



USES AND CONSEQUENCES

OF A CRIMINAL CONVICTION

Going on the Record of an Offender

Margaret Fitzgerald O'Reilly



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Margaret Fitzgerald O'Reilly
University of Limerick
Limerick, Ireland

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“Mens evil manners live in brass: Their virtues we write in water.”
William Shakespeare, Henry VIII, Act 4, scene 2, line 45

For Eileen

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Part I

Criminological and Penological Perspectives



1

Introduction

“Liberation is not deliverance. A convict may leave prison behind but not his sentence.”¹ So stated Victor Hugo in his classic novel, *Les Misérables*, where we become acquainted with the story of protagonist Jean Valjean, an ex-convict, who spends his life trying to escape from his criminal past. Imprisoned for 19 years, Valjean is released, hardened by the nature of his sentence, and presumably relieved to put it behind him. But he quickly realises the true nature of his conviction and time imprisoned, which is expressed eloquently by Hugo in the following quote:

[w]hen at the time of leaving prison Jean Valjean heard the words, ‘You are free’, the moment had seemed blinding and unbelievable, as though he were suddenly pierced by a shaft of light, the true light of living men. But this gleam suddenly faded. He had been dazzled by the idea of liberty. He had believed for an instant in a new life. He soon discovered the meaning of liberty when it is accompanied by a yellow ticket. (Hugo 1982, p. 103)

¹Hugo, V. *Les Misérables*, 40th ed., Translated by Denny, N. (London: Penguin Classics, 1982), at p. 97.

Despite his embittering experience, Valjean resolves to change his life but finds that this yellow ticket, which he is obliged by law to display, subjects him to prejudice and stigma and forces him to be an outcast. He is obliged to produce this ticket at work and as a result receives less pay. He is also refused accommodation because of it and his ex-convict status incurs such suspicion from external forces that he is relentlessly hounded by police inspector, Javert, almost to his dying day. Jean Valjean's redemption begins with his encounter with the Bishop Myriel, who is the first to treat him like a human being in the aftermath of his release. His initial success in overcoming his past is due to his change of identity, although he never truly escapes from the wrenches of the criminal justice system: '[a] man may leave prison, but he is still condemned' (Hugo 1982, p. 104). Jean Valjean's story has surprising resonance in today's world. Although removed from the Parisian cesspool of nineteenth-century existence, today's ex-offender must face difficulties that are often quite similar to those described in Victor Hugo's novel. Fiction and reality are not that far removed, given that the same stigma and prolonged consequences often derive from the imposition of a conviction nowadays. Unlike the 'yellow ticket' possessed by the nineteenth-century ex-convict, today's ex-offender is left with a criminal record that stays with him and that can affect his activities far into the future.

This book aims to examine the retention and use of previous criminal record information. The term criminal record is intended throughout to denote a conviction, rather than referring to cautions, arrests, or other police activity prior to actual conviction. A frequently unacknowledged fact is that once a criminal conviction is imposed, that conviction stays with the individual for life. There is a misconception that the finding of guilt at trial carries with it a *de jure* sentence alone and there is a failure to recognise the *de facto* multiple disadvantages that ex-offenders continue to experience as a result of having a criminal conviction. The reality is that a criminal record is not something that is simply imposed and subsequently forgotten about (after punishment) or left behind. The label of being an offender is one that stays with the individual for life, as a result of which he or she may encounter numerous difficulties and consequences in areas both within and outside of the criminal justice system. The law plays an instrumental role in instilling and perpetuating this

label and as such examination of the laws and policies that facilitate retention and use of criminal records will form the focal point of this book. There is a surprising lack of discussion surrounding the complete range of legal and social mechanisms through which a criminal record can be employed. Analysis is often fragmented around a particular issue such as sentencing or access to employment, for example. This book aims to move beyond such fragmented discussion and examine the entire range of areas where criminal records are taken into account in decision-making processes both within the formal criminal justice system and beyond. This is not uniquely an Irish issue, but the foundations of the book will be premised upon the approach taken in Ireland and analysis of this approach will encompass the broader international context within which policy and social changes, influencing the use of criminal records, occur.

The manner by which an ex-offender remains legally condemned is something that is of particular interest to this author, as part of the broader criminological dialogue about criminal life trajectories. An individual's life is profoundly changed after a conviction and imprisonment. The return of ex-offenders, whether from prison or just to normal activities in the aftermath of conviction, is beleaguered by particular problems posed by the status of ex-offender (Stojkovic 2017; Jacobs 2015; Maruna and Immergeon 2004; Petersilia 2001; Maruna 2001). Rights, as they relate to privacy, liberty, and earning a livelihood, are ordinarily thought to be restored to the individual post conviction and release but this is not necessarily the case. Ex-offenders have needs and face circumstances that are unique to their situation. If they have spent time in prison then, on re-entry into society, many are ill-equipped to deal with the social and economic realities of the outside world. Thus, many find it difficult to break out of the cycle of poverty and crime. The criminal record becomes a further barrier to successful integration (Jacobs 2015; Thomas 2007). Criminal record information can be documented, accessed, and utilised by various agencies within the criminal justice system and beyond. It can be used in police investigations, in bail applications, as evidence at trial, and in sentencing hearings and decisions. It can also be used in order to impose additional constraints upon an individual in the aftermath of release, namely, through the implementation of policies such as monitoring orders, post-release supervision orders, and notification orders.

Beyond the criminal justice system, the individual can continue to experience many collateral consequences of a conviction, whereby access to employment, travel, and licences (among other areas of social activity) can be limited (Forrest 2016; Jacobs and Larrauri 2015; Thomas and Heberton 2013; Blumstein and Nakamura 2009; Pager 2003).

The trajectory of penal policy has changed in recent times. Crime control has become an increasingly important mode of dealing with offenders and new managerial styles of governance are developing. Security, risk, public protection, and exclusion are essential concepts that have reconfigured themselves as key elements in the penal sphere, amidst overtones of politicisation of law and order and increased emotive investment in crime policy. Using criminal records, while not a new idea, has certainly become increasingly more valued in this risk-conscious age. Collecting data, categorising risk, and monitoring movement is fast becoming the currency of new age criminal policies. The commitment to such narrative is strengthened through the international sharing of criminal record information between EU states. The significance of a criminal record to agency workers is obvious. It may enable the police to generate or confirm a suspect quicker. It allows the sentencing judge to acknowledge a repetitive pattern of offending behaviour. It may allow an employer to avoid hiring a candidate who is unsuitable for the position (e.g. a paedophile from working with children). But there is not always a coherent approach taken to the use of such information and there are many other consequences, often unintended, which can arise and have a very real impact upon the person's ability to be able to move on with their lives. The stigma of the 'convict' label can be extremely difficult to break away from, leading many to become, or remain, disenfranchised and socially excluded. This narrative of marginalisation and exclusion has become increasingly interwoven into the fabric of policymaking. The law itself can create a continuum of exclusion by labelling individuals as offenders and preventing them from becoming fully integrated into normal social life. Despite national and international acknowledgement of the importance of successful reintegration of offenders, there often lacks a consistent strategic approach to dealing with re-entry, which undermines efforts to promote equality and social inclusion. Not all those who offend and are released back into society are considered to pose a high risk to the

public, and yet recidivism is high. It can be that many are simply unable to move beyond their circumstances and obtain better opportunities. For many, the shackles of a criminal record are a lingering obstacle to leading a law-abiding life, even where the positive mental attitude for change exists. This is an issue which should concern us all, especially in view of public safety.

The book begins with an analysis of the relevant theoretical literature including perspectives on control theory, governance, and desistance in order to illustrate the nature of the legal rules and principles that invoke criminal records, explain the social and political influences that have effected changes in this area, and assess the implications of this having regard to concepts such as labelling, citizenship, and the legal principle of proportionality. Contextualising the discussion with reference to such theoretical perspectives will enable us to better understand the significance of having a criminal record and why this type of information is becoming increasingly more valued in Ireland and elsewhere. The chapters that follow explore the various key areas from pretrial to post release, where prior convictions become an issue. Chapter 3 documents the role past criminal records play in the investigation of crimes and assess whether routine police practices target ex-offenders as a category and what the potential implications of this are. Chapter 4 explores the use of criminal record information in bail decisions, in particular the legislative developments, which have expressly endorsed the consideration of such information by judges hearing bail applications. Chapter 5 examines the impact that criminal records have upon the trial process and deals with the circumstances where the prosecution can introduce prior convictions as evidence in chief or cross-examine the accused on such. Chapter 6 examines the impact of criminal convictions upon the sentencing process and focuses upon explaining when past convictions are taken into consideration by a sentencing judge, the justifications for this, and the effect that its use has upon the offender. Chapters 7 and 8 move on to explore the nature of a criminal conviction in the post-release stages. Chapter 7 considers post-release measures applicable to ex-offenders, such as those under the Sex Offenders Act 2001. Chapter 8 explores the collateral consequences of a conviction throughout the life trajectory in areas like employment and access to travel. Chapter 9 looks at the international

exchange of information pertaining to criminal records in and beyond the EU and concludes with an analysis of the overall consequences of having a criminal record in light of its use and retention, not simply in the Irish context but from a broader international perspective also.

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2

Mapping the Criminological and Penological Landscape

It would be easy to delve straight into a discussion of the legal and social regulations upon criminal records and their impact upon ex-offenders, but to do so would omit an important part of the conversation. Legal policies do not occur in a vacuum, nor are the effects of a criminal record limited to the immediate aftermath of conviction. To fully appreciate the significance of this issue, we must understand the political, social, and cultural influences relevant to it. Theories such as control, governance, labelling, as well as social exclusion and citizenship are important to consider in establishing the narrative of this book. Understanding how such theories shape the significance of a criminal record facilitates a greater appreciation of what it means to be an ex-offender.

Security, Risk, and Controlling Ex-offenders

Managing offenders has always been a key focus of social concern and the response to deviant behaviour has evolved throughout the ages with this key issue in mind. From death to hard labour to imprisonment, the penal system has continuously strived to develop legal sanctions to

impose upon those who contravene the social contract (Foucault 1977; Beccaria). The twentieth century in particular has witnessed a number of institutional changes in penal policy, moving from penal welfarism in the early half of the century to a more control-orientated system in the latter stages (Garland 2001). Rehabilitation and individualised justice was the focus of the welfarism era. Assessing, diagnosing, and neutralising deviant behaviour in order to ensure conformity became “lodged in the framework of the penal judgment” (Foucault 1977, p. 19). This approach to punishment began to wane towards the latter part of the twentieth century, and changes emerged in the social and political reaction towards offending behaviour.¹ Rehabilitation was seen as less and less likely, and dealing with crime was becoming less about eradicating social problems and more about managing choice actors (see Rose 2000).² Changing social and cultural structures generated insecurity, accompanied by an obsession with risk and control which continues to play an essential role in evolutionising our responses to crime (see Garland 2001).

In this era, criminal justice systems have manoeuvred towards an actuarial stance,³ with penal policies becoming increasingly concerned, not with causal criminality but rather with managing risk and controlling offending behaviour. An incessant fear of crime has produced greater emphasis upon harsh and expressive justice and in a stance of populist punitiveness, political will is set upon allaying fear and demonstrating to the public the will to act. The penal mode has become more security orientated (Pratt 2017; Garland 2001). Liberal interests are becoming increasingly overshadowed by security interests (Hudson

¹ The change in Ireland has perhaps not been as stark or emphatic as changes in countries like the US and UK as documented by Garland. Nonetheless, a gradual influx in control policies has been observed in this jurisdiction and such policies continue to grow in number and popularity.

² Rose observes that “[s]chemes of risk reduction, situational crime control and attempts to identify and modify criminogenic situations, portray the criminal as a rational agent who chooses crime in the light of a calculus of potential benefits and costs.” Rose (2000, p. 322).

³ It is argued that the preoccupation with actuarial risk in penal systems diminishes and often abrogates the idea of social justice which challenges the socio-economic constraints that often structure offenders’ decisions to desist from crime. See generally O’Malley, P. (2001) Risk, Crime and Prudentialism Re-Visited. In Stenson, K. and Sullivan, R.R. (eds.) *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies*. Devon: Willan, pp. 89–103.

2003) and tensions have arisen that frequently result in confrontations between longstanding concerns: right versus wrong; good versus bad; victim versus offender. It is often assumed that any adherence to offenders' rights represents a loss for the victim, and such perceptions give rise to increased scepticism when it comes to offenders' rights. This in turn can make society more complacent when it comes to control mechanisms being implemented (Hudson 2003).

When it comes to the ex-offender, increased emphasis is being placed upon the need to monitor and regulate the behaviour of anyone who has passed through the system before. Common opinion seems to be that ex-offenders are habitually dangerous and need to be monitored at all times (Maruna and LeBel 2003). Progressively restrictive measures are being taken to protect mainstream society from those perceived to be a threat because of their criminal background or because of their future criminal potential. The dominant focus is upon control and risk, and there is an ever increasing concern with risk probabilities and harm minimisation (see Young 1999a; Hudson 2003).⁴ There is an assumption today that there is "no such thing as an 'ex-offender'—only offenders who have been caught before and will strike again" (Garland 2001, p. 180). The reaction is defensive and increasingly offensive in the sense of putting forward strategies that eliminate or curtail anticipated risk. We must protect ourselves against the dangerous other rather than concern ourselves with their welfare and rehabilitation (see Garland 2001, p. 184). The preoccupation with public protection has tended towards pre-empting the infliction of harm upon victims and potential victims. Risk must be identified, assessed, and managed, and the priority given to safety and security considerations has often culminated in the surrender of individual rights. Rights of liberty, privacy, and due process are often disregarded in favour of keeping tabs and monitoring potential risks. Notification laws are a prime example of the increasing desire to classify and share information about offenders on an institutional and

⁴There is nothing new in strategising towards risk and control, or with promoting public safety, or with targeting ex-offenders. However, what is new is the joining together of "the actuarial, probabilistic language of risk and the moral language of blame." Hudson (2003, pp. 52–53).

sometimes a community level. Offenders that are perceived as particularly dangerous, like sex offenders and drug offenders, are listed on registers and monitored, and there is a growing trend of utilising this form of security management for other categories of offenders, even those not originally considered to pose a high risk. As the gap between 'us' and 'them' grows wider, social stigma has become a useful tool. Marking the individual out as an offender through the lifelong retention of criminal records serves to alert the public to his danger. The criminal record becomes the instrument that enables social control of the ex-offender. Being tough on those who have already paid their debt to society has become the standard narrative of penal policy (Maruna and LeBel 2003).

The criminal record is growing as a factor to be taken into account in a wide variety of circumstances ranging from the pretrial to post-trial stages of the justice system. As crime prevention becomes a key aspect of the Garda function, increased Garda powers enable greater consideration of criminal records in the control and investigation of crime. As bail laws have tightened, the criminal record has become an express factor to be considered by the judge in determining whether to refuse a bail application. Presumptive sentencing practices are emerging and developing at an increasing pace, augmenting the significance of past record in the formal distribution of punishment. Well beyond the completion of formal punishment, the criminal record can operate to monitor and facilitate the provision of security against ex-offenders. There is an obligation to disclose prior convictions in areas like employment, travel, and obtaining licences, and this can effectively lead to exclusion from such circuits of socially inclusive activities. Legal constraints operate in the informal social setting because the ex-offender is considered to be someone who continues to pose a threat, and a precautionary logic dictates the attitude and response to such individuals in the community (Hebenton and Seddon 2009).

It should be said that assessing and managing risk is not a disingenuous task. It may be entirely necessary in many instances in order to ensure national security and to protect the public from serious harm. Moreover, it is not always true to say that individual rights are entirely forgotten in the strive for political security. The judiciary in particular remain strong

advocators for due process rights.⁵ Nonetheless, it is apparent that concerns about security and control are seeping into criminal justice values at a core level, and political volition has tended towards the enactment of penal policies that emphasise such values in one way or another. In relation to the ex-offender, there is a move towards increasing control strategies upon this category of individuals. What is concerning perhaps is that many of the legal policies are targeted upon the offender 'status'. Often it is this status or the stereotype of the typical offender—the sex offender or drug offender—which provokes such a hard line approach, a sort of sanctimonious intolerance. Laws enacted to deal with ex-offenders are generalised and all-encompassing and there is often a lack of an individual- or evidence-based reaction (Hudson 2003, p. 46). The insatiable demand for security had rendered such reactions undesirable and unpopular. Thus, policies that seek to protect the public from the dangerous offender often fail to balance rights with risk concerns and favour punitiveness and post-release surveillance. The 'othering' of the offender or ex-offender neatly atones with the prioritisation of public safety. Retaliatory and expressive gestures intended to reassure a worried public have found momentum, while often sacrificing the need for policies which effectively address the underlying problems long term. Rights of the ex-offender become temporarily, or sometimes permanently, suspended. While safety is a laudable concern, it should not be all-encompassing if we are to retain the value of individual rights.

Political Governance and Ex-offenders

As observed above, the pattern of criminal justice policies in recent times has tended towards the use of actuarial styles of reasoning and technologies (Garland 1996). Governance is another relevant theory in understanding the significance of the criminal record label. Rose refers to

⁵ Chief Justice Finlay commented in the case of *Kenny* that "[t]he detection of crime and the conviction of the guilty no matter how important they may be in relation to the ordering of society cannot ... outweigh the unambiguously expressed constitutional obligation as far as practicable to defend and vindicate the personal rights of the citizen." *People (DPP) v Kenny* [1990] 2 I.R. 110, at p. 134.

governance as “any strategy, tactic, process, procedure or programme for controlling, regulating, shaping, mastering or exercising authority over others in a nation, organization or locality”. Michel Foucault explains that historically the state has a power over its citizens, which extends to exercising a direct power over any one who contravenes the laws of the state (Foucault 1984, in Rabinow). Essentially punishment was part of the exertion of state power and control. The development of this power has been largely transformed from an exercise in the infliction of cruel and horrific punishments to the creation of a carceral system that gave new meaning to social order and punishment, which struck at the ‘soul’ of an offender (Foucault 1977). The penitentiary institution represented a change in the character of justice, which became concerned with punishment as corrective of human behaviour (see Foucault 1977; Garland 1990). The governmentalisation of the state (Foucault 1991, in Burchell) is the invention and application of an array of technologies connected from political spheres to community organisations, which extend the scope of state operations and the extent of their incursion into the lives of their citizen subjects. Techniques of power emerged that were designed to observe, monitor, and regulate individuals’ behaviour both in the prison and in the community, where other institutions and agencies became involved in perpetuating the carceral structure and retaining infinite possession over the individual. Individuals and groups came to be governed through strategies of discipline and surveillance, and such surveillance could be de facto lifelong in nature and effect. Surveillance of offenders assumes the creation of “a documentary system, the heart of which would be the location and identification of criminals” (Foucault 1977, p. 281). This is a key element of the post-release policies emerging today. Effectiveness in crime control means activating a risk discourse in which information on offenders is vital. Discourses and technologies of risk are premised upon the idea of insurance and it is through this idea that new technologies of control and security are developed and imposed. Risk thinking has become part of politics, not purely at the level of rhetoric but in the governing of citizens—most notably within the criminal justice sphere. While the state may not be able to guarantee security or social enrichment, it can be seen to be harsh on criminals. Governing through crime cultivates the relationship between the state and its citizens

on the one hand, and excludes the offender on the other (see Simon 2007). The offender becomes the *homo sacer*, the individual upon whom state power is readily exerted and against whom political techniques can be focused to create the “docile bod[y]” (Agamben 1995, p. 3). This individual becomes what is at stake in political strategies, and violence against him becomes licit because the ordinary rights of the citizen do not pertain to him. The state’s right to punish is inextricably linked with the *homo sacer*, who is excluded in the eyes of the state while at the same time forming an integral aspect of the state’s assertion of authority: “no life is more political than his” (Agamben 1995, p. 183)

In today’s world, it is not simply a matter of apprehending an offender and punishing him. Rather, it is a case of surveillance being ‘designed in’ to the flows of everyday life (Rose 2000, p. 325) and with this the continual monitoring of behaviour becomes normalised in the community. The retention and subsequent use of the criminal record meshes well with what Foucault described as the carceral archipelago, the dispersal of penal discipline throughout the social body where the power to control and punish are natural and legitimate (Foucault 1977, pp. 293–308). Control is effectuated now, as it was when Foucault wrote, through a variety of laws and agencies. It operates at every level of the social body. For the police, for example, the criminal record can be an extremely valuable tool for both generating suspects and continuing the penitentiary technique of surveillance and discipline. Contemporary penal policies seem to signal a gradual move towards enacting and exerting *deliberate* policies upon ex-offenders. There is growing popularity for laws that promote presumptive sentencing in relation to those with criminal records and political will to legislatively control groups such as sex offenders.

Rose argues that modern control strategies are diversified into techniques of inclusion and techniques of exclusion (Rose 2000). Identity is one of the most prominent examples of inclusive control strategies. There is an incessant requirement to prove identity in our society, demonstrated through the use of passports, driving licences, social security numbers, and bank cards. These forms of ‘virtual identity’ represent the importance of information flow, while at the same time permit access to various privileges (e.g. mortgages, telephone, electricity). Criminal record databases are connected to this flow of information and provide an important

source of identity classification for the police and government agencies, such as those dealing with insurance (Kilcommins 2002; Ellis 1990).

There are also political strategies that focus upon exclusion. Such strategies are stressed against the excluded 'other' of society, those considered to pose a threat: "the vagrant, the degenerate, the unemployable ... the social problem group ... the criminal" (Rose 2000, p. 330). Many of the new risk strategies are directed towards these marginalised and excluded groups.⁶ In relation to offenders, there is a shift towards regulating deviance in the aftermath of formal processing through the justice system. Control here is not just about restraining risky individuals, it is about generating knowledge in order to define and classify risks and create practices of exclusion (or inclusion) based on that knowledge (see Rose 2000). A notable example of this is in relation to sex offenders. As a group, sex offenders are perceived as generally risky and are thus subjected to incessant modes of control post release from prison (Levenson 2016a; Vaughan 2002). There is a sharing of responsibility in this regime of surveillance and a relentless desire to improve techniques of knowledge amongst the relevant agencies (An Garda Síochána, the Probation Service and the Irish Prison Service).⁷

State empowerment in an age of uncertainty is often achieved through the disempowerment of the individual offender. Ex-offenders become the target of laws not always because this will effectively produce conformity or public safety but rather because it is an expression of what the state is doing for its (law-abiding) citizens. Expressive justice frequently supersedes a thought-out, evidenced-based approach, and grouping offenders

⁶Risk thinking is central to the management of exclusion in strategies of control. Ericson and Haggerty explain that in the contemporary work of police "categories and classifications of risk communication and ... the technologies for communicating knowledge internally and externally, prospectively structure the actions and deliberations not just of police officers and police tactics, but also other professionals who are now enrolled in the business of control ... welfare workers, psychiatrists, doctors" (Ericson and Haggerty 1997, p. 33). For an interesting work on the risk paradigm, see Trotter, C., McIvor, G., and McNeill, F. (2016) *Beyond the Risk Paradigm in Criminal Justice*. Palgrave Macmillan.

⁷Rose argues that this is despite the "incompleteness, fragmentation and failure of risk assessment and risk management" (Rose 2000, p. 333). In Ireland at present, there is little by way of a broad scale determination of the success or failure of risk assessment strategies, so it is difficult to know which way the pendulum swings. In relation to notification requirements (e.g. under the Sex Offenders Act 2001), success rates are often measured in terms of compliance, and without any reference to the effectiveness of these obligations in terms of the presumed goal of public safety.

into categories of perceived dangerousness appears to be more palatable than individualised assessments of risk. The released or 'ex' offender becomes the *homo sacer* and what is at stake in political power. The retention and utilisation of the criminal record generally is evidence that political will is upon retaining control of offenders even after they have served their time. This strategy is extremely important in perpetuating modern technologies of power and control.

The Exclusion of the Criminal 'Other'

In today's world, common perceptions of offenders are of individuals who have injured society in not abiding by the established rules and who thus deserve the consequences of their behaviour. Such consequences can extend to widespread censure of the offender even after he or she has served the formal punishment. They can face disapproval from the community at large which may culminate in him being treated like a pariah, someone to be avoided or excluded from normal engagement. The theory of social exclusion is apt for explaining the position that the ex-offender often assumes in the community, that of an outsider.

Jock Young in his book *The Exclusive Society* proffers a thought-provoking analysis of the social, cultural, and political processes within our society, with the aim of providing a causative explanation for the marginalisation of offenders. Young's analysis reveals two paradigms to be dealt with within this theory of human behaviour. These paradigms can be described as the process of inclusion and the process of exclusion. The inclusive society of the early and middle twentieth century placed emphasis upon full social, legal, and political citizenship (Young 1999a, p. 5). The deviant in this society was someone to be socialised and rehabilitated. The approach was thus primarily anthropophagic, in that the offenders were enmeshed within the social structure, with the aim of moulding them into law-abiding citizens once again (Young 1999b). Towards the latter half of the twentieth century, a breakdown in social and cultural structures that maintained and organised the dominant social classes caused people to become more cautious and unsure of each

other, largely due to ontological insecurity and material insecurity.⁸ A move from an inclusive to an exclusive society occurred during this time, transitioning society from one intent on integration and assimilation to one which seeks to divide and exclude (Young 1999a).

Social exclusion can be a catalyst for deviant behaviour. From a cultural standpoint, crime occurs because of a deficiency in socialisation, of symbolic embeddedness into society and the family (Young 1999b, p. 393). The structural causes, on the other hand, are material deprivation, essentially poverty, unemployment, and inequality. Exclusion theory does not expound the idea that absolute deprivation leads unequivocally to criminal behaviour. A better view is that it is relative deprivation which can evoke a deviant response (Young 1999a). There is the dichotomy in social processes, in that while advances in society are exhorted to culturally assimilate people through education and employment, this ideal of inclusion is in reality not achievable for many. There is a bulimic quality to the social entity, and crime can occur “where there is cultural inclusion but structural exclusion” (Young 1999b, p. 394). The reactions of the state often work to strengthen and aggravate social exclusion. Security and classification become key motivators in political culture. In particular, there is a need to classify and position the deviant ‘other’. This process of essentialism can quickly evolve into demonisation.⁹ Young notes that in late modernity “the spatial and social pariah recurs with a vengeance in the concept of the underclass” (Young 1999a, p. 5; see also Sibley 1995). The underclass become the outgroup, but particularly, the criminal underclass become the target for dynamic expulsion and segregation. They become the dangerous other. It is important for achieving ontological security that the criminal other be as far removed from us as possible. They must be essentially different. Thus, certain types of offenders are more prone to segregation techniques. In recent times,

⁸ Ontological insecurity arises from living in a diverse world where identity becomes less certain. Material insecurity arises from an increase in risk in the late modern world. See also Young, J. (2003) “Merton with Energy, Katz with Structure: The Sociology of Vindictiveness and the Criminology of Transgression” *Theoretical Criminology* 7(3): 389–414.

⁹ Young explains that there are appeals to essentialising the other, namely, the provision of ontological security, the legitimisation of privilege and deference, it permits us to blame the other, and it forms the basis for protection. Young (1999a, pp. 103–104).

sex offenders and drug offenders are most fervently perceived as the dangerous other, to be rejected and expelled. Moreover, this segregation is promoted and facilitated through legal rules and principles. Increasingly harsh penal techniques are utilised to minimise the risks posed by such offenders and to promote a sense of social solidarity against them. More severe sentencing, post-release supervision in the community, notification requirements, and other monitoring orders are becoming more popular as a way of managing these offenders and indeed other types of offenders also. The general status of 'offender' incurs experiences of rejection and marginalisation.

There is somewhat of a paradox in the approach taken towards ex-offenders. On the one hand, there are attempts to include, perhaps most notably through community-run organisations and programmes aimed at rehabilitation, but such attempts are frequently overshadowed by the need to classify, isolate, and exclude. An example of such a contradiction is the Sex-offenders Act 2001, part 5 of which refers to the rehabilitation of offenders as a goal of the provisions. However, part 4 of the 2001 Act places a blanket prohibition upon those convicted of a sex offence under the Act from applying for a job without disclosure of their record, which can essentially lead to exclusion from the labour market. Facing life on the outside after imprisonment can be very difficult for any offender, especially if they have been incarcerated for a significant period of time. The welfare of released offenders is an important concern which is slowly ebbing away as populist connotations of the irredeemable offender amplify the demand for 'punitive segregation' (Garland 2001, p. 142). Policies like notification requirements emphasise that reintegrative strategies are shifting from an approach to bring the offender into the community and help him be a part of it, to an approach perpetuating his exclusion in that community. This discourse of exclusion aims to anticipate antisocial behaviour, it is concerned with the possibility of crime and with identifying, classifying, and isolating the deviant (Young 1999a).

We need to address the issue of marginalisation in order to adequately deal with the re-entry of offenders into society. Developing coherent reintegrative strategies, which will assist individuals from overcoming their criminal past, warrants consideration of the exclusionary impulses of

society and the need to address such impulses in a more holistic approach to the treatment of ex-offenders. Despite recognition of the importance of reintegration as a central goal of the justice system, the concern with security and risk means that community safety takes priority in the hierarchy of goals within the criminal justice system, often to the exclusion of offenders' rights. However, in terms of safety, exclusion may actually be counterproductive, and instead of inhibiting and controlling deviant behaviour, it may generate or encourage it. Deviancy is then amplified again through the targeting and further exclusion of the marginalised offender and thus a cycle is created and sustained through the enactment of legal policies that focus upon the ex-offender.

The Convict Label

Labelling theory examines not just deviant behaviour but also social and political actions around the offender and how such actions may affect him. The essential labelling ideology may be summarised in two questions: why and how are people defined as deviants? And how does this impact upon the person's self-image? Labelling theorists argue that acts are not inherently deviant or unlawful in themselves but rather that deviancy is a man-made idea (Glick 1995). That is, that acts only become unlawful when they are so defined. Murder, for example, is not unalterably defined as unlawful once one person kills another. It may be legally sanctioned in instances of self-defence in times of war and in some countries as a state-authorised criminal penalty. Thus, it is the reaction of others to the act that so defines it as lawful or unlawful. Moreover, the definition of certain behaviour as criminal is often dependent upon the actor. Becker asserts the proposition that "deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an offender. The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label" (Becker 1963, p. 9; see also Tannenbaum 1951; Lemert 1951). Once the label is attached, it can generate an alteration of the individual's self-identity. He comes to recognise the definition of himself as a deviant and perceive himself to be different from others

where he may not have done so before.¹⁰ Becker described this process as labelling, which encapsulates the profound effect on an individual of tagging them as a deviant. Secondary deviance occurs when the individual comes to accept the offender label, adopting the role assigned to him, associating with other deviants and engaging in the criminal behaviour that originally attracted the label (Becker 1963; Cressey 1962, in Rose). The label thus acts as a type of self-fulfilling prophecy. It must be noted that this internalisation of the deviant label is a subjective occurrence and that not all those who are tagged as offenders will behave the same in the aftermath. The effect of being so labelled will depend upon how the individual is treated by society and also how he deals with the consequences. This will depend largely upon the actor and the type of offence committed.

The criminal record is a legally sanctioned label, a 'yellow ticket' that can follow the individual around indefinitely.¹¹ Entering society with this label can have extremely negative consequences (see Maruna and Immarigeon 2004; Moore et al. 2015; Mingus and Burchfield 2012). Social perceptions of this individual categorise him as different and this perception can transfer to the person's image of themselves.¹² Engaging with family, friends, and society in general with the label of 'offender' amplifies the stigma associated with deviant behaviour and makes it more difficult to assimilate oneself into the membership role.¹³ Any such perceptions are exacerbated if the individual has served time in prison. Managing stigma in the aftermath of imprisonment often becomes a primary concern for ex-offenders (Uggen et al. 2004 in Maruna and Immarigeon).

¹⁰ See Bernburg, J.G., Krohn, M.D., Rivera, C.J. (2006) Official labelling, criminal embeddedness, and subsequent delinquency: A longitudinal test of labelling theory. *Journal of Research in Crime and Delinquency* 43(1), 67–88; Baur et al. (2018) Beyond banning the box: A conceptual model of the stigmatisation of ex-offenders in the workplace. *Human Resource Management Review* 28(2), 204–219.

¹¹ See also Uggen, C., and Blahnik, L. (2015) The increasing stickiness of public labels. In Shapland, J., Farrall, S., and Bottoms, A. (eds) *Global Perspectives on Desistance*. London: Routledge, pp. 222–243.

¹² It must be said that not all those who commit crimes will necessarily have a criminal self-image. Many may separate themselves from their past criminal behaviour and some may justify their behaviour (perhaps believing that it is not really criminal).

¹³ Some argue that the stigmatic function of the imposition of a conviction is not entirely bad and serves a useful function in deterring many from offending (Vold et al. 2015).

The creations of laws that focus upon the ex-offender are becoming more and more popular and the stigmatic label manifests itself in techniques of surveillance and monitoring in the aftermath of formal punishment.¹⁴ Targeting known offenders becomes a useful tool and creates a heightened sense of suspicion—he did it once he could do it again. An increasing number of offenders are subjected to laws which create obligations to sign-on at Garda stations, restrict movement, require post-release supervision, and permit the imposition of other conditions that monitor the ex-offender. Thus offenders are being released but remain within the control of criminal justice agencies by virtue of laws that perpetuate the criminal label. The permanency of this label may be felt far into the future.¹⁵ As an accused on trial, or a witness in a case, an individual can be cross-examined on their past offences. Accessing the labour market is made more difficult and potential employers can discriminate against an individual simply for having a conviction regardless of the nature of or length of time since the conviction. The stigma connected with the deviant label may cause the individual to gravitate further towards nonconformity and lead them to reorientate their life around the label. Of course many ex-offenders may become motivated to change their lives. The problem is that the label may prove an insurmountable obstacle. Normal social activities become an exercise in legal control of the known deviant. Accessing employment, travel, insurance, and even licences becomes exacerbated by the requirement to disclose past convictions, resulting in significant barriers to and often exclusion from such activities. There is evidence in our system of a categorical labelling of those with a criminal record, particularly in the pronouncement of laws that generate and perpetuate the label. While the criminal label has always had a role to play in areas like evidence, policing, and sentencing, its significance is increasing and new techniques have brought it to a more prominent position in criminal justice policies.

¹⁴The outlets for and forms of such stigma are also evolving: Lageson, S. and Maruna, S. (2018) Digital degradation: Stigma management in the internet age. *Punishment and Society* 20(1), 113–133; Lageson, S.E. (2017) Crime data, the internet, and free speech: An evolving legal consciousness. *Law & Society Review* 51(1), 8–41.

¹⁵See Ipsa-Landa, S., and Loeffler, C.E. (2016) *Indefinite punishment and the criminal record: Stigma reports among expungement seekers in Illinois*. *Criminology* 54(3): 387–412.