and, if this were unsatisfactory, join together to make an approach to the Home Secretary involving all three organisations.

I do hope we can keep in touch about this.

Yours, Bob

x In reply to Tom's letter received today

Appendix 1: Letter from R.L. Morrison, Director of NACRO to Tom Sargant, Secretary of JUSTICE, 4th November 1969
(Source: Hull History Centre U DJU/8/13)

Appendix 2: The case of 'M' (Source: Hull History Centre U DJU/8/13)

14th December 1969

Dear Mr Sargant,

I read with great interest you letter in the "People" of today's date. I too find myself in the same position as the unfortunate many you refer to in your letter, in that my livelihood has been affected by an offence committed seven years ago.

At this very moment I am contemplating a business venture, in which I am prepared to invest my complete savings, but I am warned by my solicitor that there is a risk that my conviction may be held against me, despite the fact that I have since had a "clean" life.

As you will appreciate, this leaves me feeling rather desperate.

I was unaware of the existence of "Justice" and indeed I may be jumping to the wrong conclusion, but my reason for writing was to see if in some way you could possibly help me, or recommend any organisation that could help me.

I find that cold statistics in black and white read by unsympathetic people are often dismissed without any consideration whatsoever. Whereas an organised body, whose aim is to assist such as myself, would perhaps be prepared to listen sympathetically and assess the facts in an unbiased way, and perhaps help me to prepare a solid case for presentation to the proper authorities at the right time.

I would be extremely grateful, for any assistance or advice you could extend in any direction.

Yours sincerely,

'M'

22nd December 1969

Dear 'M'

Thank you for your letter of 14th December – I can reply only briefly as one of my staff is away.

There is really nothing I can do to help or advise you in your particular circumstances – you can only rely on what your solicitor tells you and no machinery exists at present. I should perhaps warn you on one point – which is that if you start in business you should be careful to declare your conviction to your Insurance Company otherwise they may repudiate any claim if they discover it.

Yours sincerely,

Tom Sargant

Appendix 3: The case of 'J' (Source: Hull History Centre U DJU/8/13)

15th December 1969

Dear Mr Sargant,

I was interested in your letter in Sunday's issue of the 'People' – particularly your last sentence.

In my own case, I was convicted, on a breathalyser and blood test, on July 25th 1968, fined, with costs and deprived of my licence for a year, after taking solicitor's advice to plead guilty.

The police stated that I had collided with a lamp-post, although in actual fact I had struck the pavement kerb, snapped off the near-side front wheel wish-bone and scraped the side of the lamp-post with the car body. In fact, after repair of the wish-bone and some panel beating of the side-panels the care continued to roadworthy for another year.

As to the fine and deprival of my licence I have no complaints- justice was done according to the law.

However, getting back my licence at the end of the years' ban and trying to obtain reasonable insurance was another story.

The girl clerk who I approached about renewal of my driving licence stated that I could renew it on the 24th July, 1969 and not therefore necessarily on the 25th July as I had thought. Application on the 24th July met with a refusal as another clerk stated that I could certainly renew on the 24th July, after midnight – but as she carefully explained the taxation office would not then be open.

As far as my insurance was concerned, my local agent with whom I had dealt for over 20 years without any claim, informed me that no company that he knew of locally would undertake to insure me under any terms except my former company, The Cornell, whose only offer which I was obliged to accept was restricted third party for an annual premium of £25 – this covered no passenger liability at all and met on the bare requirements of the law. My own teacher union insurance company subsequently offered me third party cover for £50.

In addition to this my licence has been endorsed with full details of the offence which I have been told will remain for ten years.

I would state that I have been driving motorcycles and cars since 1932 without a single offence recorded, so I feel that this proves to some extent that I was [sic], and am not, a persistent and habitual 'hard' drinker – the actual lapse being due to ill health and depression for which I had attempted a drastic and foolish cure.

Since returning to driving I have experienced so many situations where my own discretion has saved serious accidents and the frequent flouting of all the laws by those eagerly sought by the insurance companies for low premiums that I feel that your last sentence applies in my own case very aptly.

Certainly my attitude to British justice has changed considerably – and hardly for the better.

Yours sincerely,

'J'

Appendix 3 (continued): The case of 'J'

24th December 1969

Dear 'J'

Thank you very much for your letter of the 15th December which I have read with some sympathy.

So far as insurance companies are concerned, there is really no useful comment that I can make. I know that insurance companies demand exorbitant premiums for persons whom they consider to be bad risks, but this is only natural commercial prudence.

I should imagine that after you have driven for a further year without incident your own company may take a more reasonable view of the matter.

On the question of the duration of the conviction, I have more sympathy and I hope that eventually something will be done about this.

Yours sincerely,

Tom Sargant

Appendix 4: The case of 'H' (Source: Hull History Centre U DJU/8/13)

15th December 1969

Dear Mr Sargant,

This is 'H____ the Pen' writing.

That was – still is – my nickname. I am now an OAP and a disabled person. I live happily with my wife M_____ who I married on Aug. 4th 1951 – 5 weeks following my release from my last sentence of 6 years for burglary. I spent about 8 1/2 years inside, but after 1951 I was 'nursed' back to decency and respectability by a wife in a million, she is a woman and a half in her own right!

But although I have never been inside since July 1951 I have had to live like a monk because no-one would ever employ me, the DPA never helped. NACRO helped me in 1956 after ex-Justice Streatfield spoke up.

I am interested in writing – creative – although I've had no success I still am trying, nowadays I am rewriting an indictment on the prison system as I knew it. NACRO bought me a second-hand Imperial Typewriter through a Probation Off. – even NACRO could not trust me to purchase it with their donation!

Needless to add I am poor – recently I applied for a grant to help me decorate this house but the Dept. Health and Social Security would not help – in my dossier at their local office 69 Carlton Road Barnsley are details of a crime I committed in 1941 – I served a short sentence for committing wilful damage to the then Public Assistance Board's property. I served two months. Ever since then I have made two appeals to the local Tribunal against the decision to refuse me similar grants and the Tribunal having read in my dossier about my crime, refused me my appeal. As you are connected with Justice I decided to comment re. your People letter.

In June last I was before Barnsley Court charged with stealing a 2/9 tin of meat – I did not steal it. A rich lady was interested and she paid for a Barrister to defend me. I was found guilty after perjured evidence but I could not prove it. That is the only stain on my character since 1951.

I trust you won't mind my letter. The typewriter referred to is still here but it needs repairing but NACRO are deaf to my approach – I wrote them once.

Sincerely,

'H'

P.S. Incidentally, I wish you the compliments of the season.

Appendix 4 (continued): The case of 'H'

4th February 1970

Dear 'H'

I do apologise for not answering your letter before, but I was abroad when it arrived, and overlooked it on my return.

I appreciate the difficulty which you are having over the grant to decorate your house. However, it may well be that the Tribunal's refusal is not entirely due to your 1941 conviction but many factors have to be taken into account.

If you like, I will write to your local branch but I do not really hold out any hope of getting anything done. If you would like me to write, would you send me the address of your local branch.

Yours sincerely,

Tom Sargant

Appendix 5: The case of 'S' (Source: Hull History Centre U DJU/8/13)

15th December 1969

Dear Sir,

As an ex-prisoner who has led an honest life since my release in June 1965 I would like to bring to your attention the predicament I am in because of my past record, and also because I feel that there may be many thousands of similar people in the same position I now find myself in.

The facts are these:

1. In 1961 I was convicted of conspiracy to receive stolen motor cars along with other co-defendants, and received five years imprisonment. I was moved to Parkhurst for a time and during this period my wife and children were assisted by local people to settle here so that I could see them regularly.

Towards the end of the sentence I went to Norwich on a training course for City and Guilds certificates, and was released on the 21st June 1965, returning to my family on the Isle of Wight. I immediateley [sic] obtained work, an in Feb 1966 I was able to get the backing of a local firm, who lent me nearly one thousand pounds to start up in business, selling their products (Ice Cream). The money was repayable over three years, but by a rapid expansion and hard work I was able to settle it in full in about eighteen months.

One of the terms imposed by this firm which lent the money was that to protect their interests they insisted a suitable insurance was taken out to cover me against illness, etc. I was introduced to the local agent for the Royal Insurance Company, a Mr ____, who fixed up the necessary policies. At no time was it ever mentioned or indeed suggested that I was a man with a past criminal record, nor was there any question on the proposal forms regarding this.

My wife and I expanded, we obtained the Franchise for the Mister Softee ice cream firm (Lyons Ltd) for a period of fifeteen [sic] years, and started running mobile Fish and Chip vans as well. In March 1968 we opened a very successful Fish and Chip restaurant in Ryde at the above address, and also ran a coachbuilding firm which specialised in converting vehicles into mobile shops, etc, and have built over 97 such cans, which have been sold to all parts of the country, and also abroad. During this expansion we naturally insured the various businesses with the Royal Group and I now come to the point I wish to raise, which directly concerns the action of this insurance company.

2. On 31st July this year there was an accidental Calor Gas explosion at my Bullen Road premises, which completely destroyed the building and all contents. The insurance cover was assessed at nearly £8000 on the fire risk for loss of contents, and £7000 for loss of profits. I engaged a well know firm of loss adjusters to assess the exact damage, and their report was duly submitted towards the end of August to the Royal Group for payment.

After a long wait I made enquiries as to why we had heard nothing from the Royal and it took several letters from my solicitor (Mr W_____, Walter Grey and Co, Thanet Chambers, James Square, Newport, IOW) to ascertain the reason for non-payment of the claim.

A letter was received from the solicitors acting for the Royal in which they stated that they had been informed that I was a man with previous convictions, and that because they had not been declared when I sought insurance they were treating the policy as void, not only the ones relating to the coachbuilding business, but also all my other policies, such as motor traders, Fish and Chip shop cover etc.

Appendix 5 (continued): The case of 'S'

We took legal advice from counsel on the point, and the opinion was that our case is very strong, and with this information I contacted my local MP, Mr Mark Woodnutt, who was horrified to learn of the action of the Royal in this case, and he wrote personally to Sir Paul Chambers, their managing Director, in very strong terms. Sir Paul promised to look into the case himself, and at the same time my solicitors issued a high court writ, claiming the value of the policies. A defence was entered (my convictions) also a counter claim for £179 which had been paid out on a fire in the fish shop when a pan caught alight, and the whole matter may take months to come to court.

As a result of this I am faced with ruin, a finance company has issued a writ in respect of vans which were destroyed in the fire, which although not on HP to me were in my possession as agents for the company, and it is only on Mark Woodnutt's intervention that the Sheriff has not executed the writ. I have lost all my capital in the fire, everything was paid for such as tools, equipment, a fleet of ice cream vans etc, all of which were destroyed, so I have been trying to stave off creditors and live on the proceeds of the Fish shop.

Last week Mark Woodnutt managed to persuade Sir Paul Chambers to instruct his solicitors to meet my solicitors in London with a view to settlement, and the result was an offer of £4000 ex gratia, which was of no use at all.

The Daily Mirror Special reporter for the southern area (Mr Sandiford, Southampton Office) has all the facts, and has investigated the case, and the would like to publish the story, but of course it is now sub judice, unless I take the writ out of court.

It is said that when a man has served his time he has paid his debt, but this case proves just the opposite, I have earned the respect of very decent well respected local business people, who know of my past, and they are all shocked at the treatment meted out to me in this case by a well know company, and I would be thankful if there is anything that can be done to get some action in this case very quickly as I cannot hold out much longer, and I think the insurance company are banking on this as a way out of their present situation.

I have agreed that I would accept the sum of £10,000 in full settlement, and withdraw the writ, but I hold out no hope of quick settlement, and my position is just getting worse, so if there are any channels in which you can raise this matter I would be very grateful, and the people mentioned in this letter will readily confirm what I have said.

Yours sincerely,

'S'

Appendix 5 (continued): The case of 'S' (Source: Hull History Centre U DJU/8/13)

22nd December 1969

Dear 'S'

Thank you very much for your letter of 15th December. This is really a very sad and disgraceful case but as I told you on the telephone it is very difficult for me to give you any worthwhile advice except that come what may I feel that you should not, at least for the time being, accept the £4,000 which has been offered to you.

What I have in mind is to send a copy of your letter to my Chairman Lord Shawcross asking him if he himself feels disposed to take the matter up at top Director level. I cannot guarantee that he will be willing to do so as he is always averse to JUSTICE taking up individual cases but I will do my best in the matter.

Yours sincerely,

Tom Sargant

22nd December 1969

Dear Lord Shawcross,

As a result of a T.V. interview I gave on the subject of the handicap of old convictions and the need for some scheme to erase them after suitable periods, I have received a number of illustrative letters and also the enclosed letter which, while not strictly relevant to the point I was trying to make, is very disturbing.

You will see that Mr S_____'s M.P. has already approached Sir Paul Chambers with some result but I feel very strongly that further approaches ought to me made to him at high level not to repudiate Mr S_____'s claim and to void all the other policies. I understand that no question has been raised of any dishonest action on the part of Mr S_____ and that his business methods and successes are highly respected.

It is true that he can bring an action but this must involve him in great expense at a time when most of his working capital has been wiped out and he will defeat his own successful efforts to re-establish himself as an honest citizen if he takes the action to court with the resulting publicity. I wonder therefore if you will consider approaching Sir Paul Chambers personally on the matter.

Incidentally, this raises an important point in that anyone with a conviction who has not declared it on insuring his house, his car or his business, is liable to have his policy repudiated. There must be thousands of people who have put themselves in this position unwittingly.

Yours sincerely,

Tom Sargant

Appendix 5 (continued): The case of 'S'

26th December 1970

Dear Sir,

Thank you for your letter of the 6th Dec. re. the trouble I had with the fire insurance, the outcome was as follows:

1. We issued a writ in Chancery, but because the law lists were full there was no hope of a hearing until about May/July this year, and as I was being forced into bankruptcy I had to accept an offer.

2. Mark Woodnutt had been in direct contact with Sir Paul Chambers the Chairman of the Royal Group, and eventually an offer of £6000 was made (our claim was £14000), and this was accepted.

3. All the sum was accounted for and we were left with nothing, and I am still paying of the debts incurred at the rate of £92 per week from our Fish and Chip shop takings.

4. We can get not insurance anywhere, the Royal cancelled all our policies and the Fish and Chip shop has not been covered since Feb this year. Mark Woodnutt was not able to find any company willing to accept us.

I should like to come and address a committee on the whole matter, there is a serious loophole in the insurance laws as they stand, had I not had the assistance of Mark Woodnutt I feel we might very well have lost all, through no fault of mine, except that of being an ex-prisoner.

I look forward to hearing from you in the near future.

Yours sincerely,

29th December 1970

Dear Mr S_____

Thank you for your letter of the 26th December from which I am very sorry to learn that in the end you had to settle for so small a sum. I did hope that the tactics that I suggested to your solicitors might obtain a little more.

I note that you would like to come and talk to the Committee which is considering this problem and I will certainly bear this in mind and pass the details of your case on to Lord Gardiner who is chairman of the Committee. When he was Lord Chancellor he was given assurances that insurance companies would not repudiate claims on technical grounds unless there was evidence of dishonesty.

I did rather hope that your solicitors would come back to me before they finally reached a settlement.

Yours sincerely,

Tom Sargant

Appendix 5 (continued): The case of 'S'

29th December 1970

Dear Gerald

Re: Previous Convictions

I am enclosing details of a case which might be of particular interest to you, involving the repudiation of an insurance claim.

Hartley was unwilling to pursue the matter with Sir Paul Chambers because he was involved with him over something else and I therefore consulted Philip Kimber. He put me on to a report by your Committee which decided against any such legislation in respect of assurances from the Insurance Companies Association that they would not repudiate claims on technical grounds unless there was evidence of dishonesty.

Philip told me that he had successfully invoked this in a similar case and I advised S_____'s solicitors to do the same.

I then heard nothing from them and received S____'s last letter in result of an enquiry from me as to how the matter had eventually been settled.

It would appear that apart from the actual subject of our Working Party, there is a need for reform of the insurance laws and I wonder if you would like to give this your consideration?

Unfortunately I have temporarily mis-laid the rest of the correspondence in this case, and I hope you will not find S_____'s original letter too difficult to read,

Yours sincerely,

Tom Sargant

Appendix 5 (continued): The case of 'S'

12th January 1971

Dear Tom,

Many thanks for your letter about Mr S_____ and enclosures which I return.

I thought from what you said that the case was one in which the insurance company had insisted on the implementation of an arbitration clause, but I am not clear this is so.

I enclose a copy of the Law Reform Committee's Report, and you will see the undertaking which we obtained from the British Insurance Association of Lloyds in paragraph 13.

I myself thought that we ought to report in favour of legislation enacting the recommendations contained in paragraph 14 of the Report, but I could not persuade the Committee to go further than to say that if legislation was desirable this was the form which it should take.

One of the difficulties is that the Board of Trade have always insisted that insurance law is a matter for them, and there is, I am afraid, a good deal of jealousy on their part both of the Lord Chancellor's Office and of the Law Commission.

I agree that the position of insurance is of considerable importance as this case illustrates, and our Committee should clearly pay particularly attention to it.

We have, of course, to bear in mind that insurance is a contract, and that it is difficult to prevent anybody contemplating making a contract from asking such questions as they may think relevant.

Yours ever,

Gerald

Appendix 6: The case of 'R' (Source: Hull History Centre U DJU/8/13)

15th December 1969

Dear Mr Sargant,

I was interested to read your letter in The People regarding convictions and wiping the slate clean. Have you ever had any response from the Home Office in answer to your submissions?

I am aged 46 years and up to the present I have an absolutely clear record. Until August of this year I held a responsible position. I am now awaiting trial at the London Sessions on a minor charge having pleaded to go to trial. The case I understand will not be heard until March or April 1970. I might add I am not guilty of the charge.

Due to the fact that a small item appeared in the local press and the fact that I have told the truth in interviews, up to the present I have been unable to obtain another appointment. People have also told me that if I am found guilty and receive a fine this will bar me forever from:

(a) Taking up a government appointment

(b) Emigrating to say Australia or Canada.

Up to 1960 I was a Regular Officer in the Army and since 1960, the General Secretary of a large charity. I must apologise for writing to you but I would appreciate your comments.

Yours sincerely,

R_____

PS. Please excuse the writing.

PPS. From my experience over the past few weeks I can now see how normal persons are turned into criminals and I am pleased to see that there are certain organisations such as your own, continually pressing for reform.

16th December 1969

Dear 'R'

Thank you for your letter which has just come to hand.

You tell a very sad story but it is difficult to say how I can help you as no doubt you are being defended by Solicitor and Counsel who would not appreciate my intervention. I would, however be interested to know about the nature of the charge that is brought against you, and how it arose.

The most important thing is, of course, that you should be efficiently represented.

Any reaction from the Home Office to the representations made are likely to be very prolonged as, to my knowledge, the problem had never been given serious consideration and the wheels of legal reform turn very slowly.

Yours sincerely,

Tom Sargant

Appendix 7: The case of 'E'

18th December 1969

Dear Sir,

Re. your letter in last Sunday's 'People' and my telephone conversation with you.

After serving in the R.A.F as a tradesman from 1940-46 I went back to the London Transport but failed to settle down and after 12 months bought an old type (??) 4 wheeled coffee stall with shafts and started daytime business in Bermondsey's dockland where my father had spent all his working life and my mother's family have lived for at least 200 years.

From this I progressed to 2 cafes and 1 licenced betting shop, after 22 years of being self-employed and at 56 years of age I decided owing to heavy expenses and high taxes to sell 1 café and the betting shop and retain the other café which was and still is let at monthly rent, my idea was to take things a little easier and apply for a situation with regular hours. I applied to the GPO for a position as a trainee telephonist and on my first weeks training was quite pleased with my progress – and so was the instructor – and I was the eldest in the class by a number of years. At the start of my second week I was called in to the supervisor's office who told me HQ wanted to talk to me on the 'phone. She left the office and a person the other end asked if I had filled in my application form correctly, I assured him I had. He pointed out that to the question 'any convictions' I had entered 'none', I agreed this was incorrect and that I was fined £600 in 1964 for receiving, he said he would have to make further enquiries, I asked him not to trouble and handed in my resignation the same morning.

A few weeks later I received a reply from Ranks Leisure Tours after applying for a position as a trainee club and bingo manager. I had an interview 4-12-69 at their offices in Whyteleaf South Surrey after travelling from my home at London Bridge. The interview was progressing satisfactory and I really believe that I had got the hob – the application form had not asked for 'any convictions'. At the near conclusion of the interview with recruitment officer Miss V_____ she said that during the training period of 3-4 months I would be asked to sign a declaration saying that I did not have any convictions and that this also applied to juvenile offences. I replied well that counts me out, she was extremely disappointed and said she must see someone else, she returned 10 minutes later and was very sorry but the interview was finished…

I am not asking you or anyone to ask Ranks to reconsider their decision or to find me a job, I have an excellent character and can provide excellent references from the police, most firms from London Bridge to Tower Bridge and my MP as a friend from boyhood and because I vote for him on election days. I made one mistake in 56 years and have never been under suspicion and at my age consider myself fortunate in receiving a reply to my application for a job. I came out of Ranks wondering what it was all about and asked myself what was I – a cast out and a no good citizen? I do not have to worry about a job, but how does a man, maybe with a family and a record, feel when he gets similar treatment? Most people in his position must turn to further crime or scrounge on social security.

Trusting this letter gives some strength and maybe a little help in your fight for justice.

Yours faithfully,

'E'

Appendix 7 (continued): The case of 'E'

19th December 1969

Dear 'E'

Thank you very much for your letter of 18th December amplifying the telephone account you gave me of your experiences.

This is most helpful to me although I think we are agreed that I cannot assist you in any way.

I am however a little concerned to learn that an organisation like Rank are not willing to employ any person with previous convictions, and I may perhaps make some enquiries into this.

Yours sincerely,

Tom Sargant

Appendix 8: The case of 'K' (Source: Hull History Centre U DJU/8/13)

8th July 1970

Dear Sir,

Having just read an article of yours in an old copy of the 'People' I would also like to have my 'slate wiped clean' from previous convictions committed more than 20 years ago as a juvenile.

Especially with less than 5 years to do of a 22 year engagement when the majority of application forms for employment state that all convictions by a court must be declared, the main form in question is the one to join the Australian forces.

From your experience what are the prospects of joining the Australian Army or of emigrating to Australia having served several terms of probation and a period in an Approved School, but all as a juvenile.

Also how far have the Home Office managed to get with studying this problem. Hoping to hear any further details you might have on the subject.

Yours sincerely,

'K'

14th August 1970

Dear 'K',

Thank you very much for your letter of 8th August.

Your case is certainly a very good example of the problem referred to in the "People".

We are setting up a committee to work out a scheme to put to the Home Office and in the meantime there is nothing I can do to help you.

Unfortunately I have no knowledge at all of the attitudes adopted by the Australian Army, except that in a recent case a man was accepted for immigration but refused an accepted passage.

If I am able to make some unofficial enquiries, I will let you know.

Yours sincerely,

Tom Sargant

FORGET IT!

2335

It's time the law knew when to wipe out a man's past

MR. X had a guilty secret. As a young man, he had committed a sex offence. It was hardly the sort of thing he could forget but he did manage to live it down . . . almost.

By PETER OAKES

He became a partner in a successful business, married and settled down to life as a perfectly respectable and respected member of his community.

But he was in for a savage let-down.

For he found himself in court on a minor motoring offence. And his "record"—that solitary mistake—came out. After **TWENTY YEARS.**

That is the procedure in Britain's courts, renowned as the fairest in the world.

Buried

When a person has been found guilty, the whole of his adult criminal record can be read out. Whether it is relevant to the offence before the court or not. And when it has long been buried.

In no other democratic country in western Europe is such a cruel system retained.

At last, three eminent British groups concerned with justice and the welfare of offenders are now planning to press the Home Secretary to limit the time a man's record can be held against him.

They are: Justice, the British section of the International Commission of Jurists, whose chairman is former Attorney General Lord Shawcross; the Howard League for Penal Reform; and the National Association for the Care and Resettlement of Offenders.

In practice, most prosecutors do not in fact produce unnecessary and unfair details of a man's record. Judges also discourage it.

But an increasing number of cases like that of Mr. X are coming to the attention of the Howard League.

Last year a driver at Halifax, Yorks., was jailed for driving offences. In court, a 16-year-old conviction for murder was dredged up with his record.

There was the case, too, of Mr. Y, who ended up in his local court for having no L-plates on his motor bike.

Hardly a serious offence—but it had serious consequences. For it was publicly announced that he had been convicted for indecent exposure some years before.

"This must affect a few thousand people we never hear about," said Mr. Hugh Klare, secretary of the Howard League.

"Something must be done—now."

Erased

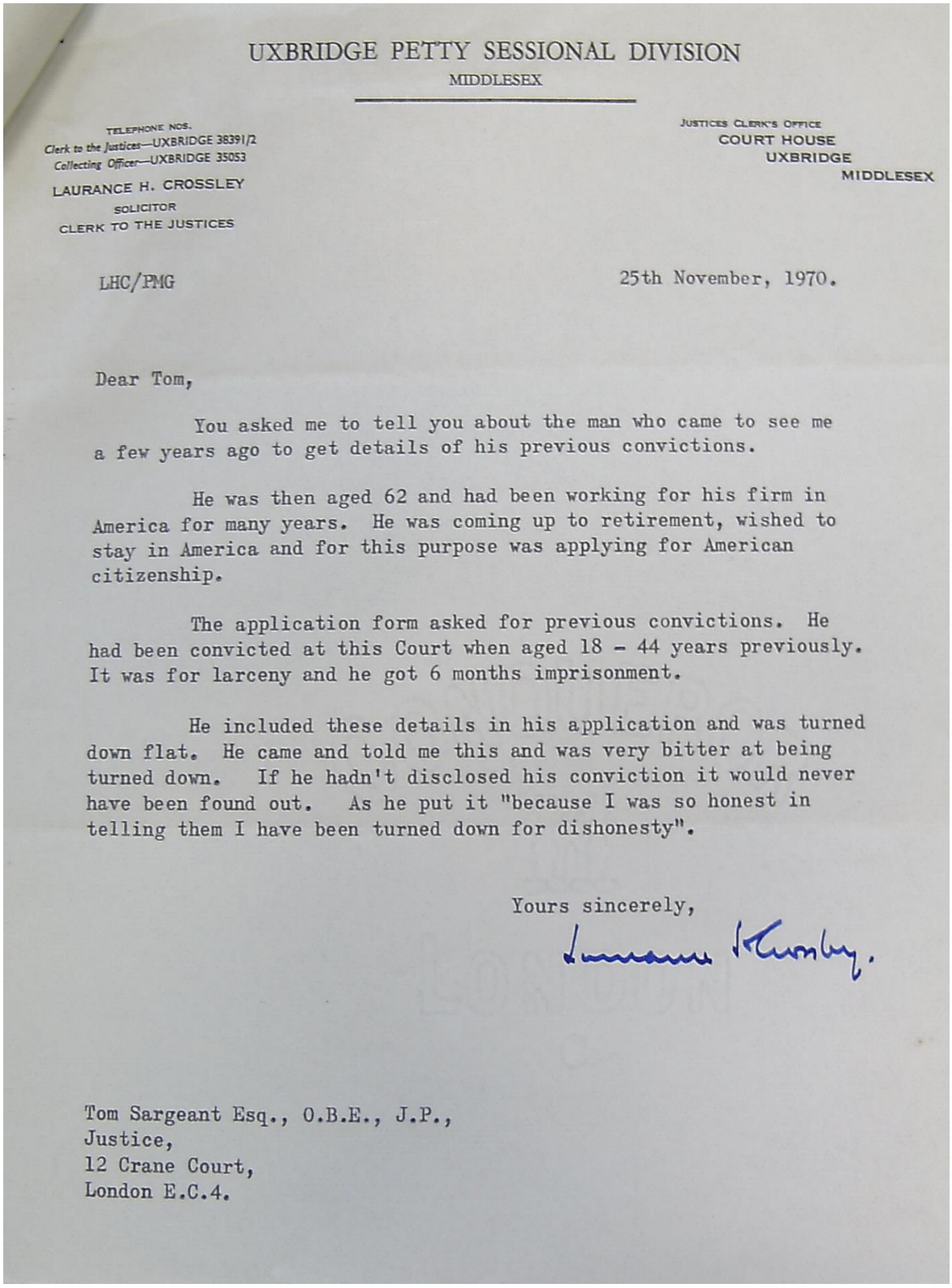
Mr. Tom Sargent, secretary of Justice, said: "The provisions of other countries vary, but the general principle is that minor convictions are erased after two or three years, 'average' offences after five years and more serious offences after 10 years from the date of release from prison.

"In some countries these erasures are automatic. In others, they are obtained by application to the court on proof of good behaviour."

The new Home Secretary, Mr. Reginald Maudling, could well give urgent consideration to some similar system for Britain.

For it is no part of justice to punish someone . . . and hold it against him for life.

Appendix 9: Article from *The People* newspaper announcing the formation of the Joint Working Party on Previous Convictions, 12th July 1970 (Source: Hull History Centre U DJU/8/13)



UXBRIDGE PETTY SESSIONAL DIVISION
MIDDLESEX

TELEPHONE NOS.
Clerk to the Justices—UXBRIDGE 38391/2
Collecting Officer—UXBRIDGE 35053

LAURANCE H. CROSSLEY
SOLICITOR
CLERK TO THE JUSTICES

JUSTICES CLERK'S OFFICE
COURT HOUSE
UXBRIDGE
MIDDLESEX

LHC/PMG

25th November, 1970.

Dear Tom,

You asked me to tell you about the man who came to see me a few years ago to get details of his previous convictions.

He was then aged 62 and had been working for his firm in America for many years. He was coming up to retirement, wished to stay in America and for this purpose was applying for American citizenship.

The application form asked for previous convictions. He had been convicted at this Court when aged 18 - 44 years previously. It was for larceny and he got 6 months imprisonment.

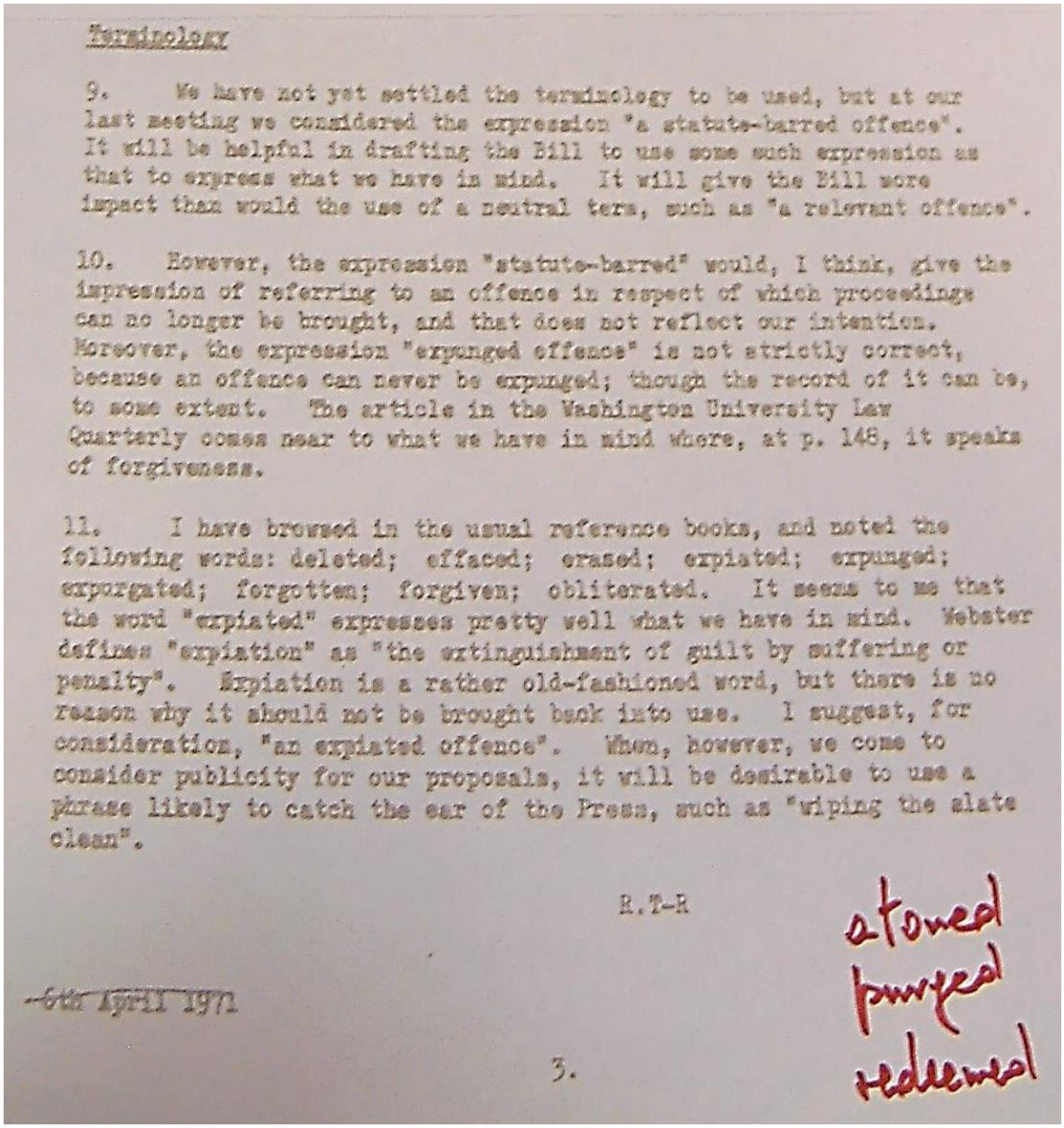
He included these details in his application and was turned down flat. He came and told me this and was very bitter at being turned down. If he hadn't disclosed his conviction it would never have been found out. As he put it "because I was so honest in telling them I have been turned down for dishonesty".

Yours sincerely,

Laurance H Crossley.

Tom Sargeant Esq., O.B.E., J.P.,
Justice,
12 Crane Court,
London E.C.4.

Appendix 10: Letter from Laurance Crossley, Clerk to the Justices, Uxbridge Magistrates Court to Tom Sargant of Justice, 25th November 1970 (Source: Hull History Centre U DJU/8/13)



Terminology

9. We have not yet settled the terminology to be used, but at our last meeting we considered the expression "a statute-barred offence". It will be helpful in drafting the Bill to use some such expression as that to express what we have in mind. It will give the Bill more impact than would the use of a neutral term, such as "a relevant offence".

10. However, the expression "statute-barred" would, I think, give the impression of referring to an offence in respect of which proceedings can no longer be brought, and that does not reflect our intention. Moreover, the expression "expunged offence" is not strictly correct, because an offence can never be expunged; though the record of it can be, to some extent. The article in the Washington University Law Quarterly comes near to what we have in mind where, at p. 148, it speaks of forgiveness.

11. I have browsed in the usual reference books, and noted the following words: deleted; effaced; erased; expiated; expunged; expurgated; forgotten; forgiven; obliterated. It seems to me that the word "expiated" expresses pretty well what we have in mind. Webster defines "expiation" as "the extinguishment of guilt by suffering or penalty". Expiation is a rather old-fashioned word, but there is no reason why it should not be brought back into use. I suggest, for consideration, "an expiated offence". When, however, we come to consider publicity for our proposals, it will be desirable to use a phrase likely to catch the ear of the Press, such as "wiping the slate clean".

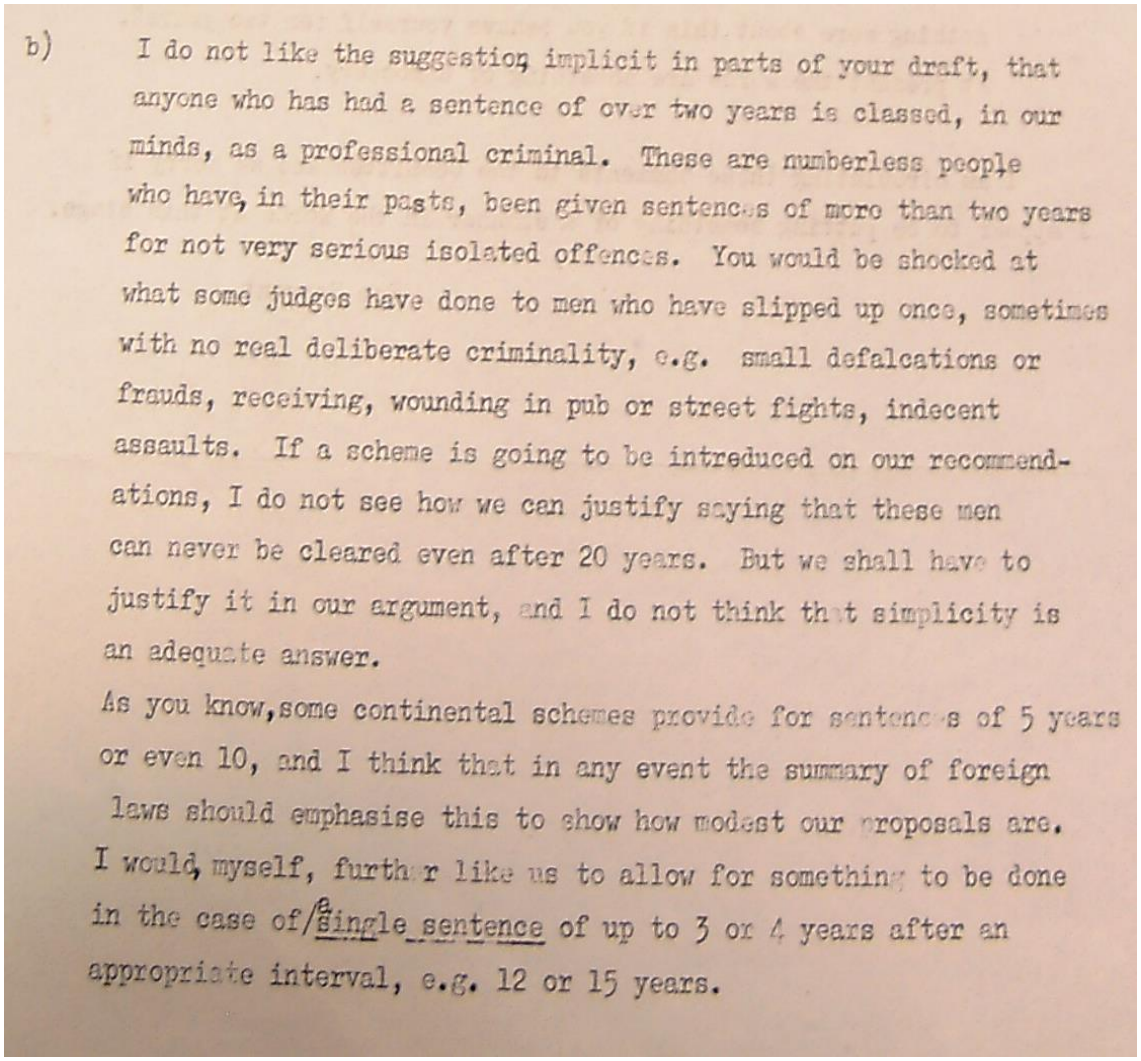
R.T-R

6th April 1971

3.

atoned
purged
redeemed

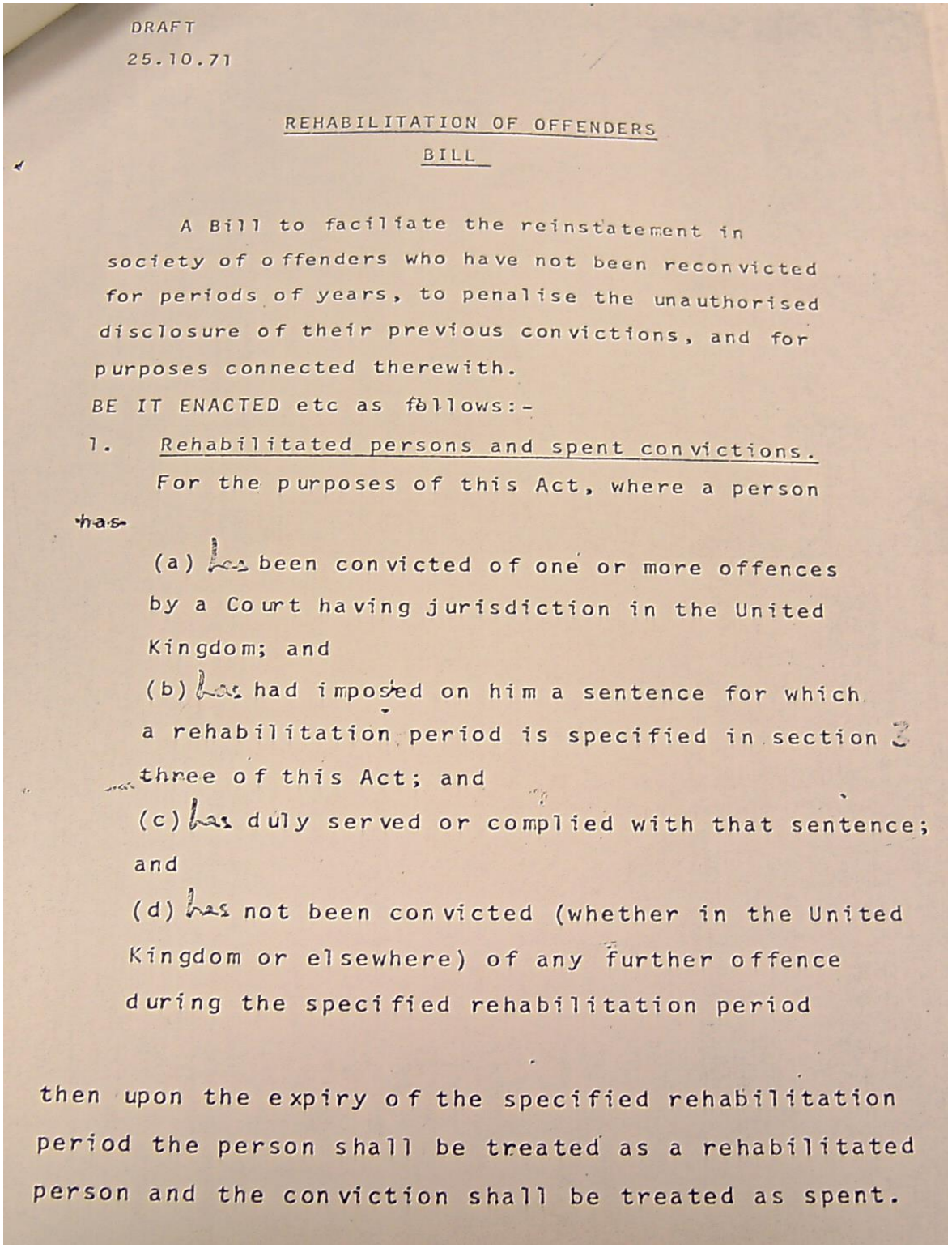
Appendix 11: Extract from memorandum dated 6th April 1971, prepared by Rupert Townshend-Rose in advance the 5th Meeting of the Committee. (Source: Paul Sieghart Memorial Archive)



b) I do not like the suggestion implicit in parts of your draft, that anyone who has had a sentence of over two years is classed, in our minds, as a professional criminal. These are numberless people who have, in their pasts, been given sentences of more than two years for not very serious isolated offences. You would be shocked at what some judges have done to men who have slipped up once, sometimes with no real deliberate criminality, e.g. small defalcations or frauds, receiving, wounding in pub or street fights, indecent assaults. If a scheme is going to be intreduced on our recommendations, I do not see how we can justify saying that these men can never be cleared even after 20 years. But we shall have to justify it in our argument, and I do not think that simplicity is an adequate answer.

As you know, some continental schemes provide for sentences of 5 years or even 10, and I think that in any event the summary of foreign laws should emphasise this to show how modest our proposals are. I would, myself, further like us to allow for something to be done in the case of/a single sentence of up to 3 or 4 years after an appropriate interval, e.g. 12 or 15 years.

Appendix 12: Extract from letter from Tom Sargant to Lord Gardiner (undated) prior to the Committee's 7th meeting, circa July 1971.
(Source: Paul Sieghart Memorial Archive)



DRAFT
25.10.71

REHABILITATION OF OFFENDERS
BILL

A Bill to faciliate the reinstatement in society of offenders who have not been reconvicted for periods of years, to penalise the unauthorised disclosure of their previous convictions, and for purposes connected therewith.

BE IT ENACTED etc as follows:-

1. Rehabilitated persons and spent convictions.

For the purposes of this Act, where a person ~~has~~

(a) has been convicted of one or more offences by a Court having jurisdiction in the United Kingdom; and

(b) has had imposed on him a sentence for which a rehabilitation period is specified in section three of this Act; and

(c) has duly served or complied with that sentence; and

(d) has not been convicted (whether in the United Kingdom or elsewhere) of any further offence during the specified rehabilitation period

then upon the expiry of the specified rehabilitation period the person shall be treated as a rehabilitated person and the conviction shall be treated as spent.

Appendix 13: First page of the draft 'Rehabilitation of Offenders Bill' produced by Rupert-Townshend Rose, dated 25th October 1971. (Source: Paul Sieghart Memorial Archive)

Appendix 14: 'Summary of Conclusions and Recommendations' from Part VI of the report 'Living It Down: The Problem of Old Convictions'
(Source: JUSTICE 1972: 36-38)

VI. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

76. Summarising, therefore, we have come to the following conclusion:

(1) there are about one million people in England and Wales today who have a criminal record, but who have not been convicted again for at least ten years (para. 16);

(2) the likelihood of any of these people being convicted again in the future is minimal (para. 16);

(3) nonetheless, they are faced with great difficulties, especially in the fields of employment and insurance, and in the courts; however exemplary their lives may have been for many years, malice or chance may at any time put an end to their rehabilitation (paras. 10-15);

(4) it is in society's interest that, when someone had done all he can to live down his past, and enough time has passed to establish his sincerity, his record should no longer be held against him so long as he does not offend again (paras. 18-20);

(5) it would not be desirable to achieve this end by destroying or sealing up old criminal records; these are still needed for criminological research, for the information of the police, and for the courts if the person concerned should ever be convicted again of a serious offence (para. 26 (a));

(6) nor is it desirable to restrict the right of people in general to ask questions designed to uncover past convictions (para. 26 (e));

(7) instead, the law should set an example by treating certain people as "rehabilitated persons" when they have not been reconvicted for a number of years, and making evidence of their past crimes inadmissible in the courts; but such a scheme will require a number of necessary safeguards (paras. 27-32);

(8) the necessary conviction-free period should vary with the gravity of the offence, as reflected in the sentence, and there should be an upper limit, at least initially (paras. 33-38);

(9) evidence of all previous convictions should nonetheless remain admissible whenever a rehabilitated person is convicted again on indictment, or if he himself wishes to have it given (paras. 41, 42);

(10) the unauthorised disclosure of the criminal record of a rehabilitated person should be made a specific offence (paras. 71-73).

77. We therefore recommend that legislation should be passed to put into effect a scheme having the following principal features:

(1) a person should be treated as a "rehabilitated person" when he has been convicted of an offence, been sentenced to not more than two years' imprisonment, has served his sentence, and has not been reconvicted of anything worse than a summary offence during the "rehabilitation period" applicable to the sentence (paras. 32-39);

(2) the rehabilitation periods should be the following, reckoned from the date of conviction:-

(a) five years, where no custodial sentence was imposed;

(b) seven years, where a custodial sentence of not more than six months was imposed;

(c) ten years, where a custodial sentence of more than six months, but not more than two years, was imposed (para. 35);

(3) these periods should be halved for convictions where the offender was seventeen or younger (para. 40);

(4) in the case of probation orders, conditional discharges or binding-overs (without any breach), the rehabilitation period should be equal to the duration of the order; in the case of absolute discharges, it should be six months (paras. 54-58);

(5) if any disqualification was imposed on the conviction, the rehabilitation period should run on until the end of the disqualification (paras. 62, 63);

(6) if there is a conviction of an indictable offence during the rehabilitation period, that period should be prolonged until any rehabilitation period applicable to the later conviction itself runs out (para. 39);

(7) the Home Secretary should have the power to vary the rehabilitation periods (up or down), and the age below which they are halved, by statutory instrument in the light of experience (para. 38);

(8) there will need to be special provisions for custodial orders other than imprisonment, and for various kinds of non-custodial orders (paras. 51-53, 59, 60);

(9) a rehabilitated person should be treated for all purposes in law as someone who has not committed, or been charged with, or convicted of, or sentenced for, the offences concerned; accordingly, he should not be guilty of any offence, or liable to any penalty of adverse consequences, if that is what he says; and no evidence to prove the contrary should be admissible in any court unless he himself wants it given, or as part of his antecedents if he is later convicted on indictment (paras. 27 to 32, and 41 and 42);

(10) it will be necessary to provide protection against defamation actions for certain publications such as law reports, textbooks, articles and the like, and for the inadvertent republication of reports after the rehabilitation period has expired (paras. 64 to 67);

(11) there should be a new statutory offence consisting of the unauthorised publication of any official record of the previous convictions of a rehabilitated person, and more severe punishment should be prescribed for anyone who obtains such information by fraud or bribery (para. 71).

Appendix 15: The case of 'D' (Source: Hull History Centre U DJU/8/13)

22nd April 1972

Dear Sir,

I have been advised to write to you for help & advise.

In January this year, I applied to the Metropolitan Police at the Public Carriage Office at the Public Carriage Office, 15 Penton St, N.1. for a Cab driver's Licence. Last week I received a reply, refusing me my application under paragraph 25 (A). Not knowing what this paragraph states I have written asking for an explanation. But this has not solved my problem.

I can only assume that the fact that I have previous criminal convictions have something to do with this, although my last conviction was in 1961, I could understand this to some extent, if I did not know of any persons with more serious convictions than I have e.g. Borstal Boys & Old Bailed Trials & sentences. But I do.

I have led an honest life for the last ten years in regular employment. But now I'm unemployed & would like to be settled in a good steady job.

With my application I submitted a letter from a cab firm offering me work, as soon as I receive a licence.

Am I to pay for my crims for the rest of my life? Are my wife and family to be penalized and punished too? It certainly seem that the Police do not encourage people to go straight, they now have my address & could have me under their own supervision, so to speak, if I held a licence, also the threat of losing that cherished licence, would most certainly encourage people to think twice.

I have written a complaint to the Home Office & the N.C.C.L., also my local M.P.

So I do hope you can advise me.

Your speedy Reply would be grateful.

Yours Sincerely,

D_____

24th April, 1972

Dear Mr. [redacted],

Thank you for your letter of 22nd April. I should imagine that previous convictions are an absolute bar to the obtaining of a cab driver's licence although I have never seen the regulations. If, as you say, you have taken the matter up in other quarters I doubt if there is anything which I can add to the weight of their representations but you might perhaps like to let me have a detailed note of your record and of the offences which stand against you and the wording of the regulation in question.

Yours sincerely,

Appendix 15 (continued): The case of 'D'

1st May 1972

Dear Sir,

Thank you for your reply to my letter.

I am enclosing a copy of the letter received in answer to my question about paragraph 25(A).

Also I enclose all my past convictions, the last you will note is 1961.

Convictions cannot be an absolute bar, it appears it is up to the Commissioner's discretion. I have been employed for the past ten years, & I consider I <u>am</u> now a man of good character.

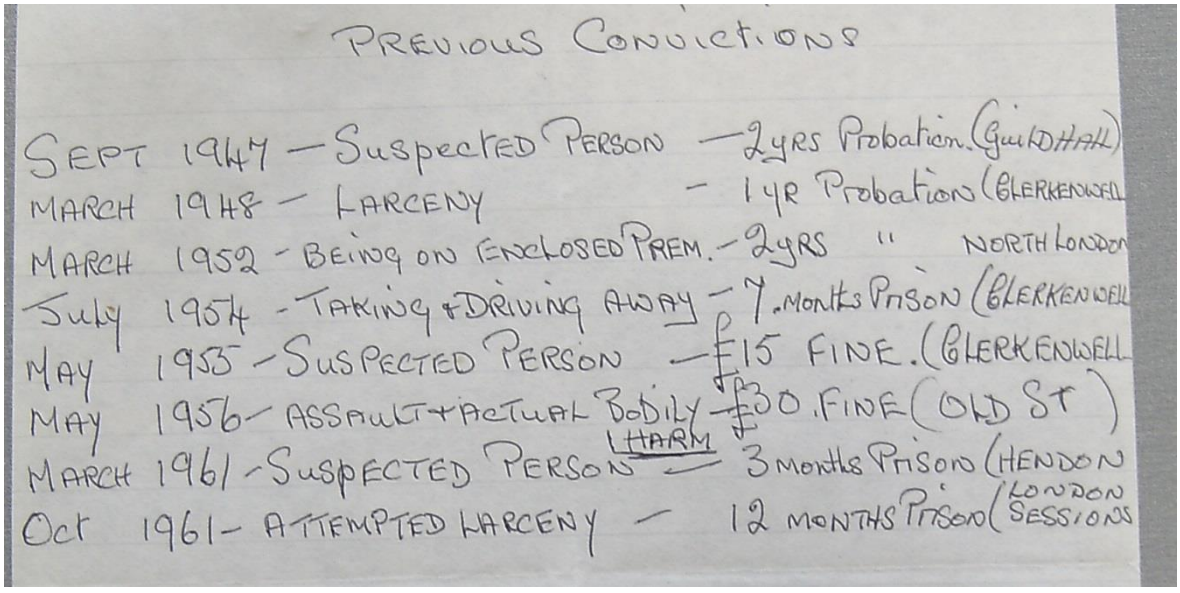
As I explained in my previous letter, I have written a complaint to the Home Office & M.P I know that nothing will be done about this.

I would like you to help & advise me if possible in any way, as it seems unfair that there is no legal right of appeal & yet I do know personally cab drivers with convictions.

Is it possible to take the Assistant Commissioner to a Civil Court?

Yours Sincerely,

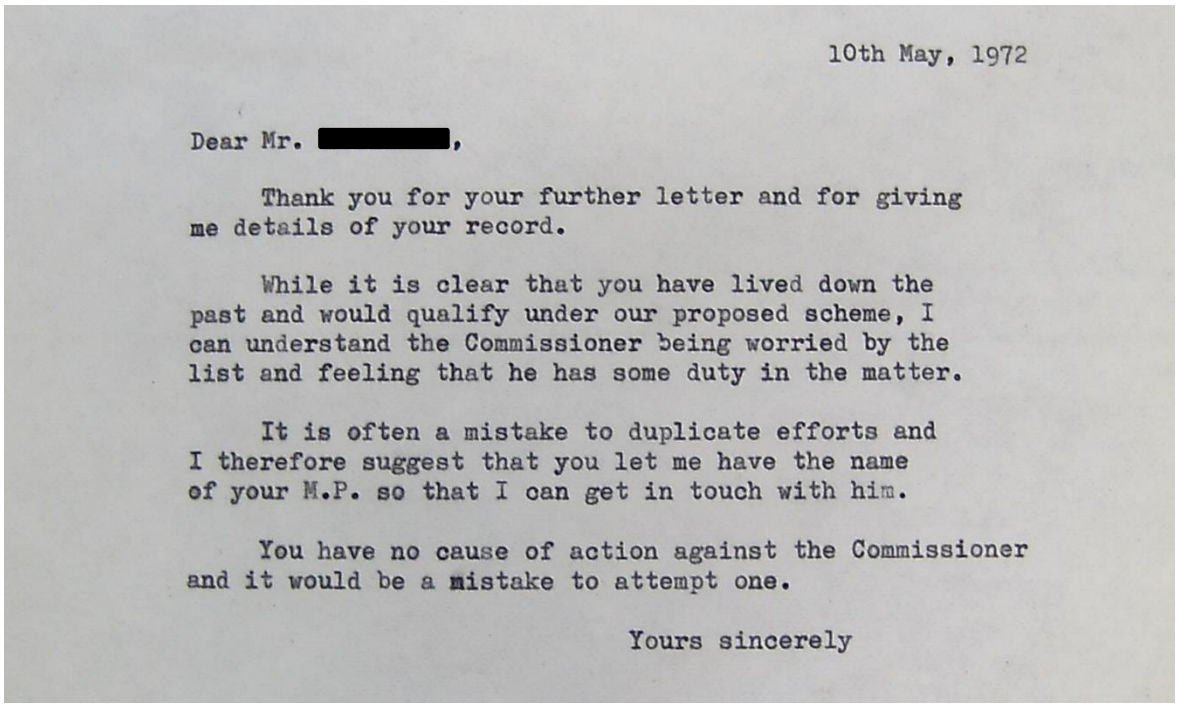
D_____



PREVIOUS CONVICTIONS

SEPT 1947 – SUSPECTED PERSON – 2 YRS PROBATION (GUILDHALL)
MARCH 1948 – LARCENY – 1 YR PROBATION (CLERKENWELL
MARCH 1952 – BEING ON ENCLOSED PREM. – 2 YRS " NORTH LONDON
JULY 1954 – TAKING & DRIVING AWAY – 7 MONTHS PRISON (CLERKENWELL
MAY 1955 – SUSPECTED PERSON – £15 FINE. (CLERKENWELL
MAY 1956 – ASSAULT + ACTUAL BODILY HARM – £30 FINE (OLD ST)
MARCH 1961 – SUSPECTED PERSON – 3 MONTHS PRISON (HENDON
OCT 1961 – ATTEMPTED LARCENY – 12 MONTHS PRISON (LONDON SESSIONS

Appendix 15 (continued): The case of 'D'



10th May, 1972

Dear Mr. [redacted],

Thank you for your further letter and for giving me details of your record.

While it is clear that you have lived down the past and would qualify under our proposed scheme, I can understand the Commissioner being worried by the list and feeling that he has some duty in the matter.

It is often a mistake to duplicate efforts and I therefore suggest that you let me have the name of your M.P. so that I can get in touch with him.

You have no cause of action against the Commissioner and it would be a mistake to attempt one.

Yours sincerely

14th May 1972

Dear Sir,

Thank you very much for your speedy reply to my letter.

My M.P. is John Grant of St. Paul's Rd, N.1. I wrote to him about the 20th April inst. But have to date received no reply whatsoever.

I do hope you will continue to advise me.

Yours Sincerely,

D_____

Appendix 15 (continued): The case of 'D'

30th May 1972

Dear Mr. [redacted],

I am sorry to have delayed replying to your letter of 14th May.

I have to say that your list of eight convictions must present the Commissioner with a difficult problem, despite the fact that the last one was over ten years ago, since he has to protect the public against risk.

In the circumstances, I think that it would be more appropriate for Mr. Grant to make representations than for me, and I have written to him and urged him to do what he can to help you.

Yours sincerely,

30th May 1972

Dear Mr. Grant,

I have had some correspondence with Mr. [redacted] of [redacted] about the refusal of the Commissioner of Police to give him a cab licence because of his old criminal convictions. He wrote to me because of our report "Living it Down" which deals with this particular problem.

I asked him for details of his convictions and enclose them. Although the last one was over ten years ago and [redacted] appears to have made good since, they are more serious than he had me to believe and I can understand the police having some hesitation in granting him a taxicab licence, but he tells me that he knows quite a few drivers who have beeh given licences, and I think it would be useful and encouraging to him if you would be willing to make some representation.

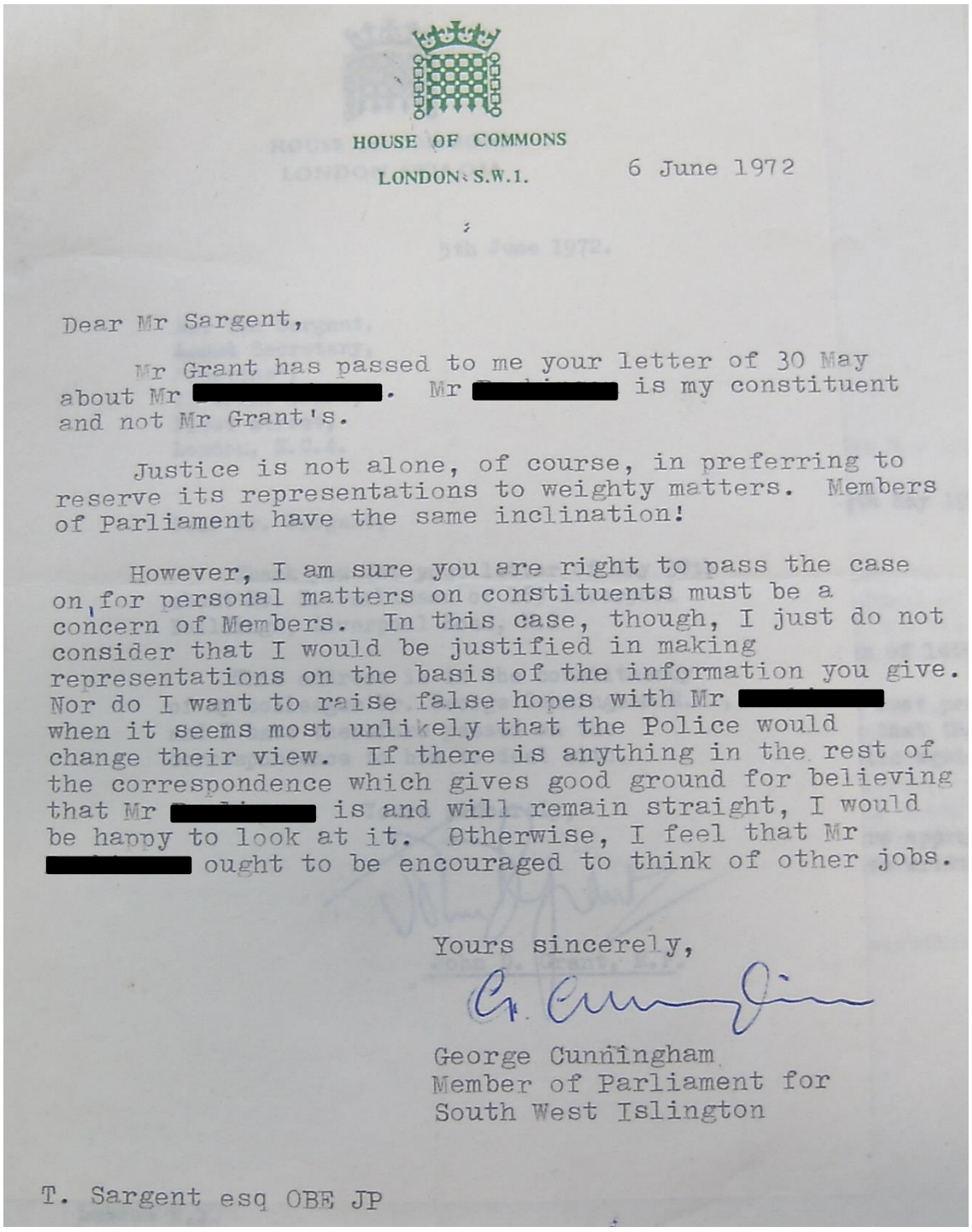
I try to reserve representations by JUSTICE to weightier matters and not to exhaust my credit with the Commissioner.

Yours sincerely,

John Grant, Esq., M.P.,
House of Commons,
London SW1.

N.B. 'D' was, in fact, mistaken about who his MP was and when Sargant wrote to Grant, the correspondence was forwarded on to the correct MP George Cunningham (Labour).

Appendix 15 (continued): The case of 'D'



HOUSE OF COMMONS
LONDON S.W.1.

6 June 1972

Dear Mr Sargent,

Mr Grant has passed to me your letter of 30 May about Mr [redacted]. Mr [redacted] is my constituent and not Mr Grant's.

Justice is not alone, of course, in preferring to reserve its representations to weighty matters. Members of Parliament have the same inclination!

However, I am sure you are right to pass the case on, for personal matters on constituents must be a concern of Members. In this case, though, I just do not consider that I would be justified in making representations on the basis of the information you give. Nor do I want to raise false hopes with Mr [redacted] when it seems most unlikely that the Police would change their view. If there is anything in the rest of the correspondence which gives good ground for believing that Mr [redacted] is and will remain straight, I would be happy to look at it. Otherwise, I feel that Mr [redacted] ought to be encouraged to think of other jobs.

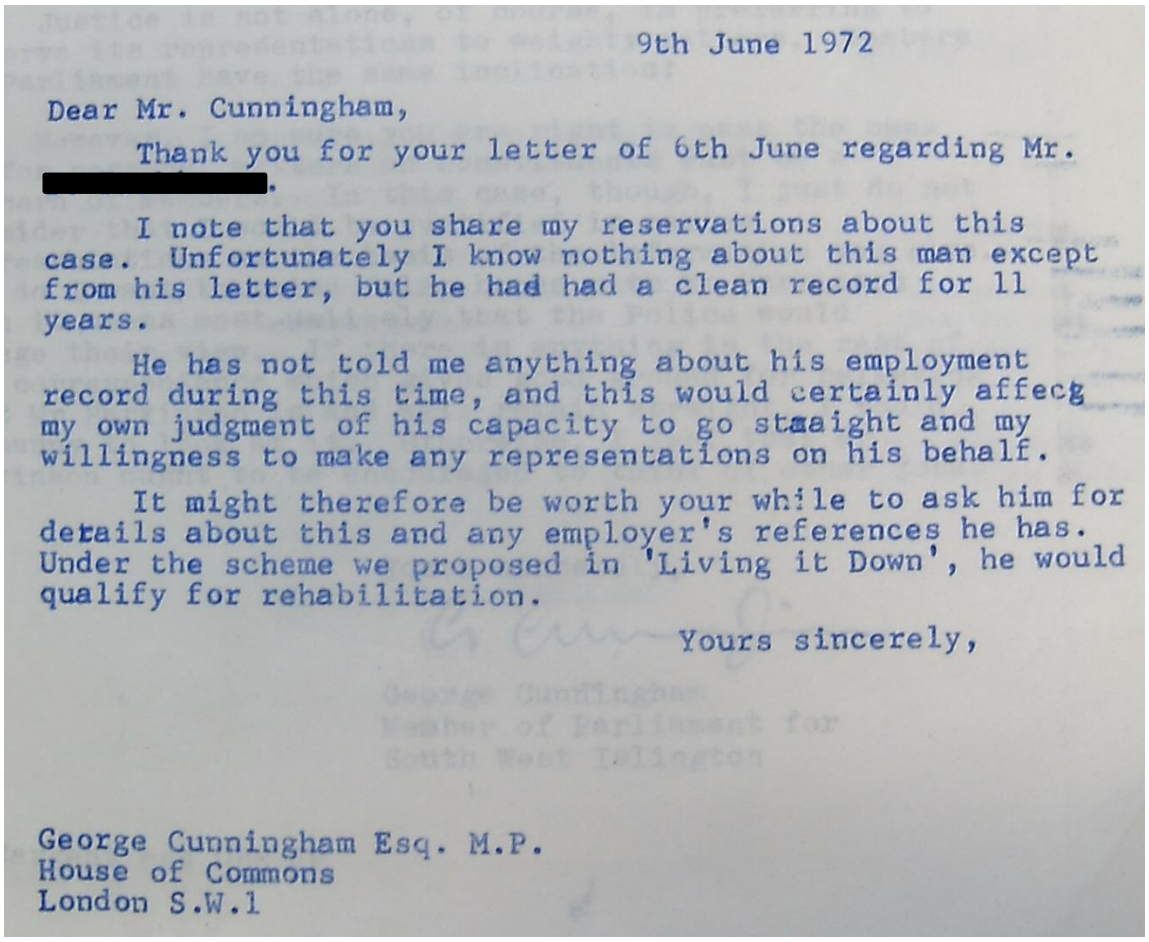
Yours sincerely,

G. Cunningham

George Cunningham
Member of Parliament for
South West Islington

T. Sargent esq OBE JP

Appendix 15 (continued): The case of 'D'



9th June 1972

Dear Mr. Cunningham,

Thank you for your letter of 6th June regarding Mr. [redacted].

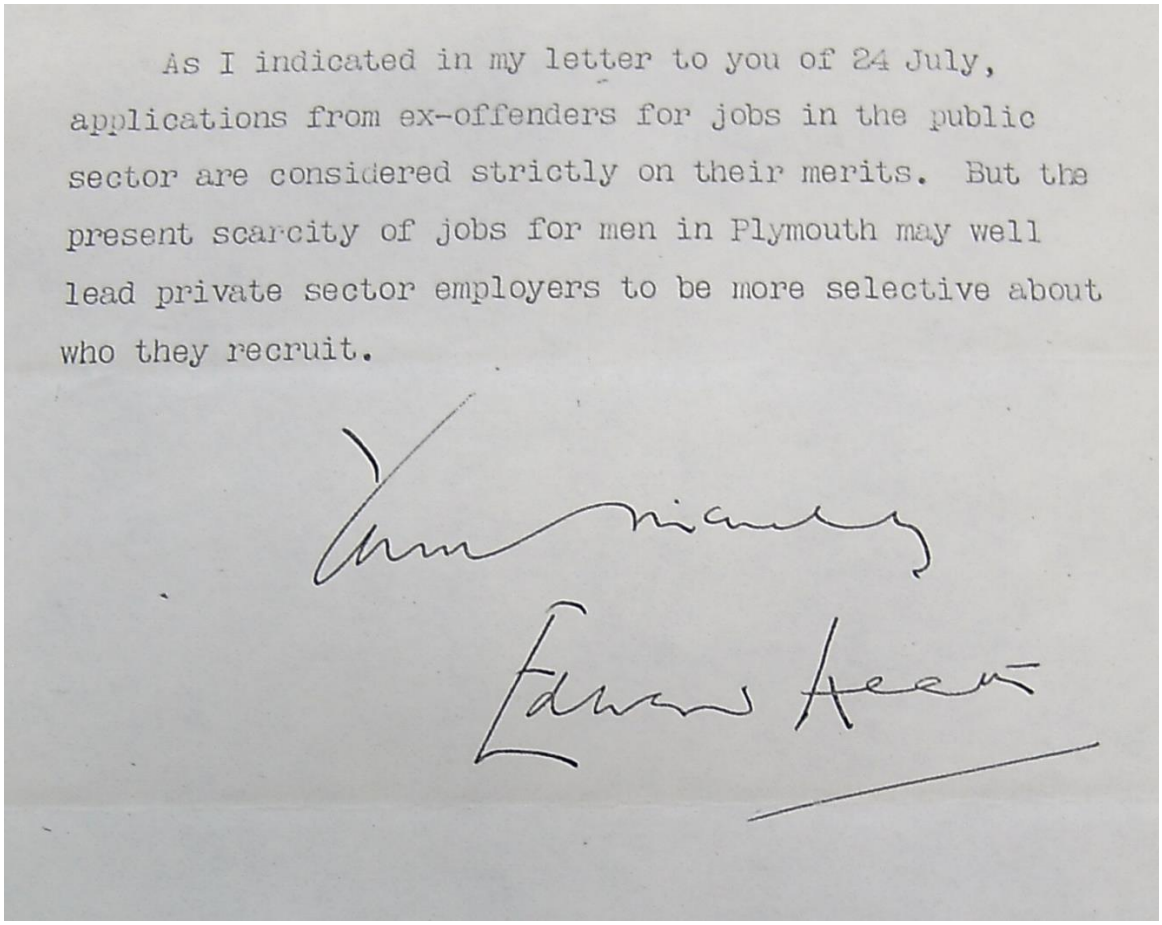
I note that you share my reservations about this case. Unfortunately I know nothing about this man except from his letter, but he had had a clean record for 11 years.

He has not told me anything about his employment record during this time, and this would certainly affecg my own judgment of his capacity to go staaight and my willingness to make any representations on his behalf.

It might therefore be worth your while to ask him for details about this and any employer's references he has. Under the scheme we proposed in 'Living it Down', he would qualify for rehabilitation.

Yours sincerely,

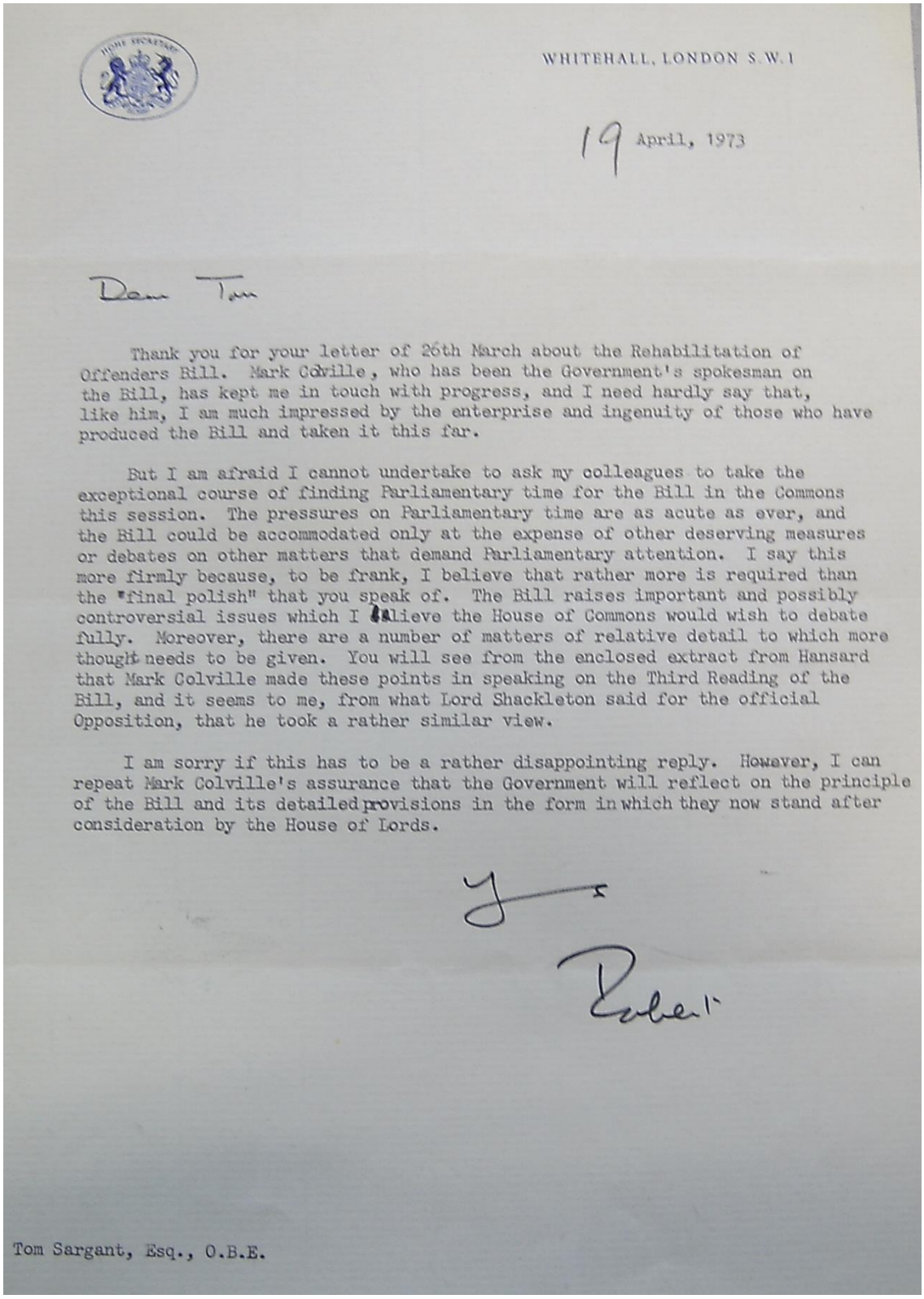
George Cunningham Esq. M.P.
House of Commons
London S.W.1



As I indicated in my letter to you of 24 July, applications from ex-offenders for jobs in the public sector are considered strictly on their merits. But the present scarcity of jobs for men in Plymouth may well lead private sector employers to be more selective about who they recruit.

Edward Heath

Appendix 16. Extract from letter from the Prime Minister, Edward Heath to Tom Sargant, 4th September 1972
(Source: Hull History Centre U DJU/8/13)



WHITEHALL, LONDON S.W.1

19 April, 1973

Dear Tom

Thank you for your letter of 26th March about the Rehabilitation of Offenders Bill. Mark Colville, who has been the Government's spokesman on the Bill, has kept me in touch with progress, and I need hardly say that, like him, I am much impressed by the enterprise and ingenuity of those who have produced the Bill and taken it this far.

But I am afraid I cannot undertake to ask my colleagues to take the exceptional course of finding Parliamentary time for the Bill in the Commons this session. The pressures on Parliamentary time are as acute as ever, and the Bill could be accommodated only at the expense of other deserving measures or debates on other matters that demand Parliamentary attention. I say this more firmly because, to be frank, I believe that rather more is required than the "final polish" that you speak of. The Bill raises important and possibly controversial issues which I believe the House of Commons would wish to debate fully. Moreover, there are a number of matters of relative detail to which more thought needs to be given. You will see from the enclosed extract from Hansard that Mark Colville made these points in speaking on the Third Reading of the Bill, and it seems to me, from what Lord Shackleton said for the official Opposition, that he took a rather similar view.

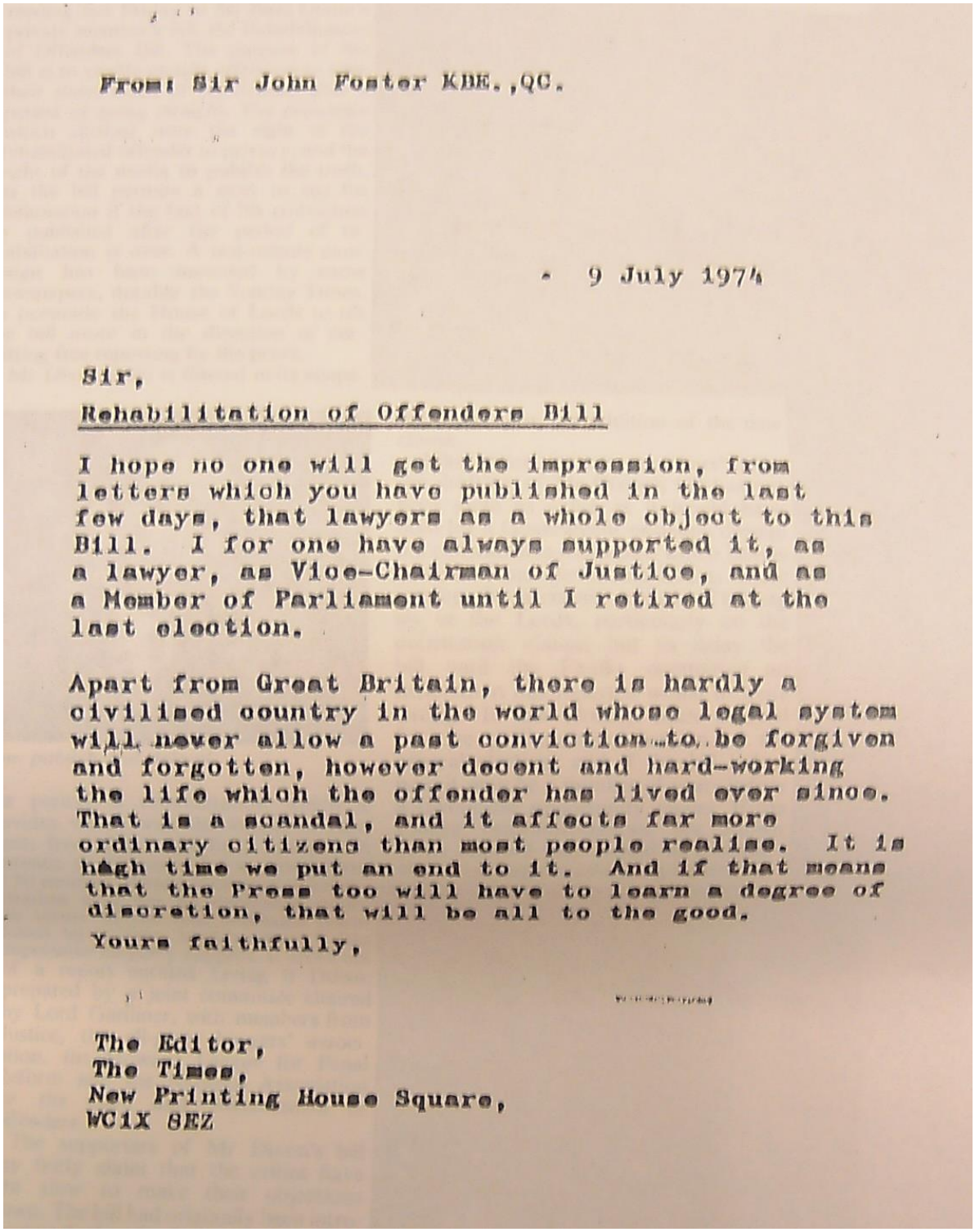
I am sorry if this has to be a rather disappointing reply. However, I can repeat Mark Colville's assurance that the Government will reflect on the principle of the Bill and its detailed provisions in the form in which they now stand after consideration by the House of Lords.

Yours

Robert

Tom Sargant, Esq., O.B.E.

Appendix 17. Letter from the Home Secretary, Robert Carr to Tom Sargant, 19th April 1973
(Source: Hull History Centre U DJU/8/13)



From: Sir John Foster KBE.,QC.

9 July 1974

Sir,

Rehabilitation of Offenders Bill

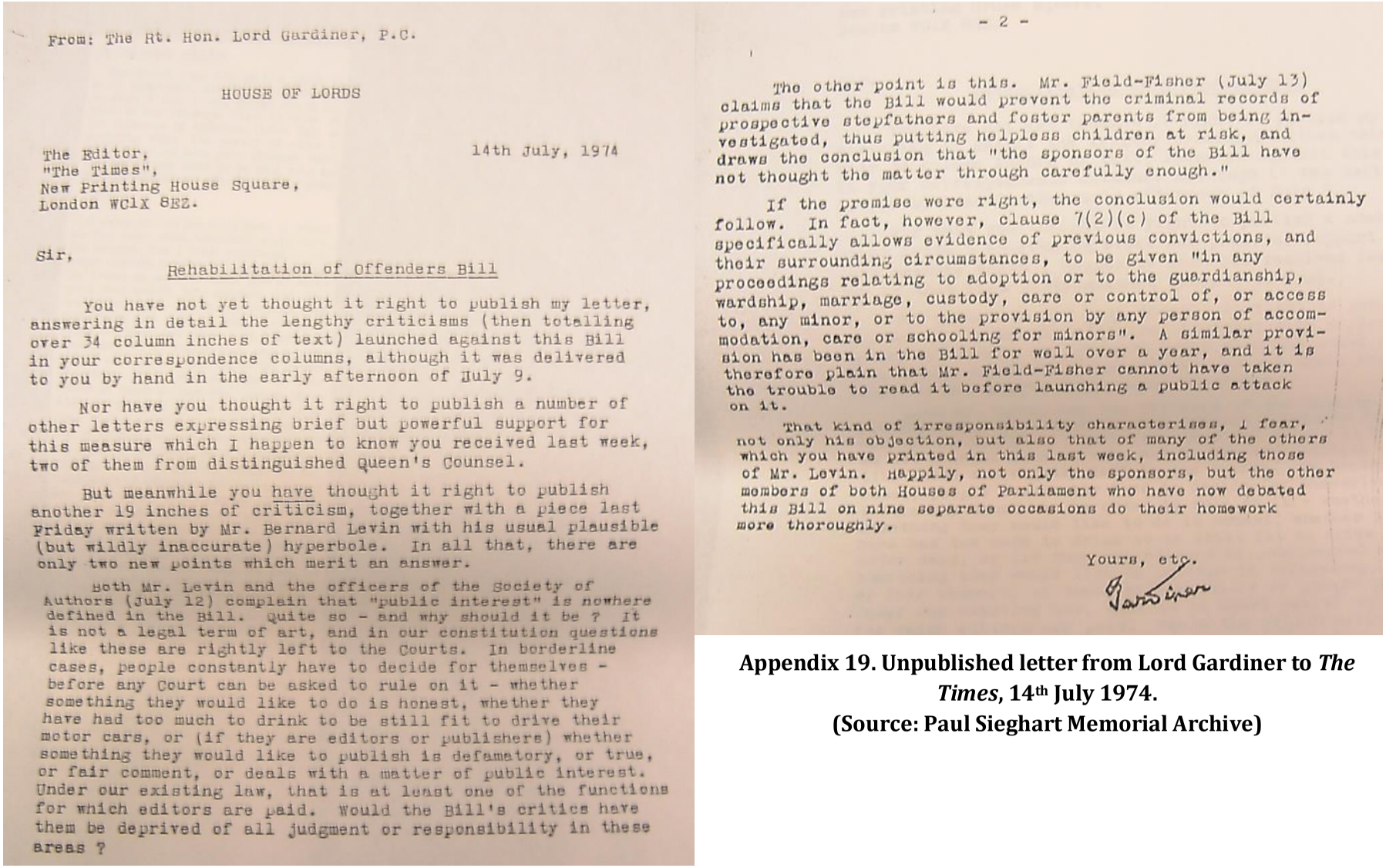
I hope no one will get the impression, from letters which you have published in the last few days, that lawyers as a whole object to this Bill. I for one have always supported it, as a lawyer, as Vice-Chairman of Justice, and as a Member of Parliament until I retired at the last election.

Apart from Great Britain, there is hardly a civilised country in the world whose legal system will never allow a past conviction to be forgiven and forgotten, however decent and hard-working the life which the offender has lived ever since. That is a scandal, and it affects far more ordinary citizens than most people realise. It is high time we put an end to it. And if that means that the Press too will have to learn a degree of discretion, that will be all to the good.

Yours faithfully,

The Editor,
The Times,
New Printing House Square,
WC1X 8EZ

Appendix 18. Unpublished letter from Sir John Foster KBE QC to The Times, 9th July 1974 (Source: Paul Sieghart Memorial Archive)



From: The Rt. Hon. Lord Gardiner, P.C.

HOUSE OF LORDS

The Editor,
"The Times",
New Printing House Square,
London WC1X 8EZ.

14th July, 1974

Sir,

Rehabilitation of Offenders Bill

You have not yet thought it right to publish my letter, answering in detail the lengthy criticisms (then totalling over 34 column inches of text) launched against this Bill in your correspondence columns, although it was delivered to you by hand in the early afternoon of July 9.

Nor have you thought it right to publish a number of other letters expressing brief but powerful support for this measure which I happen to know you received last week, two of them from distinguished Queen's Counsel.

But meanwhile you have thought it right to publish another 19 inches of criticism, together with a piece last Friday written by Mr. Bernard Levin with his usual plausible (but wildly inaccurate) hyperbole. In all that, there are only two new points which merit an answer.

Both Mr. Levin and the officers of the Society of Authors (July 12) complain that "public interest" is nowhere defined in the Bill. Quite so - and why should it be ? It is not a legal term of art, and in our constitution questions like these are rightly left to the Courts. In borderline cases, people constantly have to decide for themselves - before any Court can be asked to rule on it - whether something they would like to do is honest, whether they have had too much to drink to be still fit to drive their motor cars, or (if they are editors or publishers) whether something they would like to publish is defamatory, or true, or fair comment, or deals with a matter of public interest. Under our existing law, that is at least one of the functions for which editors are paid. Would the Bill's critics have them be deprived of all judgment or responsibility in these areas ?

- 2 -

The other point is this. Mr. Field-Fisher (July 13) claims that the Bill would prevent the criminal records of prospective stepfathers and foster parents from being investigated, thus putting helpless children at risk, and draws the conclusion that "the sponsors of the Bill have not thought the matter through carefully enough."

If the premise were right, the conclusion would certainly follow. In fact, however, clause 7(2)(c) of the Bill specifically allows evidence of previous convictions, and their surrounding circumstances, to be given "in any proceedings relating to adoption or to the guardianship, wardship, marriage, custody, care or control of, or access to, any minor, or to the provision by any person of accommodation, care or schooling for minors". A similar provision has been in the Bill for well over a year, and it is therefore plain that Mr. Field-Fisher cannot have taken the trouble to read it before launching a public attack on it.

That kind of irresponsibility characterises, I fear, not only his objection, but also that of many of the others which you have printed in this last week, including those of Mr. Levin. Happily, not only the sponsors, but the other members of both Houses of Parliament who have now debated this Bill on nine separate occasions do their homework more thoroughly.

Yours, etc.

Gardiner

Appendix 19. Unpublished letter from Lord Gardiner to *The Times*, 14th July 1974.
(Source: Paul Sieghart Memorial Archive)

The Rt. Hon. The Viscount Colville of Culross,

House of Lords,
London S.W.1.

16th July 1974

Rehabilitation of Offenders Bill

I was of course most interested in what you said last night about the conflict between truth and justice. As this particular point has been troubling me for at least three years in this context, may I tell you how I have tried to resolve it for myself ?

There is a number of virtues (today's sociologists would call them "values"). Truth is one. Others include charity, patriotism, loyalty, the protection of innocent life, the avoidance of cruelty, and so on. From time to time virtues (or values) come into conflict with each other. It is then that moral dilemmas appear. To resolve them, you have to balance the values against each other and decide which will prevail. For example -

(1) for the prisoner of war being interrogated by the enemy, patriotism will prevail over truth, and he will refuse to disclose his troop dispositions, or even lie about them;

(2) the interogator may be tempted to allow what he sees as the protection of innocent life to prevail over the avoidance of cruelty, and so seek to justify torture; others may reverse the priorities, and so condemn torture in all circumstances;

(3) the Official Secrets Acts put national security before truth;

(4) most people would think it right to lie for the sake of saving lives, and many will lie in the interest of charity (from the trivial "don't you think my new hat suits me?" to the important "can you confirm my suspicionsthat my wife is unfaithful?").

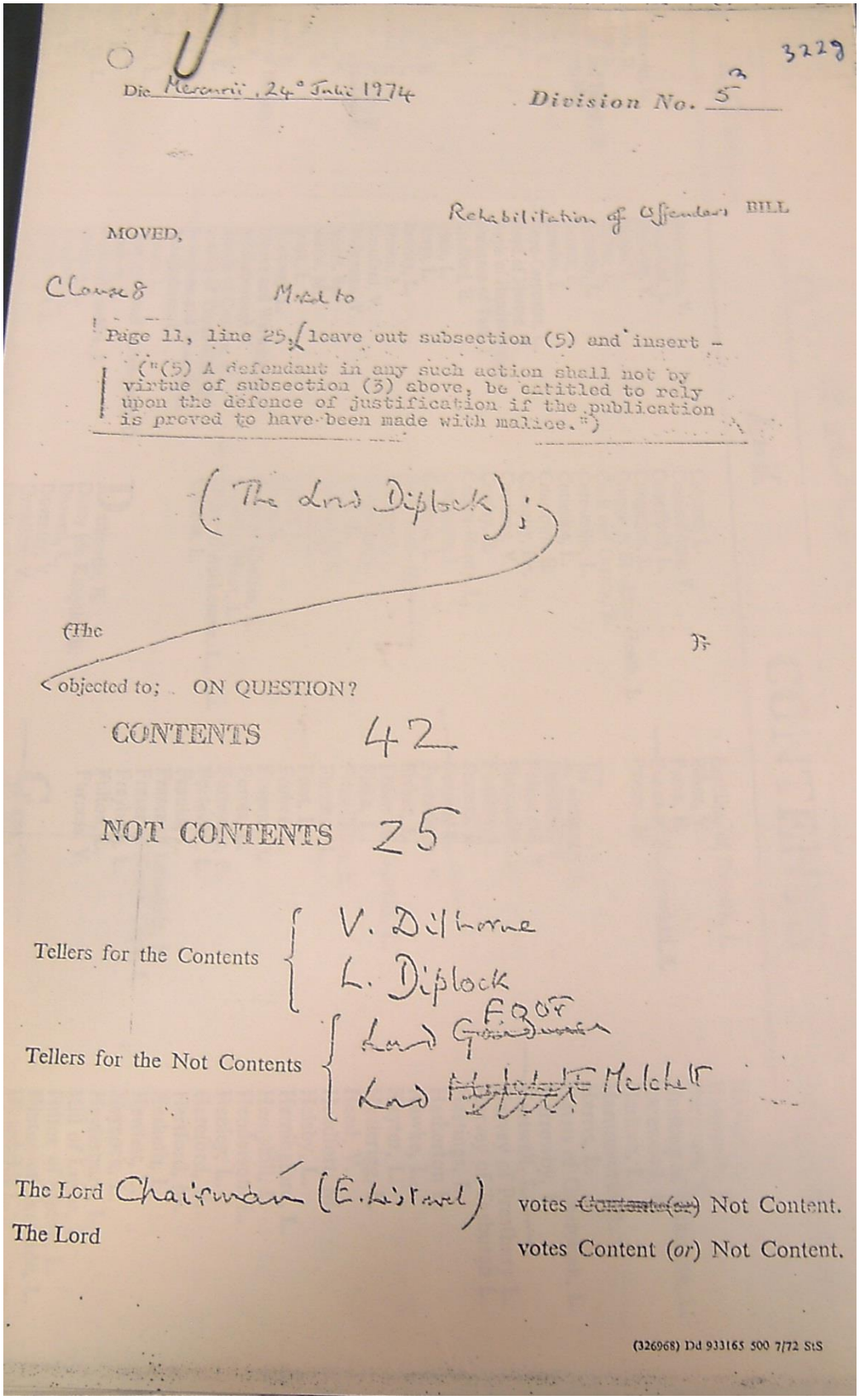
It therefore seems to me that the right abalysis is this. None of these values is always paramount. You can always find circumstances in which it must yield to another. What we call "justice" (human rather than divine) is the process by which we decide which value shall prevail in any given case: justice therefore seeks to balance and adjust other values where they conflict, and to achieve a "just" result. And the function of law is to provide a known and agreed framework for justice.

If that is right, then one could argue that the only truly paramount value is justice. That does not mean that it always over-rides every other value, since it only comes into play where two or more other values are in conflict, and then seeks to resolve that conflict with the minimum of loss to the contenders.

On that basis, the conflict over this Bill is not so much between truth and justice, as between - or rather among - truth, charity, the public interest, the protection of children, encouraging people to go straight, and I expect a good many others. In making some new law, the Bill tries to construct a framework for justice to balance these.

All this doesn't, of course, help anyone to decide what would be "just" in these cases, and therefore what the right framework would be. You and I, for example, might take different views about whether the truth should yield to the public interest, and so on, and there is of course a whole range of tenable positions on all these questions. But I think it helps to see the whole thing as being about conflicts between different values, which justice then tries to adjust, rather than as a simple conflict between the truth on the one hand and justice on the other.

Appendix 20. Letter from Paul Sieghart to Viscount Colville, 16th July 1974.
(Source: Paul Sieghart Memorial Archive)



3229

Die Mercurii, 24° Julii 1974 Division No. 5

Rehabilitation of Offenders BILL

MOVED,

Clause 8 Motto

Page 11, line 25, leave out subsection (5) and insert -

("(5) A defendant in any such action shall not by virtue of subsection (3) above, be entitled to rely upon the defence of justification if the publication is proved to have been made with malice.")

(The Lord Diplock);

(The

objected to; ON QUESTION?

CONTENTS 42

NOT CONTENTS 25

Tellers for the Contents { V. Dilhorne / L. Diplock

Tellers for the Not Contents { Lord Goodman / Lord Melchett

The Lord Chairman (E. Listowel) votes ~~Contents (or)~~ Not Content.

The Lord votes Content (*or*) Not Content.

(326968) Dd 933165 500 7/72 S1S

Appendix 21. Record of House of Lords Division on Amendment (No. 34) to the Rehabilitation of Offenders Bill, 24th July 1974
(Source: Paul Sieghart Memorial Archive)