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Judicial Rehabilitation? A view from England

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Abstract

Criminal records in England are maintained by the police, and there is no possibility of 'judicial rehabilitation', in the narrow sense of a judicial decision which authorizes the wiping clean of the record. However, the law is complex. The Rehabilitation of Offenders Act 1974, was designed, as the name suggests, to help in the rehabilitation of offenders by penalizing the unauthorized disclosure of their previous conviction(s) after a period without further conviction. An offender becomes rehabilitated and the conviction is 'spent'. However, the public protection agenda of recent years has resulted in the expansion of numerous exceptions to this law. Many organizations have access to the data held by the police, and individuals can be asked to provide a criminal record certificate (to potential employers). This paper explores these exceptions, and some recent court decisions which seek to balance the conflicting human rights and interests apparent in this area. It concludes, perhaps optimistically, that it is possible to see the potential for judicial rehabilitation in a looser sense, and even for redemptive rituals (see Maruna and LeBel, 2003), in English courts. However, at this moment any likelihood of a formal process of judicial rehabilitation, in the sense of record erasure, seems inconceivable.

Keywords: Criminal records – Rehabilitation of offenders – Public protection

Introduction

Shadd Maruna's emphasis on the need for messages of positive reintegration to encourage and support an offender's attempts to go straight rings true to many people involved in the criminal justice process (see Maruna, 2001, 2011). This article provides an opportunity to consider how this might in practice be encouraged by way of 'judicial rehabilitation'. There are ways in which a judge can recognize success, and foster trust, but it seems unlikely that, in the English and Welsh context, any route which erases a criminal record would be successful. The concept of 'judicial rehabilitation' currently has little meaning in England, and certainly there is no power for a judge to wipe clean an offender's record. The law provides a detailed and complex set of rules on when convictions become 'spent': after a fixed period of time, it has been (since 1974) lawful for someone not discloses the conviction (and indeed,

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it becomes an offence for others to disclose it). These rules apply automatically, and a judge has no power to shorten the periods involved, or to broaden the protections of the law. Whilst data protection laws might have been expected to strengthen the confidentiality of the conviction records, the reality in England and Wales has been that the law has tipped away from emphasizing the rehabilitation of the offender towards much greater disclosure of criminal records, in order to underline the political priority afforded to public protection, or rather the protection of vulnerable people. This article creates an opportunity to explore issues relating to criminal records which have been little discussed in the English and Welsh academic literature.

Criminal records in England and Wales

When someone asks, 'Have you got a criminal record?', they normally mean, 'Have you had a criminal conviction?'. Criminal convictions are recorded by the police on the Police National Computer (PNC), which holds a huge database of criminal records (and other material related to arrests, cautions, DNA, fingerprints, intelligence etc). When someone is convicted of a crime in court (whether they plead guilty or are found guilty), the court staff will record this on their computer system (LIBRA in the Magistrates' Courts; XHIBIT in the Crown Court[1]). The information gets sent to the police, who add it to the PNC, which also contains details of cautions (formal warnings), but not, perhaps surprisingly, fixed penalty notices[2].

How did this system develop? Going back a few hundred years, it is clear that although courts kept records of their decisions, these records were often unreliable, and were maintained only locally[3]. In the 19th century, when the death penalty and transportation were replaced by imprisonment as the standard penalty for serious (and not so serious) criminal behaviour, it was felt that the police needed better records to help them supervise released offenders[4]. The Habitual Criminals Act 1869 and the Prevention of Crimes Act 1871 were therefore enacted to allow the supervision of offenders by the police, and police forces started to maintain registers of offenders. A Criminal Record Office was formed in 1913. A key issue was that the record itself did little to tie an individual to a particular record or offence: more was needed to tie the named offender to an individual. So, as time went by, this register of known offenders was used more to collate information which would help to identify existing and future offenders (particularly fingerprint identification), than to supervise existing offenders. It seems simply to have become accepted that this was the way it should be, that the police should maintain criminal records.

[1] Research for this paper led to me discuss in some depth with court administrators, to whom I am very grateful, the status and long-term management of court records, including their practical storage, and the duties of the courts under the Public Records Act 1958 and 1967. I hope to return to this fascinating (and also under-discussed) subject another time.

[2] Since the Criminal Justice and Police Act 2001 was brought into force, the police have imposed vast numbers of fixed penalty notices (for either £80 or £50) for many high volume offences such as 'behaviour likely to cause harassment, alarm or distress' and being 'drunk and disorderly'. They are also imposed for shoplifting (theft under £200), using the public telecommunications system for sending false messages, throwing fireworks in a thoroughfare, destroying/damaging property (under £500), trespassing on a railway, leaving litter and other alcohol related public order offences.

[3] Many courts are still defined as 'courts of record', which means that they are supposed to keep records in perpetuity: see fn 1 above.

[4] For a history, see Thomas (2007)

As the years passed, much was done to improve police records: the Police National Computer came on line in 1974. But enormous controversies have continued to dog the system: over the years, complaints about the quality of the records, about the huge expense of various (some failed) computer systems, and about halting attempts to 'join up' various different parts of the criminal justice 'system' have continued. Yet there seems to have been little or no debate about why it is the police, and not the courts, who maintain the national register of convictions.

The Police and Criminal Evidence Act 1984, a major attempt to codify police powers, provides in s. 27 (which provides the rules on fingerprinting suspects):

> '(4) The Secretary of State may by regulations make provision for recording in national police records convictions for such offences as are specified in the regulations.'

This remains the legal basis for police records. The Secretary of State (the Home Secretary) is authorized to pass regulations, and has done so on several occasions[5]. Thomas points out that the wording of s.27 (4), that the Secretary of State 'may' make regulations, implies that the law still only empowers the police to keep criminal records, rather than placing any statutory duty on them to do so (Thomas, 2007: 50). The definition of 'convictions' has been extended to include cautions, reprimands and final warnings[6]. A huge proportion of offenders in England every year are 'merely' cautioned by the police rather than prosecuted[7]: it is important that when they consent to this, they understand that this caution will go on their criminal record. As footnote 5 shows, large number of offenders every year also receive Fixed Penalty Notices for disorder, which result in fixed fines: curiously, these do not get put automatically on the PNC.

Today, when someone is prosecuted, the police will send through to the court copies of their criminal antecedents: a print off from the PNC, and supplementary forms with any convictions (MG 16) or cautions (form MG17) not recorded on the PNC. Curiously, this information is still sent in hard copy: for Crown Court proceedings, the police send 2 copies to the CPS, and 5 to the Court (2 copies to be given to the defence and 2 for the probation service). Five copies are produced for magistrates court hearings, but are distributed via the Crown Prosecution Service. When someone is convicted, the information is logged immediately on to the court computer system. This information is immediately available to the police (as well as other criminal justice agencies: Crown Prosecution Service, prisons, probation, the National Offender Management Service (NOMS), Youth Offending Teams (YOTs).

The criminal records held on the PNC should not be confused with the work of a body called the Criminal Records Bureau. The Police Act 1997 introduced a new regime of

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[5] See The National Police Records (Recordable Offences) Regulations 1985 (Statutory Instrument 1985 No. 1941), were updated in 1989, but replaced in 2000 (see SI 2000 No. 1139). These new 2000 Regulations have been amended in 2003 (SI 2003 No 2823), 2005 (SI 2005 No 3106) and 2007 (see SI 2007 No 2121) .

[6] Reprimands and warnings are the form of 'caution' given to offenders aged over 10 and under 18.

[7] Of the 1,335,800 recorded offences detected in 2008, 69,800 (52%) resulted in court proceedings, 319,3000 (24%) in a caution, and 108,400 (8%) in Penalty Notices for Disorder. There were 326,900 offenders cautioned (including reprimands and warnings) for all offences in 2008. The cautioning rate (the number of offenders cautioned as a percentage of those found guilty or cautioned (excluding motoring offences) in 2008 was 29% (see Criminal Statistics 2008 (2010), available at www.justice.gov.uk/publications/docs/criminal-stats-2008.pdf).

standard and enhanced disclosure for those who want to work (or even volunteer to work) with children or vulnerable adults, and the next year a new body was created, the Criminal Records Bureau[8], to deal with these criminal record checks and disclosures, particularly Enhanced Criminal Record Certificate (ECRC). The CRB, established under Part V of the Police Act 1997, was launched in March 2002. But despite its name, this body does not itself maintain criminal records: the police are responsible for the provision of information (both from the Police National Computer and other information which may be held locally by individual forces[9]) and a private company, Capita, run the administration infrastructure and call centre[10].

The police hold an enormous amount of data. For example, since the enactment of the Sex Offenders Act 1997[11] all people convicted or cautioned in respect of sex offences, or found not guilty by reason of insanity, have had to notify the police of certain details, in particular their address. These notifications requirements have become known as the Sex Offenders Register, although there was no mention of a register in the legislation[12]. But this is not really a record of offending, which is already recorded on the PNC. This additional Register is maintained by the police, and the offender has to keep it up to date by notifying the police of his current address (those sentenced to 30 months imprisonment or more are currently subject to notification requirements for the rest of their lives without the opportunity for review[13]). Another database is VISOR (or the Violent and Sex Offender Register) which can be accessed by the Police, National Probation Service and HM Prison Service personnel. Again it is managed by the police.

It is perhaps worth adding that all criminal court decisions relating to adults are in the public domain. The police (and Crown Prosecution Service) may try to ensure that journalists are in court so that convictions and sentences get the maximum publicity. They also provide journalists with press releases and other information packages, often presenting a public statement outside court after a case is completed[14]. But this is not at all the same as giving public access to the PNC.

[8] See see www.crb.homeoffice.gov.uk

[9] There are still 43 independent police forces in England and Wales, governed by a complex tripartite structure (the Home Secretary, Chief Constables and local police authorities). The current Government proposes fundamental changes to the nature of local accountability, but appears less keen than its predecessors to shrink the number of independent forces.

[10] The complex law surrounding the vetting and barring scheme, and the role of the Independent Safeguarding Authority, a body set up only in 2009 to make barring decisions in relation to those seemed unsuitable to work with children or vulnerable adults, is perhaps beyond the scope of this paper. In any case, the new Government has announced that it is reviewing the vetting and barring scheme and intends to "scale it back to common sense levels" (see *The Coalition: Our programme for government).* It remains under review as we go to print.

[11] Since repealed and replaced (strengthened) by provisions of the Sexual Offences Act 2003

[12] See s. 1 of the Sex Offenders Act 1997

[13] It is important to note that the Supreme Court has recently held that there had to be some circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence could be discounted to the extent that continuance of notification requirements was unjustified: see *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, in which the Supreme Court follows the reasoning of the European Court of Human Rights in both *S and Marper v United Kingdom* (2008) 48 EHRR 1169 and *Bouchacourt v France* (2009, Application No 5335/06).

[14] See Mawby (2010) for a recent account of the increasing sophistication of police media relations

Accessing the Criminal Record

English criminal records may be used for a number of very different purposes, and of course, access depends upon these purposes. The PNC is obviously regularly and widely used by the police as part of their core work in the investigation of offences. As we have seen, this purpose explains why it is the police that maintain the database. In the 1990s, there was much emphasis given to 'intelligence-led policing', and the PNC helps the police to profile offenders. In court, they are, of course, used for sentencing purposes. But they may also sometimes be used pre-sentence, at the trial stage, as evidence of bad character (of either witnesses or defendant)[15], or as part of an application for anti-social behaviour order (ASBO) in civil cases[16]. The probation service also has access to the record to help them prepare pre-sentence (post conviction) reports for courts, and a copy of the criminal record will accompany a prisoner from court to prison. Thus, the prison service, and the private companies that run private sector prisons, also have access to the record, which will be used to help, for example, in the security categorization and allocation of prisoners.

Outside the criminal justice system, a number of organizations have access to criminal records. If a crime victim requests the name and address of an offender for civil proceedings, the police are obliged to give this information. The Criminal Injuries Compensation Authority, the body which authorizes compensation for victims of crime from public money, is also told of an applicant's criminal record in order to help the assessment of the merit of the application.

Criminal records may also be accessed by those responsible for vetting applicants for appointment to a huge variety of jobs and appointments. Thus posts closely connected with national security (for example, the Government's Communications Headquarters (GCHQ), M15 and M16) are subject to vetting. Many other jobs require security clearance: for example, trading in alcohol, driving a bus or taxi, working in a casino or betting office. Employment screening is now a huge industry. Huge priority has been given in recent years to vetting those who wish to work with children or vulnerable adults. The announcement of the creation of a Criminal Records Bureau in 1998 caused little surprise: a new self-financing agency to deal with the explosion of application to check people's criminal records (or absence of criminal record). This has resulted in what Thomas calls the 'commodification' of criminal records: there have been millions of disclosures (and 95% have been 'blank' disclosures). CRB checks have soared from around 1.4million in 2002-3 to over 3.8 million in 2008-9. Since the inception of the Bureau, 19 million checks have been completed. The system continues to be hugely criticized: it is an expensive and cumbersome procedure, and one which makes mistakes[17]. As Hughes (2010) points out, the absence of an opportunity to make representations *prior to disclosure* can be disastrous. She gives the example raised in Parliament[18] of a student nurse who was suspended when her ECRC revealed that she was on bail for suspected fraud, but she had in fact been the victim of identity theft.

[15] For an analysis of the difficulties of retrieving adequate information from the PNC in applications to admit previous convictions (and especially in challenging such applications), see Spencer (2006: 97-100)

[16] Breach of an ASBO is a criminal offence.

[17] See National Audit Office (2004), NACRO (2006)

[18] HL Deb. vol. 713, col. 664 (20 October 2009)

English law and practice has traveled a complex journey in the last 50 years, awkwardly balancing the rights of the offender with the protection of the public. The 1970s saw a priority being given to rehabilitation. Now the position is much more complex: the right of the offender to rehabilitation, always a limited right, is now often ignored in favour of a much wider 'public protection agenda'. This is leading to many challenges in the courts, which may lead to the subject gaining more public and political discussion. Perhaps, as this article is being written, it is possible to see a glimpse that the realities of current budget deficits is leading to greater emphasis being given to rehabilitation once again[19]. NACRO (a well known and well respected NGO) has launched a campaign to change the rules on criminal records[20]. The current Government, committed to saving money and perhaps with a clearer civil liberties perspective than the previous Government, may be in a mood to listen.

It has long been clear that a criminal record can be an effective bar to rehabilitation and reintegration into crime-free society: if it is known about, it can lead someone to be socially excluded, less likely to get a tenancy on a flat and certainly a barrier in the way of employment. Faced with two candidates for renting your flat, or employing in your small business, would you choose to employ the one with a criminal record[21]? It is not surprising that offenders prefer to hide their records. English law acknowledged the wisdom of this practice in the Rehabilitation of Offenders Act 1974. This Act was deliberately intended to help in the rehabilitation of offenders who have not been reconvicted of any serious offence for periods of years and to penalize the unauthorized disclosure of their previous convictions. After a certain period an offender becomes rehabilitated, and the conviction is 'spent'. Even police or court officers cannot disclose it[22]. Thus according to section 4, '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'. The periods were (and remain) fixed: the conviction of someone sentenced to more than 30 months imprisonment is never spent, but if the sentence was between 6 months and less than 30 months, the period is 10 years, less than six months 7 years, and those sentenced to community orders or fines have a 'spent' conviction after 5 years. For those under 18, the rehabilitation period is halved.

From the start, there were numerous exceptions. Within the original Act, both section 7 and 8 clearly limited the breadth of the exemption from disclosure found in s. 4, particularly in relation to the possible use of convictions in subsequent court

[19] A Green Paper on 'Breaking the Cycle: Effective Punishment, Rehabilitation and the Sentencing of Offenders' was published in December 2010; the Ministry of Justice's structural reform plan of July 2010 spoke of a 'rehabilitation revolution', harnessing 'the innovation of the private and voluntary sectors' (see www.justice.gov.uk/about/docs/moj-structural-reform-plana.pdf

[20] Nacro (2010): www.changetherecord.org

[21] Actually, the attitude of English employers appears more complex, less clear-cut: see Fletcher et al (2001) and Working Links (2010). In the 2010 research, although only 10% of employers said they would not consider employing ex-offenders, only 18% said they have actually employed someone they know to have convictions; Ex-offenders have a largely negative reputation amongst the employers who had no known experience of working with them, in stark contrast to the positive impressions of those employers who are open to recruiting ex-offenders. When employers were asked what impact the disclosure of a conviction would have on their decision making process, almost three quarters said they would use this information to either reject the candidate outright (16%), or to discriminate in favour of an equally qualified candidate with no convictions.

[22] See *Reynolds v Phoenix Assurance* [1978] 2 Lloyd's Rep 22:24

proceedings. In a criminal case, it is the duty of the prosecution to disclose to the defence the convictions, however old, of a witness. Furthermore, the court responsible for sentencing must be given the full record of the person appearing, however old and however minor the convictions, and, as we have seen, it is the police who provide this from the PNC.

The original Act (s. s 4(4)) allows the Government to pass delegated legislation limiting the breadth of the parent Act. Thus, para 3 of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Statutory Instrument 1975 No 1023) commences with the words 'none of the provisions of section 4(2) of the Act shall apply in relation to….'. There then follow a great number of subsections referring to a great number of schedules. For example, (a)(i) relates to any question asked by or on behalf of any person in the course of the duties of his office or employment in order to assess the suitability of the person to whom the question relates for admission to any of the professions specified in Part 1 of Schedule 1 to the Order, and eighteen different professions are then set out in the Schedule; (a) (ii) relates to questions asked of the person to whom the question relates for any office or employment specified in Part II of the said Schedule 1, or for any other work specified in paragraphs 12A, 13, 14, 14A, 20, 21, 35, 36, 37, 40, 43 or 44 of Part II of schedule 1, (and then Part II contains some 44 paragraphs). The details are not important, but the point is important: the exceptions have always been complex and numerous[23].

The rights of the offender to prevent access to his record appeared to be supported by the enactment of the Data Protection Act 1998, which sprang from the EC Directive designed to 'protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'. In the early days of the Data Protection Act 1998, the police adopted a policy of 'weeding' certain very old convictions, a policy which was agreed with the Information Commissioner, who endorsed the Codes of Practice for Data Protection produced by the Association of Chief Police Officers (ACPO) in 1995, 1999 and 2002. However a change of policy was agreed after the huge public controversy after the conviction of Ian Huntley, a school caretaker, for the murder of two school children in August 2002. After the publication of the report of Sir Michael Bichard's inquiry (Bichard, 2004), which explored why one local police force had failed to notify another that the school caretaker had previously been investigated for allegations of sexual offences against children (although he had no previous convictions), ACPO then decided that 'weeding' was inappropriate

In October 2009, the Supreme Court, in *R. (on the application of L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2009] 3 W.L.R. 1056 had to consider whether the disclosure to the applicant's employer in an Enhanced Criminal Record Certificate (ECRC) of the fact that her son was on the child protection register breached her rights under the European Convention on Human Rights 1950 art.8 or was justified on the ground that her employment was in a school where she was responsible for the welfare of children. Although the Court held that disclosure in this case was justified, it is to be hoped that it will have led to serious reconsideration of the balance to be struck. L had obtained a job as a school playground assistant, and the employing agency then applied for an enhanced criminal records certificate (ECRC) under s.115 of the Police Act 1997. The police disclosed to the school that

[23] See *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079, discussed below.

although she had no convictions, she had been accused of neglecting her child and of non-cooperation with social services, and that her son was removed from the child protection register after he received a custodial sentence for robbery. Her employment was terminated. She claimed that the police disclosure violated her right to respect for her private life under the Human Rights Act 1998[24].

The Supreme Court unanimously dismissed the appeal. Lord Saville, Lord Brown and Lord Neuberger all explicitly agreed with Lord Hope[25]. He stated that all ECRC disclosure decisions are likely to engage art.8, as the information has been collected/stored in police records; and disclosure is likely to affect the private life of the applicant in virtually every case. The proportionality of the proposed disclosure must therefore be considered in each case. Lord Hope analyzed the police notes of guidance 'MP9 Human Rights Guidelines', which sets out the steps that the police officer is expected to take to establish whether or not he believes that the impact of disclosure on the applicant's private life outweighs the potential impact on the vulnerable group if the information was not disclosed. Those steps are subject to a risk/human rights rating table, in which four human rights categories are compared with three risk categories:

> 'Where the risk that a failure to disclose would cause is moderate, careful consideration is only required if the disruption to the private life of anyone would be one grade higher: severe. It is only where the risk that a failure to disclose would cause little quantifiable risk to the vulnerable group that careful consideration is required if the corresponding human rights category of little disruption to private life applies. In all other cases the corresponding human rights category is trumped by an equivalent risk category' (para.32).

Lord Hope concludes the approach of the Court of Appeal in *R. (X) v Chief Constable of the West Midlands Police* [2005] 1 W.L.R. 65 had 'been to tilt the balance against the applicant too far'. It had encouraged the idea that priority must be given to the social need to protect the vulnerable as against the right to respect for private life of the applicant. The correct approach, as in other cases where competing Convention rights are in issue[26], is that neither consideration has precedence over the other. The rating table in MP9 should be restructured so that the precedence that is given to the risk that failure to disclose would cause to the vulnerable group is removed. It was possible, said Lord Hope, for the relevant law[27] to be read and given effect in this way to be compatible with the applicant's art.8 right. In this particular case, insufficient weight was given to L's right to respect for her private life, but the risk to children must, in her case, be held to outweigh the prejudicial effects that disclosure will give rise to.

Lord Neuberger, in supporting the majority view that the applicant's consent should not be taken, as Lord Scott suggested, to negate any claimed violation, stated:

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[24] This Act incorporated the European Convention on Human Rights 1950 into domestic law.

[25] The fifth justice, Lord Scott, agreed in the result but endorsed the approach of Lord Woolf in *R. (X) v Chief Constable of the West Midlands Police*, according priority to the need to protect the vulnerable as against any art.8 rights of the applicant. He also took issue with Lord Hope's statement that applicants for an ECRS only consent to disclosure of information on the basis that their right to private life is respected. He stated that the consent of the applicant negated any claimed violation.

[26] He cites in particular the developing law of privacy: *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, para.12, per Lord Nicholls

[27] Section 115 of the Police Act 1997

> ‘Where the legislature imposes on a commonplace action or relationship, such as a job application or selection process, a statutory fetter, whose terms would normally engage a person's Convention right, it cannot avoid the engagement of the right by including in the fetter's procedural provisions a term that the person must agree to those terms. Apart from this proposition being right in principle, it seems to me that, if it were otherwise, there would be an easy procedural device which the legislature could invoke in many cases to by-pass Convention rights’ (para.73).

The decision in *R. (on the application of L) v Commissioner of Police of the Metropolis* (2009) is not an easy one to apply in practice, since the test of proportionality, notoriously slippery, has to be applied to the facts of every individual case. There have already been a number of subsequent cases. Thus *in C v Chief Constable of Greater Manchester* [2010] EWHC 1601 (Admin), the High Court recently granted an application for judicial review made by a man who had sought a job as a welding lecturer at a further education college teaching those over the age of 16. The college requested an enhanced criminal record certificate[28]. The chief constable disclosed details of an allegation made by C's stepdaughter that C had sexually abused her between the ages of 5 and 15. The complainant had originally made the allegation when she was 15 but had withdrawn it. She made the allegation again when she was 27. The disclosure stated that although there had been no reason to disbelieve the complainant's account, there had been insufficient evidence to give a realistic prospect of conviction. The chief constable considered that there was a risk that C would abuse children in his care in the lecturer post. He noted that C had not been charged, but found that the allegation was relevant, that there was no evidence to suggest it was false other than C's denial, and that the fact that the allegation had been made twice added weight to it. C argued that the disclosure was unlawful. The High Court held that the question of proportionality necessitated close attention to detail by the decision-maker: care had to be taken in weighing the risks of non-disclosure against those of disclosure. The force of the accusations was relevant in striking that balance. The analysis required an appreciation of the extent of risk. There had been no detailed consideration of the extent to which C would come into contact with children. The chief constable's view, that there was no evidence to suggest that the allegation was false, ignored the fact that the complainant herself had said it was false when she retracted it. There had been no detailed consideration of proportionality. It was normally insufficient for a decision-maker merely to state his belief that disclosure was proportionate. The chief constable had also taken an uncritical approach to the explanation given for the retraction. Further, the fact that an allegation had been repeated could not be said to add weight to the allegation. Moreover, the chief constable had failed to consider risk. More was required than the statement that there was a risk that C would abuse children in his care when the post dealt with over-16s in a college environment and the alleged abuse was in the home environment on a girl between 5 and 15. The decision to disclose could not stand. Nor could it be said that the decision, though flawed, was nonetheless unarguably right. Although the allegation might have been true and might have been relevant, the quality of the evidence was questionable and the relevance of the allegation to the post was low. A decision that would inevitably have the consequence of C being unable to obtain work in his chosen profession was not proportionate to the risk from non-disclosure, which, though existing, was low. C won his case.

[28] Under s.113B of the Police Act 1997

Thus we see that although the Rehabilitation of Offenders Act 1974 appeared to protect an offender from disclosure, the reality of English law today presents a very complex picture. Many offenders continue to be forced to disclose their convictions before they can obtain a job. But perhaps the tide of public protection is beginning to turn?

Deleting the criminal record

Currently there is no way that a criminal record can be deleted from the PNC. This was confirmed by the decision in *Chief Constable of Humberside v Information Commissioner* [2009] EWCA Civ 1079. Here the Court of Appeal made it clear that the law permits the police to keep all convictions on the PNC forever. Several individuals had complained to the Information Commissioner (a post created under the Data Protection legislation) following the disclosure of old minor convictions following a request by the Criminal Records Bureau or, in one case, a request by one of the individuals herself. In respect of each of those convictions, the Information Tribunal upheld the view of the Information Commissioner that they should be deleted from the PNC. But the police took the view that no convictions should be deleted except in exceptional circumstances, which should be narrowly construed, as limited to such matters as convictions being established as wrongly obtained. The original tribunal held that excessive data was being retained, contrary to the third data protection principle under the Data Protection Act 1998 Sch.1, and that data was being kept for longer than necessary contrary to the fifth data protection principle[29].

However, the Court of Appeal found for the police. They held that it was a misinterpretation of the 1998 Act to suggest that if the police registered particulars, then the only purposes for which data could be retained were 'core' or operational police purposes. There was no statutory constraint on any individual or company as to the purposes for which he or it was entitled to retain data. The purposes had to be lawful in order to comply with the first data protection principle but, that apart, a data controller could process data for any purpose. What the data controller has to do is identify the purpose or purposes in the public register so that people knew what the data was being retained for and so that the Information Commissioner and data subjects could test the principles under the Act by reference to the purposes identified. One of the purposes for which the police retained the data on the Police National Computer was to be able to supply accurate records of convictions to the Crown Prosecution Service, the courts and the Criminal Records Bureau. Since those recipients required a complete record of convictions, spent and otherwise, it could not be said that the data being retained was excessive or being retained for longer than necessary for those purposes. As well, if the police said rationally and reasonably that convictions, however old or minor, had a value in the work they did, that should, in effect, be the end of the matter.

[29] A separate point arose in the case of one individual who alleged that the retention of a reprimand on the computer after her 18th birthday was unfair under the first data protection principle because she had been given an assurance that the reprimand would be removed from her record when she was 18 if she did not get into anymore trouble. She also lost on appeal.

It seems inconceivable that in England convictions will ever be deleted from the national records completely. There is indeed a possibility that Parliament[30] (or indeed the courts) might change the rules on how these records are used, but not that they should be deleted completely.

Judicial rehabilitation rituals à l'anglaise?

However, even if criminal records are very unlikely ever to be erased, there are many other possibilities for greater judicial involvement in rehabilitation. The concept of 'rehabilitation' has long been seen as one of the main purposes of punishment in England i.e. a judge when sentencing should take it into account when sentencing. This was 'solidified' in s. 142 of the CJA 2003 which provides the following 'purposes of sentencing':

- the punishment of offenders,
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders,
- the protection of the public, and
- the making of reparation by offenders to persons affected by their offences.

It would seem likely that magistrates and judges regularly commend offenders for the steps they have taken to desist from crime in the time since arrest and before sentence. It would be interesting to see the extent to which judges take into account 'rehabilitation' in their sentencing remarks[31]. Although judges are required by law to make detailed remarks explaining/justifying the sentences they impose, there has been remarkably little empirical research into these reasons[32].

Courts can celebrate partial desistance, or attempts at desistance, from crime by, for example, giving a lenient sentence, deferring sentence, or suspending a sentence of imprisonment which might otherwise have been automatically and immediately served. Lenient sentences are not encouraged, of course: the emphasis has been on proportionate sentences, based on a careful weighing of the seriousness of the offence (the harm caused and the culpability of the offender at the time). But we know little about the reality of sentencing decisions, particularly for low level offenders[33].

[30] There are strong arguments for revisiting the periods specified in the Rehabilitation of Offenders Act 1974, not least because the sentences imposed by the courts are significantly longer than they were in 1974, and so offences should become 'spent' sooner.

[31] The message from the Court of Appeal, whose decisions are binding on sentencing judges, is deeply ambivalent. For example, in *Ryan Prentice, Attorney General's Reference (Nos.8, 9 and 10 of 2010)* [2010] EWCA Crim 1074, the Lord Chief Justice said "it is said that he had made real efforts to start the process of rehabilitation during the long period when he was in custody on remand. That evidence was before the court and should not be brushed aside". Yet, despite this, the Court increased his sentence (for two robberies and affray) from 2. 5 years, to 3.5 years imprisonment as they accepted that the sentence had been unduly lenient! (See also *Baisden* [2010] EWCA Crim 1031 – on co-operation with the police being evidence of rehabilitation).

[32] A major project designed to help understand the reasons behind individual sentence decisions was abandoned in 2009 because crucial data was simply unavailable (see Dhami and Souza, 2009). A smaller, less ambitious, sentencing survey of Crown Court decisions has recently been launched by the Sentencing Council: see www.sentencingcouncil.org.uk/facts/sentencing-survey.htm

[33] A detailed study of decision-making in magistrates' courts and in the Crown Court would be invaluable, for example, exploring the different reasons given for suspending a sentence of imprisonment, or for imposing certain requirements in a community order rather than others.

After conviction, the court often adjourns sentencing for three or four weeks for the preparation of a pre-sentence report. Where this report states that the offender is determined to 'go straight', and demonstrating clear evidence of that resolve, the judge has the power to defer the sentencing decision for six months. After six months, if the defendant is still receiving glowing reports from a probation officer, the sentencer (a singe judge or a bench of lay magistrate) may decide on a lenient sentence, and congratulate the defendant for his achievements. The use of deferred sentences have not been studied in any detail, and yet there is clear anecdotal evidence of their use and effectiveness.

When a sentence is suspended, and the defendant does not reoffend, he will not be called back before the court. Although England does not routinely have review courts[34], judges are sometime involved in reviews, particularly of drug abstinence conditions in community orders. There are undoubtedly many judges and magistrates who try to be 'problem-solving courts'[35], to engage effectively particularly with low-level offenders, in order to increase compliance with orders and to reduce reoffending. The most high profile example has been the North Liverpool Community Justice Court[36], but there are many other examples of often informally and locally agreed dedicated drugs courts, mental health courts, specialist domestic violent courts as well as 42 HMCS 'problem solving pilot courts'[37]. The power created in s. 178 of the Criminal Justice Act 2003, allowing the Secretary of State, by order, to give criminal courts the power or duty to review community orders, has only be applied to 14 magistrates' courts. Perhaps the slow spread of the power of review is a question of cost. But it should also be a question of empirical evidence: whether sentencer involvement can and does impact on offender compliance and desistance. There is anecdotal evidence, and an academic literature, which persuasively argues for such 'problem solving courts', which might be called 'judicial rehabilitation' in the widest sense of the phrase. Offenders are more likely to comply with court orders if they think the criminal justice process is legitimate and trustworthy (with fair outcomes and fair procedures). The last ten years or more in England and Wales has relied far too much on coerced compliance and 'recycling' offenders in the worst possible way. Both policy officials and evaluators have tended to over-invest financially and intellectually in a technocratic model of reducing reoffending that emphasizes programmes for offenders, and to under-invest in models that see the process as a complex 'people changing' skill (see Hough, 2010). A more human model would support offenders better (more effectively) in their attempts to desist from crime.

Conclusion

Judicial rehabilitation in the context of this series of articles requires a court order, and an application to a court, to wipe clean an offender's criminal record. There is currently no way of speeding up the process of rehabilitation, in this sense, in English law: the courts will not order the police to delete records from the PNC, and indeed the courts have no power to shorten the periods under the Rehabilitation of Offenders

[34] Though many of us have been calling for them! The Halliday Report recommended review courts.

[35] See the 'Big Judges project' supported by European Social Fund (e.g. www.clinks.org/assets/files/CLINKS%20Big%20Judges%20Seminar%20Transcript.pdf); and numerous newspaper reports e.g. 'the unusual judge who hugs his clients: www.guardian.co.uk/society/2009/apr/22/drugs-judge-justin-philips

[36] see McKenna, K. (2007)

[37] Her Majesty's Court Service (HMCS) seeks "to mainstream the problem solving approach across magistrates' courts in England and Wales" in their Business Plan 2009-10:16.

Act 1974. It is possible to see the potential for judicial rehabilitation in a wider sense, and even for redemptive rituals (see Maruna and LeBel, 2003) in English courts, but at this moment any likelihood of a formal form of judicial rehabilitation in the sense of record erasure seems inconceivable. The best that reformers can hope for is that

- The *Rehabilitation of Offenders Act 1974* is amended to reduce the time it takes for offences to become 'spent'[38].
- The regime of disclosures and criminal record checks is overhauled (in particular, to reduce the number of jobs for which checks are made, and to reduce the number of unlawful or erroneous checks made).
- The scope for further judicial involvement in rehabilitative initiatives is explored.

[38] NACRO (2010) suggest fines should only have to be disclosed for one year; Prison sentences of less than four years to be disclosed for two years; Prison sentences lasting four years or more to be disclosed for four years; Life sentences to be disclosed in perpetuity. They also recommend that the term 'buffer periods' be adopted to establish the principle that the buffer period is not an additional sentence to the one already served, but a time during which an ex-offender can demonstrate his or her commitment to reform. See also Mason, 2010.

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