

# Mind the gap: sentencing, rehabilitation and civic purgatory

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## **Abstract**

This article discusses the relationships and tensions between the sentencing, statutory supervision and legal rehabilitation of lawbreakers under UK legislation. It does so with reference to both the Rehabilitation of Offenders Act 1974, which allows some criminal records to become 'spent' after a set period of time, and the Offender Rehabilitation Act 2014, which was designed to significantly expand statutory supervision arrangements. The article also demonstrates how, post-supervision, many former lawbreakers are cast into a state of 'civic purgatory', before suggesting that a more fully integrated approach to rehabilitation is required.

## **Key words**

Criminal records, legal rehabilitation, stigma, discrimination, statutory supervision

## **Introduction**

In sentencing convicted lawbreakers, courts in England and Wales are required to give due consideration to five distinct objectives (Sentencing Council 2017). These include: punishing the offender; reducing crime; protecting the public; making the offender 'give something back'; and *reforming and rehabilitating the offender*. This latter and perhaps most elusive, objective is defined as 'changing an offender's behaviour to prevent future crime for example by requiring an offender to have treatment for drug addiction or alcohol abuse' (ibid.). However, this definition arguably over-simplifies what is, in reality, a much more complex and nuanced penological objective. Indeed, 'rehabilitation' in the criminal justice context is rather a catch-all

term for a number of desired outcomes which are themselves often guided by distinct philosophical principles (for a discussion, see Brooks 2012: 51-63; Canton 2017: 102-124).

In addition to the concept of 'natural rehabilitation' (or natural desistance), whereby some individuals spontaneously cease their law-breaking behaviour and effectively 'grow out' of criminality (see Laub and Sampson 2001; 2003), McNeill (2012) describes four distinct forms of rehabilitation. *Psychological* rehabilitation, he argues 'is principally concerned with promoting positive individual-level change in the offender' (p. 27). It provides the rationale for including therapeutic interventions and 'offending-behaviour courses' as part of a sentence and therefore comes closest to the idea of somehow 'changing' lawbreakers (through intervention) conveyed by the Sentencing Council's (2017) definition. *Moral* rehabilitation conveys the notion 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). Whilst this 'paying back' is achieved partly through the suffering of 'unpleasant consequences' (Lacey 1988) or 'hard treatment' (Duff 2001), notions of restorative justice and 'reintegrative shaming' may also contribute towards the idea of some sort of moral redemption being achieved (Braithwaite 1989; 2002). *Social* rehabilitation, 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). However, this concept also involves 'the informal social recognition and acceptance of the reformed ex-offender' (McNeill 2012: 15) which 'rather than the advancement of the "science" of personal reform, is perhaps the ultimate problem for rehabilitation in practice' (ibid.).

The difficulties of advancing the social rehabilitation of lawbreakers are linked to the inherently stigmatising nature of criminal justice processes based, not merely on retribution but on the censure or condemnation of lawbreakers in the public forum of the courtroom (Von Hirsch 1993; Duff 2001). Indeed, as discussed elsewhere, processes of criminalisation and moral stigmatisation can give rise to a form of 'civil and social death' (Henley 2014; 2017a; 2018; see also Earle 2016). It is for this reason, despite being relatively neglected in the rehabilitation literature, that the question of *legal or judicial rehabilitation* is of such importance given its concern for '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). Legal rehabilitation is concerned with preventing or mitigating possible discrimination against former lawbreakers *after* they have paid the legal penalty for their crime. It is important because it says something definitive about the nature of the relationship between the state, its laws, society and the extent to which former lawbreakers are recognised as 'citizens' of equal merit after they have endured punishment.

Legal rehabilitation can thus be said to *underpin* social rehabilitation, provide *formal recognition* of moral rehabilitation, and yet be *distinct from* psychological rehabilitation. The distinction between legal and psychological forms is precisely what makes McNeill's (2012) model so valuable in helping us to avoid understanding rehabilitation as only ever being about the 'correction' of lawbreakers to socially desirable behavioural norms. That is, as being concerned merely with what Foucault (1977) once dubbed 'moral orthopaedics' (p.10), involving 'an assessment of normality and a technical prescription for a possible normalization' (p.21). Indeed, as Carlen has argued, '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: 92).

In this article I demonstrate how, and to some extent why, the distinct rehabilitative forms discussed by McNeill (2012) are not currently given parity in two key pieces of legislation which provide for the reform and rehabilitation of lawbreakers in England and Wales, with particular emphasis on those sentenced to custody. I do this by, firstly, describing the provisions of both the Rehabilitation of Offenders Act 1974 (which determines when and how legal rehabilitation takes place) and the Offender Rehabilitation Act 2014 (which was, in theory at least, designed to reduce re-offending and promote the social and psychological rehabilitation of lawbreakers by expanding post-custody supervision in the community). Secondly, I provide an analysis of the 'gaps' which exist for various custodial sentences between the achievement of legal rehabilitation under the 1974 Act and the completion of statutory supervision periods aimed at 'the rehabilitation of offenders' under the 2014 Act. Thirdly, I discuss the problems which can arise from the period of 'civic purgatory' endured by those who have completed their sentences but who have not yet been designated as 'rehabilitated persons' in law. I conclude by arguing that greater parity between individual-level attempts to reform lawbreakers and the formal recognition of successful reform is required in order to maintain both the legitimacy of supervision arrangements from the perspective of those subjected to them and also public confidence in the efficacy of such arrangements to reduce re-offending.

## **Rehabilitation: a play in two Acts (with a 40 year interval)**

As explained above, legal rehabilitation involves setting aside, sealing, or expunging altogether a person's criminal record. The aim of doing so is to mitigate the social stigma which might result from a previous conviction and to formally acknowledge that an individual has duly completed their sentence and gone on to live a crime-free life. In some jurisdictions such as France, this can be achieved through a formal judicial hearing at which desistance is officially acknowledged

(Herzog-Evans 2011). Indeed, people with convictions in France can apply for ‘judicial rehabilitation’ relatively quickly, in some cases only one year after sentencing (Stacey 2015). More commonly, however, legal rehabilitation occurs through an automatic process after a conviction-free period.

### *The Rehabilitation of Offenders Act 1974*

Following the recommendations of a joint working party on ‘the problem of old convictions’ (Justice 1972) the Rehabilitation of Offenders Act 1974 (ROA) introduced a process of dealing with old criminal records which renders them ‘spent’ after a set period of time (Breed 1987; Mears 2008; Henley 2017b). After this period has passed without any further convictions, a former lawbreaker becomes a ‘rehabilitated person’ in law. In effect, this removes the burden of disclosure of a spent conviction from former lawbreakers for *most* purposes. It also means that a spent conviction is not a lawful ground for treating a rehabilitated person less favourably, for instance, following an application for employment, or for a financial service such as insurance. Following amendments in Section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the rehabilitation periods in the ROA were reduced in length and the protections of the Act extended to include those sentenced to terms of imprisonment up to and including four years (see Table 1). Prior to this, the Act had only applied to those sentenced to 30 months or less.

**Table 1.** Rehabilitation periods under the Rehabilitation of Offenders Act 1974 (as amended) for selected sentences/disposals

<b>Sentence/disposal</b>	<b>Rehabilitation period</b>
Absolute discharge	Spent immediately
Fine	One year from point of imposition
Community order	The length of the order plus one year
Prison sentence up to six months	Length of sentence plus two years
Prison sentence between six and 30 months	Length of sentence plus four years
Prison sentence between 30 and 48 months	Length of sentence plus seven years
Indeterminate, extended determinate sentences and prison sentences over 48 months	Never spent

The amendments to rehabilitation periods followed earlier criticisms of the ROA in the Home Office (2002) report *Breaking the Circle: A Report of the Review of the Rehabilitation of Offenders Act*. This report suggested that the Act was ‘no longer considered to be wholly effective’, that it was ‘not achieving the right balance between resettlement and protection’, and that it was ‘confusing’, lacking in ‘proportionality and clarity’ and ‘failing to achieve the protection for ex-offenders’ which had originally been aspired to (pp. 5-6). Whilst the limited amendments eventually introduced by the LASPO Act did not go nearly as far as those recommended by this report a decade earlier (it had advocated including *all* determinate sentenced prisoners), the campaigning work of organisations such as Unlock (the charity for people with convictions) has kept ROA reform on the agenda and ensured that at least some progress has been made in reducing the burden of disclosure.<sup>1</sup>

A number of fundamental issues with the ROA remain, however. Firstly, many exemptions to the principle of a ‘spent conviction’ have been made – particularly in the area of employment – through both the Rehabilitation of Offenders Act (Exceptions) Order 1975 and its subsequent expansion. Such exemptions are not only restricted to occupations which involve working with children and vulnerable adults (e.g. in education, training and healthcare settings). Instead, the current list of exempted professions includes: veterinary practitioners; employment concerned with healthcare; traffic wardens; locksmiths; certain professions in the financial sector; drivers of private hire vehicles like taxis; those involved in the administration of justice; and employment in the private security industry (see Thomas 2007: 98-100). For such occupations ‘standard’ and ‘enhanced’ criminal records checks conducted by the Disclosure and Barring Service (DBS) are available which reveal both unspent and spent convictions to prospective employers (as well as a host of ‘non-conviction’ information in the case of enhanced checks, see Larrauri 2014a). This potentially restricts people with convictions to an increasingly narrow range of possible occupations.

Secondly, the ‘spent model’ of dealing with old criminal records requires people with convictions to tell a ‘legal lie’ about their past after a set period of time. That is, to answer ‘no’ to any question about whether they have a criminal record if it has become spent under the ROA, rather than prohibiting employers, insurers and others from asking such a question in the first place or restricting such questions to only those offences which might be deemed to have a ‘close nexus’ with the purposes of the enquiry (for instance, motoring offences and applications for driving jobs or car insurance) (see Larrauri 2014b).

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<sup>1</sup> See, for example, the *Criminal Records Bill* introduced (as a Private Members Bill) by Unlock’s President Lord Ramsbotham which seeks to bring rehabilitation periods in line with those proposed by ‘Breaking the Circle’ and to extend the protections of the ROA to all those who have served a determinate sentence.

Thirdly, the 'spent model' renders the legal rehabilitation of former lawbreakers a 'passive' rather than an 'active' process' (see Maruna 2011). That is, rather than having any progress made since the end of a sentence recognized in law when desistance from offending actually occurs, or when the sentence plan and any rehabilitative interventions have been completed, a person with convictions simply has to wait for an extended period of time to be officially recognised as a 'rehabilitated person'. There would, for example, be no distinction made between two individuals serving two year custodial sentences – where one complied fully with all requirements of their sentence and any supervision period, and another who refused to engage with their sentence planning and was recalled almost immediately to custody due to a breach of licence conditions. Under the ROA both would achieve legal rehabilitation at the same time if no further convictions were acquired because 'rehabilitation periods' are calculated from the sentence expiry date rather than point of release from custody. Therefore, in the above example, the compliant individual would face potential discrimination in the community for *longer* than the individual who served nearly their whole sentence in custody.

The issue of former lawbreakers having to passively wait for legal rehabilitation to occur can be likened a sort of 'civic purgatory' whereby a person may have served their sentence in full, but are not yet regarded as being entitled to equitable treatment with other citizens (Henley 2017a; 2018). Indeed, as Larrauri (2014b) has noted, the 'spent model' of dealing with previous convictions accepts far too readily that people with convictions will be discriminated against *whilst they wait for their conviction to become spent*. That is, people are most vulnerable to discrimination during the key period when they may be attempting to desist from offending. Additionally, there is the issue that the ROA never allows any conviction resulting in a sentence of more than four years imprisonment, or any indeterminate prison term, to become spent regardless of future conduct.<sup>2</sup>

In its green paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Ministry of Justice 2010) the Conservative-Liberal Democrat coalition government acknowledged many of the issues with the UK's current approach to criminal records. However, despite claiming to 'want to reduce unnecessary obstacles to successful rehabilitation' (p33) and inviting 'ideas for more radical reform of the Rehabilitation of Offenders Act' (p34) the government ultimately failed to address the fundamental problems with the 'spent model' of

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<sup>2</sup> There is also an issue caused by the impact of ancillary court orders made by courts when dealing with lawbreakers due to the effect of section 5(8) of the ROA. This requires that a conviction cannot become spent whilst an order 'imposing on the person convicted any disqualification, disability, prohibition or other penalty' has effect. Such orders might include Criminal Behaviour Orders or Sexual Harm Prevention Orders (previously Sexual Offences Prevention Orders). Thus, a number of more recent 'preventative justice' measures (see Ashworth, Zedner and Tomlin 2013) introduced since the passage of the original ROA have the effect of delaying the possibility of a criminal record being spent. They therefore take on punitive as well as preventative characteristics.

convictions outlined above. Instead, as already discussed they merely revised rehabilitation periods in the existing ROA resulting in the periods shown in Table 1 (above). Whilst these shortened the waiting time required to achieve legal rehabilitation in most cases, they retained the idea that certain individuals could *never be legally rehabilitated*. These amendments took effect on 10<sup>th</sup> March 2014 just *three days* before the Royal Assent of another piece of legislation which was ostensibly concerned with furthering the cause of rehabilitating lawbreakers.

### *The Offender Rehabilitation Act 2014*

The Offender Rehabilitation Act 2014 (ORA) was vaunted by former Conservative Justice Secretary Chris Grayling as a key milestone in the ‘rehabilitation revolution’ which the *Breaking the Cycle* green paper had promised. In the months prior to the introduction of this legislation into parliament, the Ministry of Justice (2012) announced that reforms would make use of ‘greater competition to drive value’ with a ‘greater role for the private and voluntary sectors’ in order to tackle perennially high rates of re-offending and thus provide savings to the Treasury. This occurred within the context of a prolonged period of economic austerity in the wake of the Global Financial Crisis of 2008. However, the widespread marketization of criminal justice in England and Wales (involving not only offender supervision, but also prisons and resettlement services) was a longer-standing phenomena involving both New Labour and coalition governments (for a discussion, see Corcoran 2014).

Amidst much concern and criticism (see, for instance, McNeill 2013; Gilbert 2013; Calder and Goodman 2013) the ORA introduced measures aimed at ‘addressing the gap in the criminal justice system where those serving under 12 months are released with no supervision or support’ (Ministry of Justice 2012). The government’s promotion of the ORA as a measure to tackle re-offending on the grounds of this ‘gap’ was a controversial point, not least because public sector probation services had hitherto been given no statutory responsibility to provide supervision in such cases. The ORA introduced a mandatory minimum twelve month period of supervision for *all* people sentenced to custody, often delivered by 21 new Community Rehabilitation Companies (CRCs). These were formed by partnerships between private sector organisations such as Sodexo, Amey, Interserve and Ingeus UK and charities such as Nacro, the St. Giles Trust and Shelter. As well as working with an estimated 50,000 additional short-term prisoners per year subject to the new mandatory supervision arrangements, it was planned that the CRCs would take responsibility for approximately 70 per cent of the resettlement functions

previously undertaken by the public probation service. Under the ORA, management of the remaining 'high risk' cases (including those subject to MAPPA supervision) and duties such as court reports, parole assessments, management of approved premises and victim liaison work fell to the new National Probation Service, founded after the abolition of existing regional probation trusts in 2013.

Whilst section 2 of the ORA stated that: 'The purpose of the supervision period is the rehabilitation of the offender', the Act did not seek to achieve this by introducing any specific measures designed to tackle the social stigma associated with a record of imprisonment. Instead, the Act provided that non-compliance with the 'rehabilitation' on offer from CRCs could result in a further punitive sanction including a fine or up to 14 days in prison. The ORA thus showed no concern for the *legal* rehabilitation of lawbreakers, but did expand the period in which they might be subject to a range of interventions aimed at bringing about *psychological* and *social* rehabilitation.

In reality, the implementation of the Transforming Rehabilitation agenda has proven highly problematic with the foreword to a HM Inspectorate of Probation (HMIP) (2016: 4) report highlighting 'poor or patchy morale' amongst CRC staff, some of whom 'expressed concern about their competence to undertake their roles'. Moreover, 'training had not always been delivered in a timely way to equip them with the skills required to enable them to undertake new or changed roles' and 'in a substantial proportion of cases, not enough had been done before release to help the individuals with their accommodation, employment or finances'. A separate thematic review of Rehabilitation Activity Requirements (RARs) introduced by the ORA for Community Orders and Suspended Sentence Orders also reported significant problems with their implementation and delivery (HMIP 2017).

## **A new kind of 'gap'**

The passage of the ORA again led to a pronouncement that a 'major gap in the criminal justice system' had been addressed (Ministry of Justice 2014). However, despite this claim, a closer analysis of the impact of the ORA and its relationship with the pre-existing ROA reveals that a new kind of 'gap' has, in fact, been opened up by the legislation – particularly for those sentenced to custody. This gap results from the failure of the government to synchronise the period of time for which lawbreakers are subject to increased supervision aimed at 'the rehabilitation of the offender' (under s.2 of the ORA) with the period before which they can be treated *in law* as a 'rehabilitated person' under the ROA. To explain, in the majority of determinate custodial sentences, the prisoner is released at the halfway point of their sentence



and, prior to the ORA, would have served the remainder of the term on licence (with those serving sentences of more than 12 months subject to probation supervision). As discussed above, the ORA has subsequently directed that all prison sentences now require a minimum of 12 months post-custodial supervision, ostensibly for the purposes of ‘rehabilitation’. However, due to the lengthy waiting times before *legal rehabilitation* can take place under the ROA, the individual is effectively cast into a state of ‘civic purgatory’ between the conclusion of any rehabilitative interventions and the *recognition* of that rehabilitation in law. That is, where the individual is no longer strictly an ‘offender’ to be punished, managed and supervised by criminal justice agencies but is also not able to enjoy unencumbered access to the full range of rights and entitlements that ‘citizens’ do. There have, of course, always been long waiting times between the completion of a sentence and legal rehabilitation under the ROA. However, despite reducing these waiting times just three days earlier, the government’s introduction of the ORA embedded an *additional gap* between the termination of statutory supervision arrangements and the achievement of a spent conviction. Thus, for many lawbreakers, whilst supervision and contact with either the NPS or a CRC may come to an end, they will face an effective period of civic purgatory before their status as a ‘rehabilitated person’ under the ROA offers them at least some protection against social discrimination (for example, in the labour market). Table 2 demonstrates the length of this period for a selection of different custodial sentences.

**Table 2.** Key milestones and waiting periods from start of sentence for selected custodial sentences

Sentence length (months)	Normal release point (months)	Statutory supervision ends (months)	Conviction becomes ‘spent’ (months)	‘Civic purgatory’ period (months)
6	3	15	30	15
12	6	18	60	42
18	9	21	66	45
24	12	24	72	48
30	15	30	114	48
36	18	36	120	84
42	21	42	126	84
48	24	48	132	84
Over 48	24+	48+	Never	Permanent
Indeterminate	Not fixed	Not fixed	Never	Permanent

To use the example of a person sentenced to 18 months imprisonment from Table 2:

- the person is released from custody after nine months;
- they then undergo a 12 month period of supervision (comprised of the nine months mandated by their licence plus a further three months to meet the requirements of the ORA);
- their contact with either the NPS or a CRC thus ends after 21 months;
- the conviction will take a total period of 66 months to become 'spent' under the ROA (the length of the 18 month sentence, plus a 48 month 'buffer period');
- there is then a 'gap' of some 45 months between the termination of supervision arrangements and the achievement of legal rehabilitation.

In addition to the impact of this gap on determinate sentenced prisoners with short to medium length custodial terms (including the estimated additional 50,000 people subject to post-custody supervision following the ORA), it remains the case that anybody sentenced to more than four years imprisonment or an indeterminate term is never eligible for legal rehabilitation under the ROA, regardless of their subsequent conduct or engagement with supervision arrangements. Table 3 reveals that in the five years which have followed the LASPO Act and its promised 'rehabilitation revolution', a significant number of sentences have been handed down in England and Wales which fall into this category. Moreover, the number of such sentences appears to have increased during this period compared to the 2013 baseline. Therefore, a growing number of people with convictions are permanently regarded in law as *beyond legal rehabilitation*.

**Table 3.** Sentences handed down which cannot become spent under the Rehabilitation of Offenders Act 1974

<b>Year ending March 31<sup>st</sup></b>	<b>Number of sentences</b>	<b>% increase (against 2013 baseline)</b>
2013	6,841	n/a
2014	6,690	-2.2
2015	7,169	+4.8
2016	7,335	+7.2
2017	7,480	+9.3
<b>Total</b>	<b>35,515</b>	<b>-</b>

(Source: Ministry of Justice 2017)

The lengthy buffer periods contained within many rehabilitation laws such as the ROA usually last for several years and are justified by the argument that a convicted person might remain at

risk of further offending for a certain period of time after having served their sentence. However, research demonstrates that the ability of criminal records to predict future offending declines over time with reported rates of offending becoming similar to (or even lower than) those for previously un-convicted people after approximately seven years (see Kurlychek et al. 2006, 2007; Soothill and Francis 2007; Bushway et al. 2011). Crucially, it is not known to what extent the reoffending which occurs during this period is a result of the stigma attached to a criminal record. One significant area where criminal stigmatisation is known to manifest itself is within the labour market (see Working Links 2010). This is a worrying phenomenon since stable employment has been shown to reduce re-offending by between 30 and 50 per cent (Social Exclusion Unit 2002).

## **Problematising civic purgatory**

As discussed elsewhere a number of ‘pains of criminalisation’ may stem from the stigma associated with a criminal record (Henley 2018). In addition to problems with fair access to employment, these can include: problems with accessing financial products such as insurance and mortgages; difficulties securing a tenancy; problems with attaining travel visas for certain countries; restrictions on participating in civil society (e.g. through election to various public offices) and even the possibility of obtaining compensation as a victim of serious crime (ibid.). Such negative outcomes are often referred to as the ‘collateral consequences of a conviction’ although in many cases their impact may be experienced as *more severe* than the initial punishment for an offence. Thus, the extent to which they are merely ‘collateral’ for many former lawbreakers is highly debatable. In this final section, I discuss several reasons why this condition of ‘civic purgatory’ – resulting from the gaps between sentence completion, the cessation of supervision arrangements and legal rehabilitation - should be regarded as particularly problematic.

### *The problem of unnecessary confusion*

In the first instance, the period of civic purgatory after sentence completion is unnecessarily confusing for people with convictions (who need to understand the complexity of rules around when they are required to disclose convictions), practitioners working in the criminal justice sector (who may be asked for advice from their clients about those rules) and employers, financial service providers and others (who need to understand precisely what kind of information about convictions they are allowed to ask about and in what circumstances they are

legally allowed to consider this information). Indeed, in addition to the Home Office (2002) review of the ROA, research on financial literacy amongst prisoners (Bath and Edgar 2010) found that the rules surrounding spent convictions were poorly understood by people with convictions, with some assuming that the term 'spent' referred to the serving of the *actual sentence rather than the post-sentence rehabilitation period* prescribed by the ROA. There is thus a case for a greatly simplified system of dealing with criminal record disclosures post-sentence which is more clearly understood by all the relevant stakeholders. Indeed, if this were not the case, the charity Unlock (which provides information and advice on issues surrounding criminal records) would not receive so many thousands of contacts each year from people with convictions seeking clarification about the rules surrounding disclosure.

### *The problem of public confidence in rehabilitative interventions*

In the second instance, failing to treat individuals who have completed their sentences and, in many cases, who may have engaged with their sentence planning and any interventions aimed at promoting individual level reform (*psychological rehabilitation*) runs the risk of sending out a message that the government lacks faith in the efficacy its own measures to reduce the risk re-offending. That is, by maintaining a period of civic purgatory, the post-sentence status of the convicted individual is rendered highly ambiguous since members of the public may assume that if a conviction remains unspent then this is indicative of an ongoing risk on the part of the individual concerned, regardless of any claims of personal reform underpinned by their engagement with rehabilitative activities. In short, given that one of the stated aims of sentencing is 'reforming and rehabilitating the offender' (Sentencing Council 2017) it sends a very confusing message to the public if the law does not *recognise rehabilitation* once the sentence is complete. This runs the risk of undermining the social rehabilitation of the former lawbreaker. Indeed, when making a determination about whether or not to offer a job to a person, the employer is likely to be confused by a situation in which an individual claims to have been rehabilitated when the law is not yet prepared to accept that rehabilitation. This situation is also problematic because, as stated above, the utility of criminal records to predict future offending diminishes steadily over time. Moreover, as Larrauri (2014b) has highlighted, the disclosure of a full criminal record (including unspent or spent convictions and cautions depending on the level of background check performed) may not always be a good proxy for the risk that employers in particular hope to avoid. For instance, the disclosure of an unspent common assault conviction on a 'basic' level criminal records check tells the employer nothing about an underlying alcohol problem which poses the real risk for a job as a courier.

### *The problem of perceived legitimacy*

A third and critically important problem arising from the state of civic purgatory is that it may undermine the perceived legitimacy of rehabilitative interventions from the perspective of those required to engage in them. That is, for those lawbreakers who have been required to undergo supervision and to engage with rehabilitative activities, a sense of injustice is likely to arise if, following the successful completion of a sentence, they discover that the law does not treat them as a 'rehabilitated person' for a lengthy period afterwards (if ever). If we accept the idea that punishment serves an expressive purpose of communicating social disapproval to lawbreakers (following Duff 2001), the failure to formally recognise and legally protect the status of a person who has complied with supervision and engaged fully with any rehabilitative interventions sends a particularly harsh message – not only to them, but also to other potential desisters – that the law, the state and society are not prepared to reciprocate when genuine efforts at 'making good' (Maruna 2001) take place.

The period of civic purgatory following a sentence is therefore likely to lead to feelings of injustice. This is important, since Tyler (1990) has argued that people do not comply with the law simply because they fear punishment but because they feel that legal authorities are legitimate and that their actions are generally fair (for a discussion see Bottoms and Tankebe 2012). Given that many thousands more people each year are now required to participate in rehabilitative activity as a result of the ORA and that approximately seven thousand people each year receive a sentence which cannot become spent under the ROA (see Table 3), this problem of perceived legitimacy would appear to be both a substantial and growing one.

### **Reconciling sentencing, supervision and legal rehabilitation**

There is, arguably, an inherent absurdity of intervening further in the lives of more lawbreakers through an expanded system of statutory supervision but then undermining the efforts of those involved in probation work by attempting to 'resettle' people with convictions in a hostile social climate where discrimination based on criminal records is widespread. Moreover, as alluded to above, if the government has any confidence in the efficacy of its rehabilitation programs, natural justice demands that the law also treat the individual as rehabilitated after the conclusion of the sentence. To do otherwise suggests that the government is unwilling to commit to the requalification of former lawbreakers as citizens of equal merit once attempts at social and psychological rehabilitation are complete. However, legal rehabilitation evidently

remains something of an afterthought within the current approach resulting in the problems of civic purgatory identified above.

In order to both mitigate the problematic elements of civic purgatory and to reconcile the processes of sentencing, supervision and legal rehabilitation, I contend that there is a pressing need to work towards a fully-integrated approach to rehabilitation which achieves greater parity between the four elements of rehabilitation (psychological, moral, social and legal) in McNeill's (2012) model. Whilst the points made here are about legal rehabilitation, McNeill has argued that the lack of social rehabilitation is at the root of a 'hostile correctional climate...and it lies behind the mistranslation, corruption, and misuse of rehabilitation theories' (p.15). Indeed, Mawby and Worrall (2011; 2103) have noted how the occupational culture of probation workers has been shifted away from its traditional 'social-work' foundations and towards 'offender management' approaches which are heavily invested in compliance, enforcement and risk-prevention.

In moving towards such a more 'integrated' approach it will be necessary to rethink the dominant utilitarian penal philosophy which seems to take precedence over any 'ethics of duty' in rehabilitation. To explain, the Transforming Rehabilitation agenda has largely been advanced on utilitarian grounds of reducing public expenditure and maximising public protection rather than through a deontological approach which 'says that we should rehabilitate offenders because it is just...because each individual has moral importance and we should make every reasonable attempt to assist offenders in the transformation from criminal to law abiding citizen' (Brooks 2012: 52). The deontological grounding for rehabilitation matters precisely because the perceived legitimacy of criminal justice sanctions is undermined by civic purgatory not only for those *currently* serving sentences but also for the over 11 million people in the UK who have a potentially disclosable criminal record recorded on the Police National Computer (Home Office 2017).

In order for these people to perceive sentencing and supervision arrangements as 'just' they must feel that they have been genuinely given a 'second chance'. Thus there is a moral duty to return people to society unencumbered by the stigma of their punishment. However, this is not to undermine other competing demands on sentencers that lawbreakers should receive their 'just deserts' for wrongdoing. Canton (2017) has argued that the 'right to rehabilitation', far from being at being at odds with more retributive approaches to criminal justice, is in fact *required* by the retributivist demand for proportion in punishment. He suggests that:

once the punishment has been served, the standing of the ex-offender should be the same as that of anybody else, and retributivists ought to welcome attempts to restore people to their due status. Moreover, unintended punitive elements -

deprivations or hardships that are not part of the justly imposed sentence but may follow from it (like loss of accommodation, unemployment, stigma) – are retributively unjust and therefore ought to be minimised or redressed. (pp. 120-121)

There is thus a strong moral basis for the promotion and protection social rehabilitation through measures which also advance the legal rehabilitation of former lawbreakers. However, given some of the practical problems of the ROA, it may be necessary to introduce ways of protecting the legal and social status of people with convictions post-sentence by considering the possible impacts of their criminal records at the same time as when punishment and supervision arrangements are formalised – i.e. at the point of sentencing. This might be achieved by adopting an approach suggested by Larrauri (2014b) who argues that the mitigation of future risk and issues of public protection – which form the main rationale for criminal record disclosure – might be advanced more appropriately by allowing the judiciary to impose occupational disqualification orders on lawbreakers. These would bar individuals from specific occupational groups (such as driving offences or work in the financial sector) and replace the existing system of blanket criminal record disclosure which occurs in many standard and enhanced DBS checks. Thus, employers and others would be allowed to ask only for information which was strictly relevant to the circumstances for which a check was being conducted. Since existing statutory bars exist for work involving children and vulnerable people, a more refined system such as this is eminently achievable. Other than such bars, a fundamental *right* to be treated as rehabilitated could be asserted for people with convictions once a sentence and any supervision arrangements have been duly completed. Such an approach would be considerably less complicated than the current system of spent convictions which – after inflicting lengthy periods of civic purgatory - retrospectively rewards *only some* former lawbreakers for successful desistance, often years after psychological, moral and social rehabilitation has already occurred, often against great adversity.

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