

Howard League for Penal Reform

Early Career Academics Network Bulletin

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Early Career Academics Network Bulletin**Contents**

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ECAN Facebook Group

The Howard League for Penal Reform is active on [Facebook](#) and [Twitter](#). There is a special page dedicated to the Early Careers Academic Network that you can reach either by searching for us on Facebook or by clicking on the button above. We hope to use the Facebook site to generate discussions about current issues in the criminal justice system. If there are any topics that you would like to discuss, please start a discussion.

Introduction

Andrew Neilson, Director of Campaigns and Dr Laura Janes, Legal Director

The Howard League, in common with many small charities, has had to make radical adjustments to its work as we entered the first weeks of the COVID-19 lockdown. But we can be justly proud of moving the organisation into new ways of working whilst also maintaining our public profile and pressurising the Ministry of Justice into a number of important actions over the last two months.

This [dedicated page](#) on the Howard League website tells the story of our response to COVID-19, from our pre-lockdown blogs and correspondence with the Secretary of State for Justice, to our subsequent open letters to judicial stakeholders and weekly briefings to the justice select committee. At the heart of our efforts, however, have been two relatively unusual approaches to lobbying the government.

Firstly, we forged an alliance with the Prison Reform Trust and acted in concert – recognising that the combined efforts of the country's two leading penal reform organisations would lend more weight to our calls than acting separately.

Secondly, the Howard League's own legal expertise was a key plank of what both charities then sought to deploy in order to place pressure on the Ministry of Justice.



Since the foundation of the charity's legal team in 2002, first working with children in custody and then expanding into work with young adults aged 21 and under in 2007, this aspect of our work has differentiated the Howard League from other criminal justice charities seeking to influence policy and practice.

The legal work brings an enhanced element of 'on the ground' knowledge and contact with those in the prison system. Crucially, however, the legal expertise within the Howard League allows for strategic litigation which might force meaningful change where the usual tactics of policy development, lobbying and media campaigning are unlikely to be sufficient.

Using the charity's legal expertise, and reputation for taking cases of public importance to the courts – such as our ongoing challenges to the practice of isolating children in conditions that amount to solitary confinement – both the Howard League and the Prison Reform Trust took the decision to threaten potential legal action if our concerns as to the Ministry of Justice' actions (or lack of them) were not met.

Both charities had received intelligence that, as of late March, Public Health England (PHE) advice

was circulating within government. We understood that the advice recommended reducing the prison population to better equip the system to put in place the sort of social distancing measures seen in the community. If such measures were not taken, ministers had been warned, then the prisons could see many deaths during the pandemic.

It was not until early May that we forced the government's hand into disclosing this information. We negotiated an agreement with the government to publish this [original PHE advice](#), revealing that ministers had been asked to consider reducing the prison population by 15,000 and that as many as 3,500 prisoners might die – one in twenty of those in prison – if the recommended action to reduce the prison population was not taken.

What happened in April that allowed us to publish this original advice? To begin with, on 2 April the Howard League and Prison Reform Trust published an [important report](#) on COVID-19 and prisons by Professor Richard Coker, Emeritus Professor of Public Health at the London School of Hygiene and Tropical Medicine. The Coker report led to the Ministry of Justice conceding publicly for the first time that some element of early release was required in response to the pandemic.

Thanks to our public pressure, the Ministry of Justice [announced on 4 April](#) that some 4,000 prisoners would be released early to protect the “NHS” and “brave prison staff” (no mention was made of protecting prisoners themselves). This was our first success, although the gap between rhetoric and reality became rapidly clear.

By 17 April just four people had been released under the End of Custody Temporary Release (ECTR) scheme. Our concerns as to the painfully slow progress being made in this regard accelerated our consideration of legal action. On 17 April the two charities served a [letter before action](#) on the government setting out our concerns and threatening to serve proceedings if the government did not respond satisfactorily. The thrust of the challenge was that the government had said it needed to release a substantial number of prisoners to save lives in response to the threat of COVID-19 but had not followed through on this. The charities argued that was irrational and unlawful.

In response to this letter before action, the government provided a detailed letter explaining that the advice had changed and that while the release programme had not been abandoned (indeed, we were told a further two hundred applications had been approved), a high volume of releases was no longer required. Instead a range of strategies were being employed to protect lives of people in prison. The government disclosed more than a dozen key documents to us on 28 April to support its arguments and subsequently gave us permission to [publish its response and the documents it disclosed](#). In light of this, it could no longer be said that the government's failure to release thousands of prisoners was irrational and we took the decision not to issue proceedings at that point in time.

As well as the original PHE advice from March, the government produced [subsequent advice dated 24 April](#) which found early emerging data that the ‘explosive outbreaks’ of COVID-19 in prison which were

feared at the beginning of the pandemic wave are not being seen. Accordingly, PHE revised its estimate of prisoner deaths from the virus from up to a reasonable worst-case scenario of 3,500 to a best-case scenario of around 100, provided severely restricted regimes remain in place for up to a year.

We have accepted for now that the combination of social distancing measures in prisons and early releases, including a natural fall in the prison population due to limited courts business, has avoided the large number of deaths we all feared might happen behind bars in these first weeks of the pandemic. Yet this has been at the cost of inhumane regimes where solitary confinement is the norm. It is not tenable in the long term and further temporary releases are required to ease pressure.

The progress has continued to be painfully slow: Despite the introduction of the ECTR scheme and a smaller programme using temporary compassionate release for prisoners such as pregnant women and the most clinically vulnerable to the virus, as of writing (12 May) only 81 prisoners have been freed early from prison. Of these, only 55 had been released under the ECTR scheme which promised a reduction in numbers of 4,000.

The negligible number of releases is perplexing given the assurances that 200 had been approved two weeks ago and that the latest PHE advice continues to warn that the risk of large outbreaks of the virus in prison remains. If wider restrictions in the community are relaxed and the courts turn the taps on, we remain extremely concerned that current

severely restricted regimes will fail to prevent further deaths; disaster will be inevitable without further government action. Whilst we have halted the threat of legal action for now, both the Howard League and the Prison Reform Trust continue to monitor the situation closely and [continue to press](#) the Ministry of Justice to adopt bolder and swifter action in future.

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Laura Janes was admitted as a solicitor in 2006 and has oversight of the Howard League legal service for people under 21 in prison. She has a professional doctorate in Youth Justice. Laura has developed an expertise in advising and representing children and young people in penal detention in relation to prison law, public law and criminal appeal matters. Laura is a committee member of the Association of Prison Lawyers and the Legal Aid Practitioners' Group. She is also a visiting fellow at the London South Bank University and Chair of Legal Action Group. In 2019, Laura was awarded Solicitor of the Year by the First 100 years' Inspirational Women in Law Awards.

Features

Legal reactivity: correctional health care certifications and accreditations as responses to litigation

Spencer Headworth and Callie Zaborenko, Purdue University
Department of Sociology

Approach

This article investigates first, the emergence and proliferation of accreditations of correctional facilities' health care delivery systems and second, certifications of individual correctional health care (CHC) practitioners in the United States.¹ We collectively label these privately produced validations as 'endorsements'. For this project, we first conducted archival research at the National Commission on Correctional Health Care (NCCHC) and interviews with key informants, which provided a basis for outlining the legal and professional interventions that begat standardisation in CHC and impelled accreditation and certification programmes. This history shows the interrelationship between certain outcomes of incarceration—especially inmate lawsuits—and the reforms that endorsements symbolise. More recent developments—especially the Prison Litigation Reform Act—have buffered corrections actors' exposure to legal liability.



Based on this history, we developed hypotheses to test quantitatively. We hypothesised that contemporary individuals and organisations are primarily legally reactive, not proactive, and will wait until faced with salient legal threats to seek endorsements (what we term as legal reactivity), rather than prophylactically adopting endorsements to manage general legal risk. To test our historically derived hypotheses, we assessed the contemporary relationship between our variables of interest. Our quantitative analyses support our hypothesis of legal reactivity. We found a significant positive association between litigation and endorsements, suggesting that corrections actors adopt endorsements when seeking to temper the impact of realised legal threats, or minimise similar threats' chances of recurrence.

This result advances the sociolegal conversation regarding whether litigation and court rulings are or are not consequential in effecting meaningful social outcomes. We conclude that lawsuits engender standardisation and professionalisation, offering some evidence of litigation's capacity to impel

¹ This is an abridged version of a research article currently under peer review. The authors thank Amanda Figueroa for research assistance in

preparing the abridged version. Please email sheadworth@purdue.edu with any correspondence related to the research.

change. In line with more sceptical perspectives, however, litigation does not appear to predict the highly consequential outcome of inmate mortality.

Endorsements

Private endorsements are typically voluntary, not governmentally compelled. If CHC endorsements functioned proactively, we would expect any significant association between endorsements and lawsuits to be negative, with higher rates of endorsement predicting reductions in inmates' litigation rates. This was the logic of early professional engagement in the 1970s: under emerging conditions of legalised accountability, the National Commission on Correctional Health Care's (NCCHC) embryonic iterations entered the field offering resources aimed at substantively improving service provision.

As NCCHC representatives themselves note, there are also reasons to doubt endorsements' causal impact. Fundamentally, endorsement rates are not particularly high, limiting their potential influence on important outcomes like litigation and mortality. Explaining their decisions to pursue certification, individual Certified Correctional Health Professionals (CCHPs) cite ideas like credibility, recognition, expertise, competence, dedication to the field, and personal growth; these factors' connections to lawsuits and inmate deaths are tenuous. And facility accreditation only assesses facilities' capacity for delivering adequate health care, not the adequacy of their day-to-day practices. Following accreditation, facilities can—and sometimes do—lapse into noncompliance with essential standards. All of these factors contradict an expectation that endorsements would

significantly predict litigation or mortality rates.

Compared to proactively adopting standards of best practice in hopes of reducing exposure to risks, legally reactive endorsement adoption reflects organisations' efforts to protect themselves from specific manifested threats or reduce such threats' chances of recurrence. We expect lawsuits to be the most salient threats to corrections actors. Previous research indicates litigation's power to compel sometimes extensive and expensive changes.

Historical and legal background

In 1976, the US Supreme Court's decision in *Estelle v. Gamble* established incarcerated people as that unique group of Americans with a constitutional right to health care. Post-*Estelle* legal developments, however, further suggest legal reactivity's comparative plausibility in contemporary endorsement adoption. That is, limitations on inmates' ability to successfully sue corrections organisations may reduce proactive risk management measures' appeal compared to reactive threat insulation measures. Like many Supreme Court decisions, the precedent established in *Estelle* is quite vague, and has proven a site of considerable legal contention since 1976. Subsequent litigation has highlighted two phrases from the *Estelle* ruling: 'serious medical need' and 'deliberate indifference'.

The *Estelle* decision suggested managed care organisations' diagnostic procedures as a good source for viable community standards of what constitutes a 'serious medical need'. Subsequent decisions, though, have largely deferred to local authorities' determinations of what medical needs qualify as 'serious.' Beyond granting local correctional actors leeway to distinguish between 'serious' and 'non-serious' medical needs, rulings

have not required CHC to meet any 'community standard' of adequate health care and indeed held that prison medical care does not need to be ideal 'or even very good'. Similarly, precedent dictates that incarcerated people do not have legitimate legal claims to the external benchmarks of acceptable care available to community patients.

Court cases have also highlighted the phrase 'deliberate indifference'. Rulings have unequivocally foregrounded its 'deliberate' element: inadequate—or even directly harmful—CHC does not violate the *Estelle* standard without a wilful act of mistreatment. To substantiate a claim of unconstitutional deliberate indifference, they ruled, plaintiffs carry the burden of proof in demonstrating that defendants knowingly disregarded a serious risk of harm. These narrow interpretations of constitutional protections have limited incarcerated people's litigation options, and thus corrections authorities' constitutional accountability.

Statutory intervention—namely, the 1996 Prison Litigation Reform Act (PLRA)—has also curtailed inmates' ability to claim the constitutional right to health care established in *Estelle*. The PLRA curbed courts' power regarding conditions of confinement cases through limiting injunctive relief and damages. It also included several measures making it harder for inmates to file lawsuits and easier for courts to dismiss their cases. The statute's 'exhaustion requirement' requires inmates to go through their system's entire internal grievance and appeal process before they are eligible to file lawsuits.

Post-*Estelle* doctrine and statutory restrictions on litigation mean that CHC must fail much more dramatically than community medicine to constitute legally actionable mistreatment. Mere

negligence or violations of civil recklessness standards fail to meet the 'culpable state of mind' standard required for an Eighth Amendment violation. To establish legal wrongdoing, CHC plaintiffs must establish that correctional actors caused harm through *deliberate* inaction in the face of recognised serious medical needs. Courts do not consider failures to meet basic competence standards or recognise serious medical issues evidence of legal wrongdoing; indeed, in the latter case, an organisational failure to identify a serious medical need points toward legal vindication, not legal liability.

Class action litigation has also declined in the contemporary legal context. Settlements and court orders responding to individual cases are typically narrowly tailored, compared to the systemic injunctions that group-based suits can deliver. This further contributes to an environment in which corrections actors may elect to wait and deal with litigation when (and if) it arises, rather than seeking legal prophylaxis.

Although lawsuits are especially noteworthy threats to corrections actors, we also consider the possibility that negative health outcomes, especially inmate mortality, may cause defensive reactions. We expect, however, that elevated rates of inmate death will primarily manifest as threatening through their potential effects on litigation rates, meaning that any mortality effect would flow through litigation.

Correctional health care's history and contemporary dynamics suggest two main hypotheses regarding relationships between mortality, litigation, and endorsements. Because we see lawsuits as the primary threat to corrections actors (and mortality as potentially threatening mainly through a prospective contribution to litigation), we posit

mortality and endorsements will demonstrate no significant association. And, because we expect contemporary corrections actors' endorsement adoptions to be legally reactive, not legally proactive, we posit litigation and endorsements will demonstrate significant positive association.

Findings

Using data from NCCHC records and government statistics, we estimated state-year fixed effects models assessing relationships between state-level rates of NCCHC endorsements, inmate lawsuits, and inmate mortality rates in US states between 1998 and 2015. These models support both of our hypotheses. We do not find evidence of a significant association between endorsements and mortality rates. We do find a significant positive relationship between endorsements and litigation rates, supporting the proposed legal reactivity pattern.

The lack of a significant relationship between mortality and endorsements is unsurprising, both to us and our interlocutors at the NCCHC. Given the many variables involved in predicting inmates' rates of death, it would be unreasonable to expect that NCCHC endorsements (especially in modest numbers) would be significant factors. Additionally, although we observe a positive association between endorsements and lawsuits, we think it is unlikely that endorsements are in any way 'causing' more litigation, which leads us to conclude that corrections actors tend to adopt endorsements when responding to elevated litigation rates.

Several limitations curtail our ability to fully tease out the complicated relationships between CHC endorsements and litigation. First, our litigation variable is a measure of all conditions of confinement lawsuits filed

in a state, across both jails and prisons, and is not limited to those cases involving a CHC allegation. We also cannot account for various unobserved factors with potentially significant impact. Our data's level of aggregation presents an additional general limitation. Because our data are state-level, not facility-level, we cannot systematically account for the place of inter-facility differences in endorsement adoption in the broad patterns we observe. Similarly, we cannot empirically account for mimetic isomorphism's potential contribution to states' endorsement rates; it is possible that early adopters influence proximate counterparts who perceive endorsement adoption as beneficial.

Although privatised prisons have attracted substantial popular attention, this conversation does not always attend to private contractors' substantial role in public correctional facilities; this is another factor that our models cannot accommodate. Although our study cannot ascertain contractors' place in the phenomena we describe, particular dynamics may characterise correctional contexts involving these public-private hybrids; for instance, some contracts between government and private service providers require that providers obtain NCCHC endorsements. As governments try to reduce corrections expenditures, relationships between correctional administration, private contractors, and validation organisations merit closer study.

Conclusions

During reforms to CHC in the 1960s and 1970s, expanding professional oversight ventures reflected legal proactivity: the nascent NCCHC focused on substantive reforms in the field, helping corrections actors manage general risk in an emerging environment of 'legalised accountability'. Subsequent legal developments, especially the PLRA,

curtailed inmates' ability to effectively sue over conditions of confinement. In the post-PLRA legal environment, we expected to find that corrections actors would typically wait until direct legal threats manifested in the form of elevated litigation rates to adopt endorsements. Our results support this proposition, indicating that contemporary corrections actors tend to use endorsements as a resource when responding to specific threats, rather than a proactive measure to reduce exposure to abstract legal risk. This finding corresponds to other research suggesting that organisations respond more vigorously to direct external pressure from litigation than to general conditions of their normative environments. Litigation, however, does not appear to significantly affect mortality, either directly or through the pathway of standardisation and professionalisation.

Stakes are high for incarcerated people pursuing medical care cases and other conditions of confinement grievances. And current and future inmates are not the only stakeholders in CHC; correctional facilities' treatment of their confined populations also has significant implications for the general public. Prison and jail inmates are starkly unhealthy compared to their counterparts in the community. The increasing health care needs of a 'greying' prison population compound these problems and their fiscal costs. CHC also constitutes a significant public health matter, particularly in communities disproportionately affected by mass incarceration. Millions of people cycle through the nation's correctional facilities every year. Upon release, formerly incarcerated people bear above-average burdens of disease—including communicable illnesses—and have below-average access to health-supportive resources. As the COVID-19

pandemic has laid bare, correctional facilities' activities humanitarian, fiscal, and public health consequences extend far beyond jail and prison walls.

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Verdict as a site of social (in)justice: more groundwork for a multivalent approach

Louise Kennefick

This article claims that the bivalent ('binary' or 'two-way') criminal verdict is a site of social injustice because it results in the misrecognition of the offender collective through a form of status subordination.² Its aim is to contribute to the literature that supports a multivalent ('many-valued') verdict approach, specifically from the perspective of advancing social justice, and not alone achieving just deserts (for convincing arguments along the latter line see Stephen Morse (2003) and David O. Brink (2019)). In particular, it begins by highlighting the problems pertaining to the binary verdict, before employing a 'real world' philosophy methodology to diagnose as an injustice the experience of the relevant collective. Finally, it employs the concept of recognition to inform a social justice response. The article forms part of a larger project which calls for a more humane approach to rendering verdict on both moral and political grounds. For present purposes, the aim is to justify the transformation of the site from a social justice perspective, rather than to elaborate on the detail of how a multivalent approach might operate in practice (for this, see Morse (2003) and Brink (2019)).

Problematising the bivalent verdict

This section divides into two categories the core problems with the binary verdict; those that pertain to substance, and those that pertain to methodology.

A first host of issues addresses the impact of verdict on the offender

² Note for present purposes, 'bivalent' can include the Scottish verdict, as Not Proven speaks more to the evidential aspect of the



collective and relates to the substance of the justice evaluation to follow. The verdict's bicephalic construct of the individual as either guilty or not guilty masks relevant

moral and social context that helps explain (if not fully excuse) the offender's behaviour, leaving an incomplete account of both their actions and the larger question of responsibility for crime (Ristroph, 2011), (notwithstanding that the law recognises the principle of scalar responsibility in the context of 'diminished responsibility' as a defence to murder (Morse, 2003)). For example, relevant factors that may not amount to a formal excuse (e.g. immaturity, Adverse Childhood Experiences ('ACES'), addiction, deprivation, and mental disorder not meeting the insanity defence threshold) are omitted from considerations of responsibility and verdict, with mitigation at sentencing arguably insufficient for the purpose of achieving just desert in the context of blame (Morse, 2003). Yet, these factors matter to an offender's account of their behaviour and how they are understood by the community (Maruna & Copes, 2005). Further, the bivalent verdict structure communicates a cultural message that this collective may be evaluated in 'simplistic dichotomies' (Christie, 1981), thereby conditioning communal thought of 'us' and 'them', leading to a devaluation of the status of the individual's moral worth. The process reinforces stigmatisation, exclusion and, ultimately, status subordination – harms that may be framed as a form of social injustice (as discussed below).

verdict (i.e. proving wrongdoing), as opposed to its normative messaging which is the focus of this article (i.e. responsibility and culpability).

Yet the bivalent verdict endures with very little scrutiny. Thus, the second host of issues addresses the institutional, cultural and theoretical acquiescence to the status quo, and relates to the methodological approach of this project. It is arguable that resistance to progress at this site is due to the fact that, traditionally, legal commentators present and engage with verdict as a purely objective process relating to and pronouncing on the evaluation of proof (e.g. Williams, 1983), thereby affording it an apolitical air. The legal view (though in itself valid) is an inadequate account of verdict because it fails to recognise its significance as a reported and public performance of state condemnation (Duff et al, 2004). As a result, the law gives insufficient attention to the lay interpretation of verdict, which is concerned with narrative substance, the truth and the attribution of social blame (Jackson, 1998).

The lay interpretation is underpinned by the supposition that upon a guilty verdict, a person loses any moral claim to justice they may have had owing to “a mark of bad character”, evidenced by their wrongful conduct (Rawls, 1999). This stance is ill founded, of course, given that those deemed guilty remain citizens, notwithstanding their conviction (and potential punishment). As Kymlicka and Norman (1994) observe, a citizen’s rights precede their duty to obey the law, as fulfilment of the rights is necessary for full participation as a citizen in the first instance. Therefore, offenders are ‘due’ justice to the same extent as non-offending members of the community. Perhaps more so, when we consider that verdict is the point at which the state changes its relationship towards the individual; a duty to condemn (and potentially to punish) being appended to (though not supplanting) its duty to protect. Thus, there is call for deeper engagement at both institutional and

cultural levels with the performative and communicative function of verdict, as a potential catalyst for cultural transformation in a social justice context.

The perception of verdict as apolitical is symptomatic of the paradigm of abstract individualism based on a construct of the person as rational agent, which pervades our criminal responsibility practices (Norrie, 1991). This grounding assumption overlooks the fact that verdict, as a central process of a public institution, is an innately political act imbedded in the liberalist tradition (Norrie, 1996). Look closely, and we see that the responsible moral agent of the criminal law is, in fact, the rule-breaking doppelganger of the free and equal rational agent of liberal theory. Both constructs are underpinned by a view of the individual as rational agent. For, rationality underpins freedom in the sense that the citizen has the capacity to choose how to act, and if they choose to act badly, then they come within the realm of the criminal law.

Unsurprisingly, then, the responsible moral agent paradigm feeds into the most dominant way of theorising about criminal law and process, that is, in the abstract (e.g. Moore, 1998). Of course, there are profound advantages to the ideal method, particularly in terms of gaining a ‘systematic grasp’ of everyday problems (Rawls, 1971/1999). One limitation, however, is that it restricts the range of relevant information that may be taken into account to that of the rational capacity of the person. In the case of verdict, we can point to the lived reality of the collective as being instrumental to forming a greater appreciation of the significance of the site as a potentially unjust social mechanism, with a view to responding in a way that advances justice.

Recognising verdict as a political site, then, puts political philosophy methodologies in our toolkit. Accordingly, this article endorses the application of a 'real world' approach to the site of verdict, which lends an experiential supplement to the ideal approach in order to allow space for the social reality of the collective, yet, without upending the requirement to hold people accountable when they commit a criminal wrong.

'Real world' political philosophy methodology

Briefly, a real-world political philosophy methodology ('RW') endorses an amalgamation of the 'ideal' (abstract, positive definition) and the 'non-ideal' (lacking idealised assumptions and/or taking the elimination of injustice) approaches (see Valentini, 2012).

The core features of RW are its partial and pluralistic nature, and its comprehensive and multi-perspective scope. The approach is partial in that it cordons off particular sites or 'social mechanisms' (such as verdict) for evaluation in a justice context, without the need to construct a new idea of a just society, or just legal system, in toto (van den Brink et al, 2018). The plurality of RW lies in the fact that more than one claim to justice can exist in a particular site, it does not have to provide a 'pure' account (Sen, 2009). Thus, the social justice argument advanced here, which points to the introduction of a multivalent verdict, can sit alongside arguments like that of Morse and Brink who take a more moralistic path to justify transformation. The comprehensive scope of RW permits consideration of the state of

affairs that arises from the mechanism under scrutiny to be considered in making an evaluation of injustice (Sen, 2009). Therefore, the (potential) outcomes (conviction, punishment, collateral consequences etc.) of binary verdict are relevant to our assessment of it for the purposes scrutinising its social justice credentials. Further, RW's multi-perspective reach allows for consideration of the evaluation of injustice from a number of perspectives, including agentic, institutional/structural and relational, generating richer material to inform responses.

RW involves a two-step problem-solving approach: first, the diagnosis of injustice through lived experience, and second; the use of theory as a tool to help cultivate reasoned principles to assist in better understanding and responding to those injustices (van den Brink et al, 2018; Wolff: 2011).

Diagnosing injustice at the site of verdict – recognition as a justice schema

The diagnosis of injustice at the site of verdict begins with an account of the experience of the collective subjected to the process. This section points to criminological literature that evinces the stigma and exclusion felt by many who are found guilty and convicted and frames their social reality in terms of misrecognition as a form of social injustice.³

Because bivalence conditions an interpretation of a guilty verdict as a statement about the moral worth of the person, a mark is put on their character (Austin 2004; Dovidio et al: 2000). Those

³ (As noted, it is also within the scope of a RW framework to take into account punishment and its collateral consequences as comprehensive outcomes for the purpose of an evaluation of justice, however, there is insufficient space to elaborate upon such studies, which have been

well documented elsewhere (e.g. Kirk and Wakefield, (2018); Sykes (1958/2007); Crewe, (2011); Durnescu (2011); Butler and Maruna (2009); Liebling & Maruna (2005); Butler & Drake (2007); Miller 2001)).

convicted of crime, then, experience shame and humiliation as an intended outcome of the verdict mechanism (Austin, 2004; Katz, 1997). Conviction triggers the stigmatisation process for the offender (Austin, 2004), and has been shown to be more stigmatising than arrest because of the process of formal adjudication (Chiricos et al, 2007), and even more stigmatising than going to prison for certain cohorts (O'Brien, 2001; Chiricos et al, 2007). The stigma that flows from categorisation as an offender reinforces a cultural message that such individuals (and often their families) are to be shunned (Goffman, 1963). Their wrongdoing becomes their primary status, one that they rarely escape, with very little done to '... offset the degradation heaped on them by the community' (Austin 2004; Braithwaite, 1989). The impact of stigma at conviction is evidenced by the damage to the psyche of the individual (e.g. Moore et al, 2016; Braman, 2004; Heimer and Matsueda, 1996; Matsueda, 1992), the structural impediments to their functioning (e.g. Sampson and Laub, 1997), and the increased likelihood of recidivism (Chiricos et al, 2007). Most recently, self-reported consequences of conviction have been shown to include physical and mental health deterioration, and the hindering of stability markers like employment, housing, education and so on (for example see Fernandes, 2020; Sugie and Turney, 2017).

Examining the experience of the collective through a political lens, we might reframe the stigmatising and isolating effect of the bivalent verdict as a social mechanism that creates a sub-category of citizen. Through the stigmatisation process, the offender (whether imprisoned or not), lives a lesser version of citizenship compared to those in the community who have not been convicted. For example, those convicted, imprisoned or under

supervision have been described as 'denizens' (along with welfare recipients) (McNeill, 2019), 'second-class citizens' (Edgley, 2010), 'carceral citizens' (Miller and Stuart, 2017), and 'conditional citizens' (Vaughan 2000). Applying a recognition schema, this form of categorisation may be construed as a 'status subordination' or 'status injury', in the sense of the offender 'being denied the status of a full partner in social interaction and prevented from participating as a peer in social life as a consequence of institutionalised patterns of cultural value that constitute one as comparatively unworthy of respect or esteem' (Fraser, 1996).

Recognition, as Nancy Fraser and others present it (Fraser, 1995, 2005; Fraser et al, 2004; Young, 2009; Anderson, 2010), allows us to think about those who offend as a collective not so much in an economic or production context, as with distributive justice, but by 'relations of recognition' who are 'distinguished by the lesser esteem, honour, and prestige they enjoy relative to other groups in society' (Fraser, 1996). Thus, this article claims that the institutionalised pattern created by the bivalent verdict, in casting individuals in a dichotomous context, expresses and reinforces a cultural value which views offenders as 'less than', feeding a status hierarchy as between offender citizens and citizens who have not been found to offend. Through the resultant isolation and stigma, such a pattern not alone reinforces a negative status, but impedes 'parity of participation' for the collective in terms of their ability to fulfil their functions as citizens (Fraser, 1996), and cultivate capabilities to enhance their quality of life as bona fide (albeit censured) members of society (Sen, 2009; Nussbaum, 2011).

The difference between the civic experience of the offender and the non-offender, then, can be challenged by the

negative connotation of recognition justice, as difference that creates 'discursively constructed hierarchical oppositions that should be deconstructed' (Fraser, 2004). The remedy, according to Fraser, is 'cultural or symbolic change': this might play out as 'upwardly revaluing disrespected identities, positively valorising cultural diversity, or the wholesale transformation of societal patterns of representation, interpretation, and communication in ways that would change everyone's social identity' (Fraser and Honneth, 2003). As such, the final section considers briefly the possibility of the multivalent verdict as a catalyst for cultural change.

Responding to injustice – towards a multivalent verdict

Misrecognition as status subordination is promulgated by the binary verdict in two interrelated ways: first, it masks relevant moral and social contexts that can effect responsibility and that help explain behaviour to the community, and second; it conditions collective thought to evaluate the moral worth of the person in a crude and harmful way. Taking the final step of the RW approach, a justice response must be modelled to address these aspects. This article sees the potential in a multivalent approach as a means of responding to misrecognition as injustice at the site of verdict.

The essence of a multivalent approach is the recognition that responsibility is not a matter of status, but a matter of degree. Therefore, at its most basic, multivalence at verdict incorporates some form of scalar responsibility. For example, it can range from trivalence (e.g. full responsibility, partial responsibility and nonresponsibility), to more 'fine grained' culpability distinctions as might be achieved by a tetravalent or 'fully scalar analogue' system (Brink, 2019; see also Morse, 2003; Fingarette and Hasse,

1979). Noteworthy, is the scope of Morse's proposal, as it is not limited to "pathology" in the narrow sense' but is based on 'any non-culpable diminution of rationality' like 'stress, grief, fatigue and low intelligence' (Morse, 2003:305), recognising that complex social problems can lead to impaired rational responses. The incorporation of scalar responsibility at verdict facilitates the inclusion of factors relating to the offender's moral and social context, that do not presently come within the suite of restrictive formal excuses available, resulting in a form of 'mitigating excuse' (Morse, 2003). From a social justice perspective, the multivalent approach addresses our first complaint by revealing more of the social reality of the relevant collective to the community at a pivotal and public point on their criminal justice journey. Whether or not the factors reduce the scale of the offender's responsibility, there is at the very least the opportunity to bring mitigating claims to light at the normative core of the trial. And, if such claims are proven, a reduced level of responsibility not only facilitates a more accurate just deserts (Morse, 2003), but responds to our second complaint by communicating that people ought not to be evaluated by means of crude dichotomies. This latter point can be strengthened by shifting the language of 'guilt', which alludes to the moral worth of the person, towards 'violation' (borrowing from Robinson, 1990), which focuses on the wrongdoing itself, as opposed to the culpability of the accused, e.g. 'violation', 'violation with reduced responsibility', 'non-violation'. This approach may go some way towards shifting the cultural interpretation of the verdict as a reflection of an individual's character, thereby stemming the stigma that follows. Finally, a multivalent approach is a means towards confronting the problematic reality of responsibility as a complex social interaction (Young, 2009; Ristroph 2011), and going some way towards reducing

the distance between ‘them’ and ‘us’ by allowing space for a richer and more authentic narrative account of the offender’s context.

Conclusion

The bivalent verdict amounts to a persisting structural injustice in our contemporary criminal justice system, with no convincing modern justification, owing to the misrecognition of the offender collective through status subordination. The power of the site of verdict lies in its performative and communicative function. It has the potential to act as the springboard for a cultural evolution with regards to societal perception of the offender collective. Reconstructing the verdict as a multivalent mechanism would recognise more substantively the innate worth of persons and their relevant moral and social context, (in addition to their proportionate responsibility for the criminal act they committed), thereby advancing justice at the site of verdict for the relevant collective. For, as Picinali (2017:) cautions, ‘[w]ork needs to be done in order to ensure that [this] crucial feature of our criminal justice system is justified—that this feature is not merely the product of distant historical developments and of inertia’. In arguing for a multivalent approach, this article seeks to contribute to such groundwork from a social justice perspective.

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‘Their minds gave way’: mental disorder and nineteenth-century prison discipline

Catherine Cox and Hilary Marland

*It seems that there is nothing in the life of a prison that does not tend towards the unbalancing of some of its inmates’ minds.*⁴

Since the inception of the modern prison system in the mid-nineteenth century, the question of why prisons contain so many mentally ill people has been hotly debated. Our project has explored how, from the mid-nineteenth century, prisons have stood accused of both producing and exacerbating mental despair and illness, their emphasis on enforcing discipline and punishment destroying the minds of prisoners and obstructing efforts to ameliorate conditions and to care and treat those showing signs of mental breakdown. From the era of Charles Dickens, who castigated prison reformers for introducing the cruel and mentally taxing system of separate confinement in the 1840s, through to Oscar Wilde who experienced the impact of prison discipline on the mind first hand towards the end of the century, the prison has been subject to continuous criticism for causing mental illness among its inmates and doing very little to address this issue.⁵



The separate system and mental breakdown

Drawing on the under-utilised records of individual prisons, as well as official reports, medical literature and prisoners’ memoirs, our project has investigated how mental breakdown has been experienced and managed by English and Irish prisons, prison staff and prisoners, mapping changes in approaches to assessment, care and treatment, and exploring how decisions about mental deterioration amongst prisoners were made. The research demonstrated that, while overcrowding, poor diet and living conditions, and harsh discipline all played a role in producing mental illness, the ‘separate system’ had a particularly detrimental impact. Based on the disciplinary regime in operation at the Eastern State Penitentiary in Philadelphia, separate confinement was introduced to England in 1842, with the opening of Pentonville Model Prison in London.⁶ Intended to promote self-reflection and deep-seated reform, the system enacted an agenda driven largely by the prison chaplains, many of whom were staunch supporters of the new regime. This would be achieved by means of their sermons and cell

⁴ Stanley Scott, *The Human Side of Crook and Convict Life* (London: Hurst & Blackett, 1924), p.139.

⁵ Charles Dickens, *American Notes for General Circulation: Vol 1* (London: Chapman and Hall, 1842; Penguin edn, with an Introduction and Notes by Patricia Ingham), pp.111-24; Oscar Wilde: *The Soul of Man and Prison Writings*,

edited with an Introduction by Isobel Murray (Oxford: Oxford University Press, 1990).

⁶ See Catherine Cox and Hilary Marland, “‘He must die or go mad in this place’: Prisoners, Insanity and the Pentonville Model Prison Experiment, 1842-1852’, *Bulletin of the History of Medicine*, 92:1 (2018), 78-109: <https://muse.jhu.edu/article/691233/pdf>

visitations, where they remonstrated with prisoners to confess and repent, 'drawing on the moral machinery of the system... with as much force and effect as if the prison contained no other culprit but himself'.⁷ Pentonville prisoners were isolated for up to 23 hours a day, for a period of 18 months prior to transportation; eating, working and sleeping in their cells, and strictly forbidden from communicating with other inmates. Far from improving the minds of prisoners, they soon began to show often severe symptoms of mental disorder. Pentonville attracted widespread criticism for its production of anxiety, delusions and hallucinations, excitement on religious subjects, depression of spirits and insanity. Peter Laurie, President of Bethlem asylum, reported on the 'fearful increase' of 'lunatics' sent from Pentonville following the introduction of the separate system.⁸

The system expands

Despite troubling evidence of the impact of the separate system on the mind, the regime was taken up at Dublin's Mountjoy Prison in 1850 and was widely adopted in England and Ireland during the nineteenth century. In Dublin, however, following the visit of the Inspector of Government Prisons, Henry M. Hitchins, to Pentonville, the system was introduced with some modifications. Hitchins warned Mountjoy's medical officer that long periods of separate confinement had a tendency 'to produce a general debility of mind and body' that

produced among prisoners 'imbecility or utter prostration of mental powers'.⁹

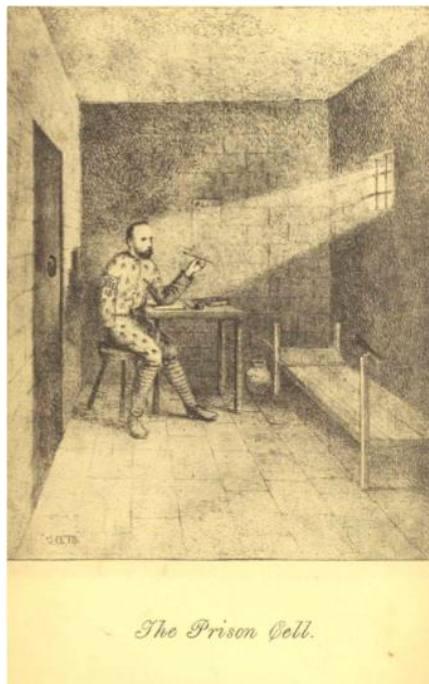
By the 1850s some 11,000 purpose-built separate cells had been constructed or were nearing completion in England, including 55 separate cellular prisons. Though only a small number of prisons in Ireland initially implemented separation, by the 1860s the number had expanded, including a new east wing at Dublin's Kilmainham Gaol with 100 separate cells in 1863. Yet, even as the separate system was being modified and extended, the potential risks to mental health were repeatedly pointed out. As Kilmainham extended the system, the Chaplain of Spike Island Prison in Cork, Reverend Charles Gibson, described the cellular prison as 'a delicate piece of

machinery which no unskilful hand should touch. A few more turns of the screw, and you injure both the body and mind of the prisoners.'¹⁰

Prisoners' voices

By the 1860s early optimism about the reforming capacity of separate confinement was lost, and replaced by a more penal approach that re-envisioned separation as a form of severe punishment, reinforcing other deprivations of prison life, including long

terms of hard labour in public works prisons as transportation was wound down after the 1850s. This fact was not lost on prisoners who from the 1860s onwards increasingly penned their own accounts of prison life, expressing their



⁷ Third Report of the Inspectors of Prisons of Great Britain, Part 1, 1837-38, p.28.

⁸ *The Times*, 11 January 1847.

⁹ National Archives Ireland (NAI), Government Prisons Office/Letter Book/12, 14 February 1850.

¹⁰ Charles Bernard Gibson, *Life Among the Convicts*, 2 vols. (1863), vol. 1, p.69.

horror of separate confinement. 'No-one', declared, the author of *Her Majesty's Prisons* in 1881, can conceive 'how quickly confinement in a small cell, tells upon the health and nervous system of a man'. Far from urging reflection and reform, 'the time is almost necessarily spent in remorseful meditations that become well-nigh maddening as the days slip by'. Many prisoners, he added, were moved to lunatic asylums, 'and a still greater percentage have their intellects more or less affected for the rest of their lives.'¹¹ 'No-one can realize the horror of solitary confinement who has not experienced it', wrote Florence Maybrick after her fifteen years in Liverpool, Woking and Aylesbury prisons. She described how it inflicted a 'voiceless solitude' and 'hopeless monotony' and was 'known to produce insanity or nervous breakdown more than any other feature connected with prison discipline.'¹²

Prison medical officers

Our research exposed numerous examples of the poor treatment of mentally ill prisoners by those charged with their care, as well as evidence of a long-held preoccupation that many prisoners were feigning mental illness to escape harsh prison regimes. Many prisoners held at Liverpool Borough Prison in the late nineteenth century who were suspected of feigning insanity or suicide, were held in dark cells on a bread and water diet or even beaten.¹³ At Sligo Prison, where the regime appeared to be particularly brutal, prisoner Michael Costello made repeated suicide attempts

in what was believed by the prison authorities to be an attempt to secure a transfer to a lunatic asylum, with its better conditions. In response Dr Murray, the prison surgeon, put Costello in a padded cell, force fed him and submerged him in cold baths, regretting the absence of 'a good powerful Electric Machine' for use in such cases. He concluded that 'Costello is evidently the worst possible character, but I hope he is now tamed for some time at least.'¹⁴

Some prisoners suspected of insanity were placed in observation cells or treated in prison infirmaries, and a few of these appeared to have recovered; others were moved to invalid prisons, such as Woking in England and Maryborough in Ireland, which took in large numbers of mentally ill prisoners during the 1870s and 1880s. Others were transferred to Dundrum or Broadmoor Criminal Lunatic Asylums, set up respectively in 1850 and 1863, or to local asylums. Many mentally ill prisoners, however, remained in prison, even though various observers, including doctors working outside of the prison system, expressed dismay and frustration at the accumulation of large numbers of 'lunatics' in prisons ill-equipped to deal with them: 'the denial to them of medical treatment at the time when it might be of service in rescuing them from lifelong insanity, is a cruel wrong.'¹⁵

¹¹ *Her Majesty's Prisons: Their Effects and Defects*, By one who has tried them, vols 1 and 2 (London: Sampson Low, Marsten, Searle & Rivington, 1881), vol. 1, pp.53, 111, 263-4.

¹² Florence Elizabeth Maybrick, *Mrs. Maybrick's Own Story: My Fifteen Lost Years* (New York: Funk & Wagnalls, 1905), pp.68, 74, 81.

¹³ Catherine Cox and Hilary Marland, "Unfit for Reform or Punishment": Mental Disorder and

Discipline in Liverpool Borough Prison in the Late Nineteenth Century', *Social History*, 44:2 (2019), 173-201:

<https://www.tandfonline.com/doi/full/10.1080/03071022.2019.1579977>

¹⁴ NAI, General Prison

Board/Correspondence/1888/Item no. 1365.

¹⁵ Editorial, 'Lunatics in Prisons', *British Medical Journal*, 2 (30 October 1880), 710-11, p.711.

Prison doctors were caught in a position of 'dual loyalty', supporting systems of discipline within prisons and regulating diet, labour and punishment, as well as dispensing medical care to prisoners and being charged with maintaining their physical and mental health.¹⁶ Reflecting this tension, prison medical officers continued to emphasise, despite the high numbers of mentally ill prisoners, that prisons and separate confinement in particular were not responsible for mental breakdown.

From the introduction of the system of separate confinement in the 1840s, they, alongside prison chaplains, were eager to emphasise that prisoners were already suffering mental illness before their committal to prison, or that their insanity was due to hereditary weakness or moral dissolution. In 1895 Dr John Baker, medical officer at Pentonville, reinforced this, stating 'The form of insanity in many cases is conclusive evidence that mental defect existed before reception in prison.'¹⁷

Taxonomies of mental illness in prison

Increasingly, given their growing experience in diagnosing and managing

mental illness, prison medical officers declared themselves experts in psychiatry in criminal justice settings. As part of this, they developed new taxonomies to describe mental disorder in prison, as they outlined the special challenges of their roles. Arthur Griffith, Deputy Governor at Millbank Prison, contended that prisoners were liable to special and exclusive phases of insanity which included 'strange delusions, religious mania, exaggerated destructive tendencies, curious attempts at suicide and persistent feigning ending in real insanity' and 'only the lynx-eyed prison medical officer, backed by long experience, sooner or later detects the flaw.'¹⁸



Particular terms were used in prison psychiatry that would rarely be encountered in psychiatric practice outside of the prison – irritable, sullen, passionate, reckless, obstinate, impatient and dull, that related

the prisoners' behaviour and character to their mental condition. The term 'breaking out' described women who were impulsive, mischievous, irritable of temper, restless and above all irrational; the term was rarely if ever used outside of prisons.¹⁹ Over time these labels became more sophisticated, though still

¹⁶ Catherine Cox and Hilary Marland, 'Broken Minds and Beaten Bodies: Cultures of Harm and the Management of Mental Illness in Mid- to Late Nineteenth-century English and Irish Prisons', *Social History of Medicine*, 31:4 (2018), 688-710: <https://academic.oup.com/shm/article/31/4/688/5039635>

¹⁷ John Baker, 'Insanity in English Local Prisons, 1894-95', *Journal of Mental Science*, 42 (1896), 294-302, p.295.

¹⁸ Arthur Griffiths, *Memorials of Millbank, and Chapters of Prison History* (London: Henry S. King, 1875), pp.177-8.

¹⁹ Rachel Bennett, "'Bad for the health of the body, worse for the health of the mind": Female Responses to Imprisonment in England 1853-1869', *Social History of Medicine* (2020) doi-org.ucl.idm.oclc.org/10.1093/shm/hkz066

they linked criminal behaviour and even particular crimes to mental diagnoses. John Baker, for example, related the violence of epileptic insanity to infanticide in female sufferers and homicide in men, and 'the proneness of general paralytics to acts of petty larceny'.²⁰ This new knowledge was drawn on and developed by individuals such as Dr David Nicolson, who worked as medical officer at a number of convict prisons before becoming superintendent of Broadmoor Hospital. He published extensively on the psychology of mental disorder among criminals, bolstering prison medical officers' claims to expertise. Tensions could also flare up between prison doctors and specialists in mental health outside of the prison, with general psychiatrists and superintendents of mental hospitals being critical of the standard of provision in prison and what they saw as the limited expertise of prison doctors in psychiatry.

Conclusion

The publication of the Gladstone Report of 1895 finally acknowledged that prisons and particularly separate confinement might have a detrimental effect on prisoners' mental health. Yet the dismantling of the system of separate confinement was slow and halting, surviving until the early twentieth century, driving 'the man more and more into himself... it leads to a brooding which poisons the whole life'.²¹ Even today, though reports into prison welfare repeatedly highlight its toxic effects on prisoners' minds, elements of separate confinement remain in the use of solitary confinement and segregation. People with mental health problems are

incarcerated in significant numbers, and unsettling parallels can be drawn between the impact of separation in the mid-nineteenth century and the widespread reporting of anxiety, depression, confusion, and self-harm among prisoners enduring solitary confinement today.²²

²⁰ Baker, 'Insanity in English Local Prisons, 1894-95', p.301.

²¹ Stephen Hobhouse and A. Fenner Brockway, *English Prisons Today* (London: Longmans, Green and Co., 1922), p.571.

²² Sharon Shalev and Kimmitt Edgar, *Deep Custody: Segregation Units and Close*

Supervision Centres in England and Wales (London: Prison Reform Trust, 2015); Agnieszka Martynowicz and Linda Moore, *Behind the Door: Solitary Confinement in the Irish Penal System* (Dublin: Irish Penal Reform Trust, 2018).

Engaging with publics and people in prison

Aside from articles and a forthcoming book, our research has also engaged with public audiences and with people in prison and those released from prison. Working closely with various artists, particularly theatre groups, using different media, and drawing on creative workshops, our historical research and involving people currently experiencing or with past experience of prison, we co-produced a range of outputs. These include award-winning theatrical performances, original pieces of theatre in prison settings, audio and visual installations, exhibitions, and learning resources. Each explored historical aspects of prison experiences such as prison diet, hard labour, medical treatment, isolation, addiction, and mental health in the past and in prisons today. For more details of all the projects and public engagement activities associated with the project, see <https://histprisonhealth.com>

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The historical interaction between criminal law and youth justice

Katrijn Veeckmans

Introduction

In Belgian law, youth justice and criminal law are recognised as two distinct legal areas: youth justice deals with young people under the age of 18 (at the time of the offence), and criminal law concerns adults. Even though these 'sister' branches of law sometimes overlap – for example when young defendants are transferred to adult court and sentenced according to adult criminal law – youth justice and criminal law are considered to have an autonomous position. They each use their own conceptual framework and act according to their specific philosophy. Whereas criminal law takes a rather repressive approach, in youth justice, however, it is more complicated. Until 2014, Belgian youth justice was based on a *protection* model, a model focused on re-educating the young person. The young person's personality along with an assessment of their surroundings were key considerations in the verdict. Young people could not be *punished* in the strict sense of the word; the aim of Belgian youth justice was to adapt to the young person and to find a *solution* in order to avoid future criminal behaviour. But from 2014 onwards, the three communities of Belgium – Belgium is a federal state – were granted competence for the judicial reaction on offenses committed by minors. The Flemish community (one of three communities which comprise the federal state- Flemish, French, and German- on which this article focuses) chose to evolve to a *responsibility* model, in which more sanction-related elements are hidden. The basic presumption is that the young person takes responsibility for their actions (depending on the degree of maturity) and



contributes to a solution *themselves* (for example through reconciliation). Because of this shift in approach, the gravity of the facts became a factor that the judge can to consider when

trying a young person. Similarly, the impact of the offence on the victim(s) became a major consideration. Consequently, the personality of the young person and their surroundings are no longer exclusively conclusive in deciding on the appropriate judicial response. Nowadays, the emphasis in youth justice is on the 'importance of a safe society'.

This shift to a more 'sanction-based' model of youth justice is the result of a long legislative but also social process. Although there are many advocates of this approach, Belgium's 'criminal law for minors' is also severely criticised. Some authors and politicians consider these new youth justice rules as a reduction in terms of children's rights. Regulations on children's rights (for example, the Convention on the Rights of the Child) indeed often adopt a negative attitude towards the application of regular criminal law to children, but is this assumption correct? To what extent should, or can criminal law have an influence on youth justice? and to what extent does it affect its principles in practice? After all, the link between youth justice and standard criminal law cannot be denied: both legal branches tend to react to criminal behaviour. The tension between on the one hand autonomy and on the other hand dependence is thus a constant in the relationship between youth justice and criminal law. The purpose of my research is therefore to

clarify the relationship between both areas from a Belgian, more specifically Flemish, perspective. This article considers whether justice is as 'sovereign' as it claims to be.

Historical overview

Since it is impossible to make an 'all-inclusive' comparison encompassing the entirety of criminal law and of youth justice, this research focuses on the influence of a limited number of subcomponents of criminal law on youth justice. In this respect, it is important to give a brief historical overview, in which I examine how youth justice emerged and in which I explain the fundamental role that the principles of criminal law played in its development. This is the focus of this article. This research uses Belgian law as a framework and does not speak to the experiences of other jurisdictions.

Throughout European history, *judicial* responses did not account for the age of the defendant. The reason for this was the *social* denial of 'childhood' as a distinct phase of life. However, the rise of the ideas of the Enlightenment changed this way of thinking. Philosophers such as Rousseau contributed to the social understanding and belief that children differ from adults, arguing that childhood and youth is a growth process. In Rousseau's view, children are innocent and naturally good, which contrasts with the way adults are 'constructed'. By the end of the Early Modern period, children had gained a special status in society. The emerging *social* dichotomy between adults and children generated a similar *legal* movement: the youthfulness of the defendant became an aspect which the judge had to consider. The creation of separate youth courts and separate regulations concerning young people was nevertheless a slow step-by-step process, which I term '*the struggle for independence of youth justice*'. What

follows next, is a summary of this '*historical struggle*'.

Before 1912

The history of Belgian youth justice can be divided in two by the 'ground-breaking' Child Protection Act of 1912. Before 1912, young people faced trial based on the process of the 'adult' criminal law (phase one). Due to the lack of awareness of children as a separate *social* category, Roman 'adult' law was fully applicable to children. There was only one exception: after the judge returned a verdict of guilty, he could reduce the sentence in proportion to their age. The older the they became, the more they were punished, but this was always less severe than the sentence for adults (the upper limit). However, for the judge to sentence the young person, they were required to ascertain the young person's capacity or competence to commit an offence. Children who lacked that capacity could not be punished. The same applied to very young children, who were always acquitted. The principle of proportionality towards children was apparent here.

Besides this (eventual) mitigation of the punishment, no amendments to regular criminal law were made. There were no child-appropriate procedural safeguards. Moreover, the favourable regime of 'softer' sentences was only applicable to children who had committed the most serious crimes. In short, only a primitive system for children existed, which was incorporated into 'adult' criminal law.

The French criminal code of 1791 (later replaced by the French criminal code of 1810 and the Belgian criminal code of 1867), went one step further than Roman

law (phase two).²³ During this time, several additional adjustments were made to criminal law following a developing social/cultural recognition of the differences between children and adults. Young people still received mitigated sentences. Nevertheless, sentences were no longer proportional to their age, but were instead based on the gravity of the offence. As a result, a young person was never subject to a criminal sentence; the most severe sentences were excluded due to this principle of proportionality. Consequently, children could no longer appear in a trial by jury, which was reserved only for the most serious offences in Belgian law but were tried by professional judges only (despite some exceptions). This kind of trial had the advantage in being faster, more private, and being less solemn in atmosphere, thereby reducing the humiliating nature of the process. The terms of sentences were also modified. For example, imprisonment was favoured as a sentence over forced labour. But the judge still had to rely on the existing sentences of adult criminal law. Life sentences for children were prohibited, and they were exempt from defamatory punishments. It is important to note, however, that these types of sentences were extant in adult criminal law; no new sentences were introduced, appropriate to the age of the defendant. These rules were applicable to children under the age of 16 who were considered to have full capacity to commit an offence. The practice of automatically acquitting very young children was abolished.

While the criminal code of 1791 only intended these rules for the most serious offences, the criminal code of 1810 made this beneficial regime towards children applicable to all types of offences, except

for the minor ones where the adult criminal law remained (phase three). This began to change from the end of the eighteenth century when sentences for minor offences committed by children and young people were abolished, in order to avoid the detrimental effects of imprisonment.

It is evident then, that, before 1912, gradual amendments were being made concerning the nature and weight of sentences imposed on children and young people despite a continue reliance on the existing provisions and sentences of adult criminal law. Youth justice as a separate legal branch did not exist. The few amendments that were made were largely aimed at reducing the humiliating character of sentences. It was thus only a limited 'material' disconnection from criminal law, in which proportionality played a key role. Over time, those deviations from criminal law were made applicable to (almost) all types of offences, but there was hardly any room for legal safeguards or other procedural adjustments. The struggle for independence had clearly begun.

After 1912

These criminal codes received a great deal of criticism as they were regarded as incomplete. Criticisms focused on the age of the young person, particularly the arbitrary setting of the age of criminal responsibility at 16 years. The lack of an age limit to punishment was conceived as a gap in the legislation. These criticisms further inspired the development of new legislation.

The demand for more comprehensive legislation was resolved in 1912 (phase four). From then on, the movement to acknowledge childhood gained momentum because, for the first time,

²³ The French criminal code was applicable to Belgian territory until 1867.

the Child Protection Act, regulated the entire process of youth justice. This act stipulated that its provisions were applicable to all kind of offences in the same way, regardless of the gravity of the case. Furthermore, all the offenders under the age of 16 years were subject to the new legislation. Judicial assessment of a young person's moral capacity was removed from the process.

Sentences were replaced by 'measures': minors could no longer be subject to prison sanctions, penalties or other sentences found in adult criminal law. Instead, the act created child-appropriate responses with an emphasis on education. The 1912 Act also legislated for the establishment of the Belgian 'youth court'. A child's appearance before a general criminal court was no longer permitted, and youth courts were run by a specialist body. Other judicial players involved, as for example the public prosecutor or lawyers, were also required to possess certain skills.

The Child Protection Act was characterised by a strong will to create an autonomous branch of youth law. In some respects, this was achieved. But, I believe this was only a partial detachment from criminal law, as there was a subsequent reversal of this position with criminal law becoming part of youth justice as rules on specific aspects of criminal law which were not initially implemented, were enforced as time went on (e.g. youth justice acts of 1965, 1994, 2006 etc.). This is the fifth phase. The gravity of the crime increasingly played a role. Procedural guarantees were reinforced, as for example the rights of defence or the mandatory assistance of a lawyer. Throughout this time there was increasing attention and significance placed on the impact on the victims of crime. The attention to the position of the victim increased. Moreover, several

'principles of administration of youth justice' were introduced, which were like those of criminal law. A new kind of measure, like community service for adults emerged. The transfer of children to criminal court was established as a correction mechanism in cases where children were accused of committed serious crimes. It was clear: youth justice drew inspiration from criminal law and in some respects relied on the principles of it.

Nature of youth justice in Belgium

This article illustrates that throughout history criminal law and youth justice have been intertwined. The two fields moved from separation, to working in conjunction. Despite this connection, youth justice has nevertheless maintained some degree of independence. The historical overview reveals four principles on which youth justice is and has been based, and which are rarely found in criminal law: (1) age sensitivity, (2), future-oriented approach (3) innocuous nature and (4) specialisation. These principles are explained briefly below:

(1) Age sensitivity: Youth justice is *age sensitive* in nature. This principle seems self-evident. Nevertheless, it is more complex than meets the eye. At a material level, this means reactions to an offence should be in proportion with the age and needs of the child. This was historically reflected in Roman law. Mandatory minimum sentences are therefore excluded. At a procedural level, age sensitivity manifests as an easily understood and accessible procedure, enabling the child to effectively participate in the trial. A certain degree of informality is required.

(2) Future-oriented approach: Youth justice always takes a *future-oriented approach*. This requirement relates to the

child's right to development. It reflects a belief that children and young people can be rehabilitated, educated and reintegrated in society. Supervision is a key element of this approach.

(3) Innocuous nature: Building on the first two principles the *innocuous nature* of youth justice ensures that multiple safeguards are implemented by the procedural requirement, ensuring that a child's age (a cognition and capability) will not have a detrimental impact in the trial. Strict privacy rules should be adhered to in order to mitigate problems such as shame and stigmatisation. Custodial sentences should be short in length and used sparingly.

(4) Specialisation: *Specialisation* plays a key role and focuses on the limits of the youth justice system's focus on children and young people based on age. History tells us that not all children and young people were afforded their appropriate legal rights, only those who were judged as not having a requisite moral capacity. All court personnel are required to have specific skills and expertise to work in youth justice.

Conclusion

This article illustrates the complex interplay between youth justice and adult criminal law in Belgium. The repression and severity associated with adult criminal law appears wholly unacceptable in considering children's rights. We should not be deceived by the negative undertone of criminal law, which is reminiscent of repression and severity and whose application to children seems totally unacceptable. Instead, we should accept the interconnectedness between both legal areas, without necessarily considering this as a problem in terms of children's rights.

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About the author

Katrijn is a PhD student at the Catholic University of Leuven, Belgium. Katrijn won two prizes for her master's thesis. She is now undertaking doctoral research concerning the application or impact of criminal law on the youth justice system under the supervision of Professor Johan Put (supervisor) and Professor Stefaan Pleysier (co-supervisor). She is particularly interested in the existence of youth justice at a 'system' level. As a PhD student in youth justice, Katrijn takes part in the interdisciplinary research field 'Youth Law and Criminology' of the Catholic University of Leuven.

The chocolatier and the dame: Barrow and Geraldine Cadbury's work in juvenile justice in Birmingham

Jess Kebbell

Background

Prior to the nineteenth century, the landscape of the criminal justice system was firmly rooted in retribution, with young people being punished in largely the same way as adults. However, in the nineteenth and twentieth centuries, juvenile justice went through a period of immense change. The focus shifted from retributive punishment to a rehabilitative approach directing children away from crime (Horn, 2010). Contemporaries believed that the increase in youth crime was caused by the breakdown of society and issues in domestic households (Shore, 2002). Responsibility for criminal behaviour was therefore moving away from the young people themselves, and was instead being attributed to parents, the education system and a lack of employment prospects (Shore, 2002). The consequence of this new understanding is that England saw a huge increase in new methods aimed at reforming children rather than retribution. Legal provisions came into force to facilitate this, specifically the Children's Act 1908, which allowed for volunteers to provide remand homes for juveniles, so long as they were fit for purpose, in order to prevent juveniles from being housed in adult prisons (The Children's Act, 1908). This is when Barrow and Geraldine Cadbury gained prominence.



Barrow and Geraldine met and were married in 1891 (Crosfield, 1985b). They were both brought up as Quakers- Barrow started at a Friends' School was he was nine and attended a private Quaker school from

fourteen to sixteen. Geraldine also attended Quaker school when she turned eighteen (Crosfield, 1985b). Not only were they given a Quaker education, but Barrow and Geraldine were also involved in local Friends' meetings suggesting that their Quaker beliefs were firmly held (Crosfield, 1985b). As a result of their firm beliefs, they carried on the Quaker tradition of reform that started with George Fox (founder of the Quakers). The couple dedicated their lives to penal reform work. Geraldine received a Damehood and Barrow was awarded the Freedom of Birmingham, yet they are both relatively unheard of in discussions and literature relating to juvenile justice. This may be because their work was largely centred in Birmingham, but Geraldine was also involved in Home Office Committees that might have resulted in greater recognition. Whilst she clearly was celebrated in her time, her name has largely disappeared, whilst Barrow is still visible through the eponymous charity.

The Cadbury family have a long history in Birmingham and were involved in a wide variety of philanthropic activities. The following examples illustrate the family's forward thinking and long-standing commitment to philanthropy and civic duty:

Richard Tapper Cadbury (1768-1860) was a Chairman of the Birmingham Anti-Slavery Society. He also took part in the World Anti-Slavery Convention in 1840 (Crosfield, 1985b).

John Cadbury (1801-1899), founder of the well-known Cadbury confectionary company, had an interest in animal welfare and founded the Animals Friend Society, precursor to the RSPCA (Crosfield, 1985a).

George Cadbury (1839-1922) built the model village of Bourneville to ameliorate worker's living conditions (Bailey and Bryson, 2007). The model village fostered a healthy and clean environment in the countryside by providing plenty of acres of outdoor areas for sport and leisure, indoor heating, and ready access to medical professionals (Crosfield, 1985b; Davies, 2015).

The Birmingham Children's Remand Home

A key aspect of Barrow and Geraldine's work was the funding of remand homes, an example of which is the Birmingham Children's Remand Home (1910-2001). On 9 November 1909 Barrow and Geraldine gave a speech after the passing of the 1908 Children's Act stating their intention to set up a remand home for juveniles. Just over a year later this became a reality when the Lord Mayor officially opened Birmingham Children's Remand Home (BCRH), funded by the Cadburys.²⁴ Children were

sent there from January 1911, and records such as the discharges and admissions registers provide information about these first children.²⁵ These records detail the physical characteristics of each child, family information, and the crime they had allegedly committed.²⁶ What the records show is that the majority of juveniles in the facility had been charged with non-violent, petty crimes such as wandering and larceny.²⁷

Barrow and Geraldine's vision was for a remand home run 'under supervision of a man and his wife', which could offer education, work, and exercise.²⁸ Thus, a warden and his wife were hired to run and live at the home full time, ensuring the children received the 'moral training' needed to keep them out of the criminal justice system in the future. This idea of moral and educational training was a prevalent idea at the time, particularly in the work of Mary Carpenter (renowned educational and social reformer with a particular interest in youth justice), who was a steadfast proponent of the idea that the social circumstances of children were to blame for their crimes they committed (Prochaska, 2004). She argued that the provision of education and skills facilitated a change in these circumstances (Horn, 2010). These reformers believed that a family environment was needed to steer them on the right path, and so having a married couple in charge was important.

Work opportunities were also seen as fundamental to the reform programme. Whilst the BCRH did not offer employment per se, there was still an

²⁴ 'Birmingham Children's Remand Home. Opening by the Lord Mayor', *The Birmingham Post*, 10 December 1910.

²⁵ The Library of Birmingham, BCC/10/BCH/12/2/1-2. Registers of admissions and discharges. 15 June 1911-17 October 1913.

²⁶ Ibid.

²⁷ Ibid.

²⁸ The Library of Birmingham, MS 466/1/16/28/1. Statement by Barrow and Geraldine Cadbury.

opportunity for the children to learn some basic carpentry skills. The opportunity to learn these basic skills improved their chances when they were released back into society. As well as providing opportunities for children to hone their working skills, education was also important. The records of educational provision at the BCRH have not survived, but in records of the Executive and House Committee of BCRH there are references to drafting an education programme.²⁹ It is likely that, given their socio-economic background, this would have been their first experience of any kind of schooling (Levin, 1940). Ensuring that the children experienced exercise and fresh air was another key component. At BCRH, a grass pitch was installed so that the children could play sports such as football and cricket.³⁰ This improved their health, physical fitness, and quality of life.

When looking at the broad BCRH programme, the goal of promoting better and happier life chances upon release is clear. Birmingham Children's Remand Home was set up to be a safe space for children who experienced hardship and involvement with the criminal justice system. The home remained open for a further ninety-two years until its closure in 2001, when it was renamed Athelstan House.

²⁹ The Library of Birmingham, BCC/10/BCH/12/1/1.

³⁰ The Library of Birmingham, BCC/10/BCH/12/1/1.

Public service

Barrow and Geraldine also dedicated their lives to civic duty, through their roles as magistrates, and through Geraldine's involvement in Home Office committees and report-writing. Barrow was first appointed as a magistrate in 1906, and he served in this role for over 30 years, his particular interest being in juvenile justice. Following the passing of the Sex Disqualification (Removal) Act of 1919, Geraldine was able to serve as a



Justice of the Peace (JP) as her husband and father had done.³¹ She served as a JP in the dedicated juvenile court, which opened in 1928 and was funded by Barrow and Geraldine

(Whitney, 1948). Prior to this official engagement, she attended court to observe, particularly cases that involved young girls. Here, she was able to gain the knowledge and experience that would serve her well in her work as a magistrate (Whitney, 1948).

Geraldine's work during those years was acknowledged by other JPs in Birmingham. One report of Birmingham Justices' Minutes from 1913 gives thanks to Geraldine for her valuable work with girls on probation.³² Probation was another key element of Geraldine's work in juvenile justice (Whitney, 1948). The Probation of First Offenders Act 1887, legislated for the possibility for juveniles

³¹ The Library of Birmingham, PS/B/4/1/1/3-5.

³² The Library of Birmingham, PS/B/4/1/1/3-5, Justices' Minutes, 1900-1952.

to be released on probation for a first offence (Cadbury, 1938). The 1907 Probation of Offenders Act made provisions for magistrates to release juveniles on probation, decided by a number of factors including 'character, antecedents, age, health, or mental condition', as well as any other circumstances the magistrates deemed relevant. After the introduction of this Act, the Birmingham magistrates first allocated probation officers to both the adult and juvenile courts, and then set up a probation committee to keep track of the use of probation in the courts. All of the magistrates would rotate on this committee, and produce an annual report detailing the number of children that had been released on probation, their offences, and any other relevant details.³³



³³ The Library of Birmingham, *PS/B/4/1/1/3-5*.

Departmental Committee on the Treatment of Young Offenders

In 1925 the Home Office Departmental Committee on the Treatment of Young Offenders was set up with the following aim:

[To] inquire into the treatment of young offenders and young people who, owing to bad associations or surroundings, require protection and training; and to report what changes, if any, are desirable in the present law or its administration.³⁴

The Committee was set up to update the seminal Children's Act of 1908 (Cadbury, 1938). Concurrently, Geraldine believed that the time had come for new knowledge, experience and understanding to be applied to the law in the area of juvenile justice (Cadbury, 1938). Geraldine was one of thirteen people (three of whom were women) who were invited to be on the Committee. This appointment testified to her knowledge and experience in the area, as well as to the wider recognition of her work leading to her inclusion on a Committee of this magnitude (Whitney, 1948). Whitney described it as 'one of the most important in the country...helping to shape the policy of legislation for children' (Whitney, 1948). The subsequent Children and Young Persons Act 1933 put many of the recommendations into force.

The Committee heard evidence from a total of 99 witnesses including magistrates, probation officers and those that worked in places such as borstals. It took two years to complete and the final

³⁴ Departmental Committee on the Treatment of Young Offenders, *Report* (London:HMSO, 1927), Cmd 2831, p. 4.

report was published in 1927 (Home Office, 1927). There were many recommendations made throughout the 141-page report, including raising the age of criminal responsibility from seven to eight. It further protected children by ensuring that no juvenile between the ages of seven and fourteen could be found guilty unless there was sufficient evidence to show they had the capacity to understand that what they were doing was wrong (Home Office, 1927). It is important to note here that Geraldine did not feel these changes went far enough; Whitney (1948) tells us that she campaigned for the age of responsibility to be raised to fifteen, but that she was outvoted on this.

Another recommendation of the Departmental Committee's report related to the selection of magistrates in the juvenile courts, and the Committee's belief that there was a lack of suitable, qualified justices presiding over the cases before them, in particular the lack of female magistrates. The earlier Sex Discrimination (Removal) Act (1919) changed the law regarding females in positions within the criminal justice system, and women such as Geraldine had gone on to take up official positions. However, it appears that there was still a lack of female representation in this area, highlighted by the Committee's recommendation regarding more female magistrates (Home Office, 1927). Magistrates needed to be representative of the population that came to court to ensure fairness across the system. A circular written by the Home Secretary was issued after the report's publication, reaffirming the need for more female magistrates (Cadbury, 1938). Another

issue highlighted was the extant magistrate's lack of knowledge and experience of children and juvenile courts. The circular was not referring to legal knowledge, but rather 'a love of young people, sympathy with their interests, and an imaginative insight into their difficulties'.³⁵ An understanding of the causes of youth crime was necessary to be able to make informed and positive decisions about a child's needs (Cadbury, 1938).

Conclusion

This article highlights only a fraction of Barrow and Geraldine's work in the field of juvenile justice and their many other philanthropic endeavours. By the time of the Cadburys deaths in 1941 (Geraldine) and 1958 (Barrow) respectively they had cemented themselves as experts in the area of juvenile justice. As well as remand homes they also founded open-air schools and hostels. Geraldine sat on seven Home Office Committees, demonstrating her range of expertise and the esteem she was held in (Whitney, 1948). The Right Hon. James Chuter summed it up best in 1947: 'Geraldine Cadbury did probably more for delinquent children than anybody in this country... She was ahead of her time, but her faith will be justified' (Whitney, 1948).

³⁵ Departmental Committee on the Treatment of Young Offenders, *Report*, p. 25.

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About the author

Jess Kebell is a PhD student at the University of Leicester, undertaking a collaborative ESRC Doctoral Studentship to produce the first [history of the Howard League for Penal Reform](#). An objective of her research is to enhance the Howard League's understanding of itself as an organisation. This will be achieved through research into the relationship between its campaign work, the larger economic and social context, and the trajectory of penal reform, at specific moments in the past. Jess is supervised by Professor Clare Anderson and Professor Steven King (the University of Leicester) and Anita Dockley (the Howard League for Penal Reform). Jess has a wider interest in the history of criminal justice reform and has previously completed her master's dissertation on Barrow and Geraldine Cadbury, on which this article draws.

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- What are the links between crime and problem gambling?
- What impact does this link have on communities and society?
- What should be done?

To support this work the Howard League will be commissioning research. It has been agreed that the first pieces of research will focus on:

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- The prevalence of problem gambling among those committing crimes
- The lived experience of people through life course analysis of people who have been sent to prison self-reporting as problem gamblers

The research commissions will be advertised separately. Please register your interest in receiving information about the commissions by emailing [Anita Dockley \(anita.dockley@howardleague.org\)](mailto:anita.dockley@howardleague.org).

For more information about the Commission on Crime and Problem Gambling see: <https://howardleague.org/commission-on-crime-and-problem-gambling/>.

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Nominations should be no more than 200 words long and emailed to Anita Dockley, the Howard League's research director at anita.dockley@howardleague.org. The nomination should also include the name, contact details (address and email) and the nominee's institution/bench. A selection panel will assess all nominations.

Nominations are assessed on a quarterly basis.

Guidelines for submissions

Style

Text should be readable and interesting. It should, as far as possible, be jargon-free, with minimal use of references. Of course, non-racist and non-sexist language is expected. References should be put at the end of the article. We reserve the right to edit where necessary.

Illustrations

We always welcome photographs, graphic or illustrations to accompany your article.

Authorship

Please append your name to the end of the article, together with your job description and any other relevant information (e.g. other voluntary roles, or publications etc).

Publication

Even where articles have been commissioned by the Howard League for Penal Reform, we cannot guarantee publication. An article may be held over until the next issue.

Format

Please send your submission by email to anita.dockley@howardleague.org.

Please note

Views expressed are those of the author and do not reflect Howard League for Penal Reform policy unless explicitly stated.