

Panopticism vis-à-vis criminal records: some socio-legal implications

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Introduction

In 1791 Jeremy Bentham designed a sort of building that was intended to control the lives and souls of the persons living there: the *panopticon*. This kind of “inspection house” was to be used as an efficient disciplinary system² for institutions such as prisons, asylums, schools, hospitals, and workhouses. The original design of the building was to achieve this goal: “[t]he panopticon was a circular construction of open single ‘cells’, built around a central inspection tower, by means of which both the inspector and the inmate were under constant surveillance.”³ Bentham’s *panopticon* influenced the construction of several penitentiaries in the XIX century.⁴ In addition, the concept of *panopticon* became a paradigm of “disciplinary societies” and was further theoretically explored by Michel Foucault.⁵

¹ I am very grateful to Stephanie Perrin for encouraging me to explore the links between “disciplinary societies” and “criminal records”, and the legal implications of the latter. I am very grateful as well to Jean François Cauchie and Eugene Oscapella for their valuable comments.

² Jeremy Bentham used the concept of “to inspect”, which Michel Foucault translated into French as “surveiller”. Michel Foucault, *Discipline and Punish. The birth of the prison*, 2d. ed., trans. by Alan Sheridan (New York: Vintage, 1995) at translator’s note.

³ Gordon Marshall, ed., *Oxford Dictionary of Sociology*, 2d. ed. (Oxford: Oxford University Press, 1998) at 476. See Foucault, *supra* note 2 at 200.

⁴ For instance, the Kingston Penitentiary (Ontario, Canada). See C.J. Taylor, “The Kingston, Ontario Penitentiary and Moral Architecture” in R.C. Maclead, ed. *Lawful Authority. Readings on the history of criminal justice in Canada* (Toronto: Capp Clark Parrier, 1988) at 223.

⁵ Foucault, *supra* note 2 at 195-228.

The purpose of this paper is to link the notions of “panopticon” and “disciplinary societies” to the notion of “criminal records”, and to explore the socio-legal implications of the latter in current Canadian society. In addition, this paper highlights the need to rethink the use of criminal records in an attempt to reduce the iatrogenic⁶ consequences attached to such a register. For this, the first part of this paper explores the notions of “disciplinary societies” and “panopticon” as used by Michel Foucault, and the links between such concepts and the concept of criminal records. The second part of this paper analyzes the socio-legal implications of criminal records and criminal registers in current Canadian society. Finally, this paper discusses some policy recommendations with regard to the use of criminal records and criminal registries.

Panopticon, disciplinary societies, and criminal records: *where is the link?*

In 1973, during a conference held in Rio de Janeiro (Brazil), Michel Foucault explored the origin and characteristics of disciplinary societies.⁷ He noted that, by the end of the XVIII century and the beginning of the XIX century, European and non-European countries faced two major phenomena: the reform and the reorganization of the judicial and criminal systems. The major principles that he identified as leading to this reform and reorganization of the judicial and criminal systems were:

⁶ David Hicks and Michael Petrunik have defined iatrogenesis, following S. Cohen, as “a term derived from the medical field [that] refers to a condition in which a given disease is caused by, or exacerbated by, the intervention which ostensibly tries to alleviate or remedy the problem.” In “The Best Intentions Are Not Enough: Drug Prohibition as a Failed Intervention Strategy” (1997) 40 *Canadian Review of Social Policy* 1 at 13. Accord Marshall, *supra* note 3 at 292.

⁷ Michel Foucault, *La verdad y las formas jurídicas*, trans. by Enrique Lynch (Barcelona: Gedisa, 1998) at 91-140. It is important to note that this conference is previous to his book “Discipline and Punishment” (*supra* note 2). The study of the movement from “disciplinary societies” to “control societies” is beyond of the scope of this essay. Accord Nikolas Rose, “Government and Control” (2000) 40 *Brit. J. Criminol.* at 325; and Michalis Lianos, “Social control after Foucault” (2003) 1:3 *Surveillance & Society* at 412. See also Thomas Mathiesen’s notions of “synoptical process” and “Synopticon” in “The viewer society. Michel Foucault’s ‘Panopticon’ revisited” (1997) 1:2 *Theoretical Criminology* at 215.

- 1) the development of a secular legal system: criminal offences would be characterized as infringements of the law of society, and not as infringements of a moral or religious system;⁸
- 2) the law of society was to prevent undesirable behaviours that may jeopardize the existence of society itself, not to enforce moral or religious values;
- 3) to achieve the former objectives, the law of society should be as clear as possible.⁹

Foucault noted that these principles led to the reformulation of the concept of “offender”; an “offender” would be the person who infringes the law of society.¹⁰ Therefore, “if crime is an offence against the law of society, and if the offender is an enemy of society, how should criminal law deal with the offender and how should it react to the crime?”¹¹ Foucault notes that this question led to the reformulation of the purposes of criminal law as well:

criminal law should be thought as a tool by which the damage caused to society by the offender can be repaired, and if this is not possible, it is necessary that criminal law prevents individuals from repeating these sorts of behaviours. The objective of criminal law is to repair the inflicted damage or to prevent new offences that may jeopardize society.¹²

Consequently, this notion of criminal law would justify four different sorts of criminal punishment:

⁸ It is possible to identify in this statement the origin of the principle of legality. The main purpose of this principle has been to reinforce the notion that no person is criminally responsible unless the conduct in question has been identified, at the time the conduct takes place, as a criminal offence within the law of society. See Joseph Raz, *The authority of the law: essays on law and morality* (Oxford: Clarendon Press, 1979) at 214.

⁹ This notion is very close to the procedural conception of the rule of law as later formulated by Raz. See Raz, *supra* note 8 at 210 – 229.

¹⁰ This notion of “offender” is also explored by Jean-Jacques Rousseau. See Jean-Jacques Rousseau, *Du contrat social* (Paris: Garnier-Flammarion, 1966).

¹¹ Foucault, *supra* note 7 at 93. [our translation].

¹² *Ibid* at 94. [our translation].

- 1) transportation: the physical exclusion of the offenders from society;
- 2) exclusion: the moral segregation of the offenders from society. The offenders would continue being within society physically, but they would be morally isolated from society;
- 3) hard labour: offenders would be required to economically repair the inflicted damage;
- 4) deterrence: offenders would suffer the same sort of harm that they have inflicted to society (Law of Talion).

However, none of these sorts of punishments would be used. Indeed, the prison would become the main source of punishment, even though this institution had never been theoretically analyzed. In addition, society would become more interested in controlling its citizens to prevent undesirable behaviors and reform identified abnormal behaviours.¹³ To achieve this goal, several other professionals would join the criminal justice system during the XVIII and XIX centuries, such as the police, psychiatrists, psychologists, criminologists, doctors, and educators. Foucault notes that it is within this movement that the *disciplinary society* emerged.

The notion of disciplinary society, as originally used by Foucault, was intended to distinguish the sort of society mentioned above from the XVI/XVII century society, the *punitive-society (la société punitive)*. The punitive-society was strictly focused on physical punishment and torture of the body¹⁴, while the disciplinary society would be mostly concerned about the notions of control and normality.¹⁵

Disciplinary societies will resort to different kind of knowledge to achieve the goals of control and normality, such as psychiatry, psychology, criminology, clinical medicine, education, and architecture. With regard to the latter, the panopticon emerged at the end of the XVIII century as an architecture of surveillance. As Foucault notes,

¹³ *Ibid* at 96-97.

¹⁴ See Mathiesen, *supra* 7 at 216-217.

¹⁵ *Ibid* at 98. Accord Foucault, *supra* note 2 at 225.

[t]he Panopticon is the utopia of a society and a sort of power that underlies current societies, utopia that finally came to existence. This sort of power can be called panopticism: we live in a society governed by panopticism. The panopticism is a sort of knowledge that does not rely on inquiry, but on inspection. The inquiry was a procedure by which someone would try to know what had happened. Its purpose was to update an event in the past through witnesses that, due to their wisdom or for having witnessed the event, would have been able to know what had happened. Something completely different will take place in the Panopticon: there would be no more inquiry, but surveillance, examination. We will not intend to reconstruct an event in the past, but to completely supervise things without interruption.¹⁶

The Panopticon would become the paradigm of disciplinary societies. Its main objective would be to supervise and control population in an attempt to distinguish normal behaviour from abnormal behaviour, and correct the latter.¹⁷ Even though the panopticon was designed as a disciplinary system for different types of institutions, it was to have its main role within the penitentiary system. XIX-century penitentiaries, both in Europe and North America, would be designed following this architecture of surveillance.¹⁸

Since the development of disciplinary societies, penitentiaries have been used as the main instrument to punish the individuals who have infringed the law of society. Penitentiaries would be seen as an instrument for controlling and reforming criminal population as well. However, how would it be possible to control the behaviour of this population once their sentences expire? Foucault notes that the development of the disciplinary institutions was only the most visible aspect of various and more profound processes, among them, the swarming of disciplinary mechanisms:

“[w]hile, on the one hand, the disciplinary establishment increase, their mechanisms have a certain tendency to become ‘de-institutionalized’, to emerge from the closed fortresses in which they once functioned and to circulate in a ‘free’ state; the massive, compact

¹⁶ *Foucault, supra* note 7 at 99-100. [our translation. The Spanish word “vigilar”, which in French is translated as “surveiller”, is translated for this quotation as “to supervise”. Neither the verb “vigilar” nor the verb “surveiller” has an adequate English equivalent.]

¹⁷ *Ibid* at 133. See also *Foucault, supra* note 2 at 200-204.

¹⁸ *Taylor, supra* note 4.

disciplines are broken down into flexible methods of control, which may be transferred and adapted.”¹⁹

One of the instruments for expanding (*de-institutionalizing*) the power of penitentiaries would be *criminal records*.²⁰ Criminal records would be registers in which offender population information are kept. These sorts of registers would not only keep information about offenders who were incarcerated, but also information about offenders sentenced to other sorts of penalties, such as fines. The main purpose of criminal records would be to identify offender population and to keep information about them in an attempt to control their behaviour. Criminal records would be used, as well, as an aggravating factor while sentencing for evaluating the degree of culpability of offenders if future offences were committed.

Criminal records were first designed as a way to control offender population and recidivism. Records were kept in a paper-file system that was shared within the criminal justice system of a country. However, is it still feasible to conceive this notion of a criminal record as a paper-file?²¹ There are two relevant characteristics of current societies that have an important influence on the notion and implications of criminal records:

¹⁹ Foucault, *supra* note 2 at 211.

²⁰ “‘Discipline’ may be identified neither with an institution nor with an apparatus; it is a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, targets; it is a ‘physics’ or an ‘anatomy’ of power, a technology.” Foucault, *supra* note 2 at 215.

²¹ This question was theoretically explored by Dominique Robert and Martin Dufresne, “Du casier judiciaire au stigmatisme juridique. État des connaissances sur la question” (paper presented to the *Forum national sur le casier judiciaire : les enjeux économiques, sociaux, juridiques et politiques*, Colline du Parlement, Ottawa, Novembre 2004 [unpublished]). See Martin Dufresne and Dominique Robert (avec la collaboration de Verónica Piñero), *Du casier judiciaire au stigmatisme juridique. État des connaissances sur la question. Rapport de recherche final* (Ottawa : Commission du Droit du Canada, 2004).

1) Information has become *digitized* and flows freely across national and international borders;²² and

2) Countries have increased international cooperation in the field of criminal justice system.²³

The next section explores some socio-legal implications of the regulation and use of criminal records in current Canadian society.

Socio-legal implications of a criminal record in current Canadian society

As noted in the previous section, two main characteristics of current societies have influenced the notion of criminal records: the increase of international cooperation in the field of criminal justice, and the fact that information is not only kept as a paper-file, but as digitized data. With regard to Canada, a third characteristic has a main influence on the notion of criminal records: neither the *Criminal Records Act*²⁴ nor any other Canadian piece of legislation defines what a criminal record is. This means that there is a *legal lacuna* concerning the concept of criminal record within Canadian legal system.

In 2001, Correctional Services Canada reported that 2.600.994 men aged 18 years old and older, and 681.199 women aged 18 years old and older, with a criminal record in Canada. If we take into consideration the population estimation provided by Statistics Canada in 1999, 20% of men aged 15 to 69 years old and 5% of women aged between 15 to 69

²² Zygmunt Bauman, *Le coût humain de la mondialisation*, trans. by Alexandre Abensour (Paris : Hachette, 2000) at 79-80.

²³ See *United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances*, 20 December 1988 (entered into force 11 November 1990, ratified by Canada 5 July 1990), and *United Nations Convention against transnational organized crime*, 15 November 2000, (entered into force 29 September 2003, ratified by Canada 13 May 2002). Some examples of international systems of computerized police cooperation are the Europol Information System, the Schengen Information System, and the European Information System.

²⁴ *Criminal Records Act*, R.S.C., c. C-47. [hereinafter *Criminal Records Act*].

years old have a criminal record.²⁵ The purpose of this section is to evaluate the impact of criminal records on three main areas: access to employment, access to insurance, and international travel. In addition, this section explores the Canadian sex offender information registers.

The negative impact of criminal records on access to employment has been extensively documented by scholarly literature.²⁶ These negative impacts range from legal prohibitions to work in some fields, to social discrimination by employers. With regard to the former, ex-offenders that have a criminal record are not allowed to work in a number of specific domains, such as some government positions, or to apply for specific work permits.²⁷ Concerning the latter, ex-offenders who are seeking employment are forced to not declare that they have a criminal record²⁸, to not apply for some positions, or to apply for certain employments for which they are overqualified.²⁹

²⁵ Pierre Landreville, *Les enjeux sociaux, économiques et juridiques* (Paper presented to the *Forum national sur le casier judiciaire : les enjeux économiques, sociaux, juridiques et politiques*, Colline du Parlement, Ottawa, Novembre 2004) [unpublished].

²⁶ R. P. Davis, "Employer stigmatization of ex-offenders and the pardon under the Criminal Records Act" (1980) 22:3 *Canadian Journal of Criminology* 343; N. Louks, O. Lyner, and T. Sullivan "The employment of people with criminal records in the European Union" (1998) 6 *European Journal on Criminal Policy and Research* 195; Del Roy Fletcher, "Ex-offenders, the labour market and the new public administration" (2001) 79:4 *Public Administration* 871; A. Grier and T. Thomas, "The employment of ex-offenders and the UK's new Criminal Record Bureau" (2001) 9 *European Journal on Criminal Policy and Research* 459; T. Thomas, "Preventing unsuitable people from working with children. The Criminal Justice and Court Services Bill" (2001) 10 *Child Abuse Review* 60; T. Thomas, "Employment screening and the Criminal Records Bureau" (2002) 31:1 *Police Studies* 55; and H. Lam and M. Hartcourt, "The use of criminal record in employment decisions: the rights of ex-offenders, the employers and the public" (2003) 47 *Journal Of Business Ethics* 237.

²⁷ Pierre Landreville, "Le casier judiciaire : un frein à la réinsertion sociale" *Porte Ouverte* 16 :2 (Automne 2004) 5.

²⁸ Comité aviseur pour la clientèle judiciairisée adulte d'Emploi-Québec, "La réinsertion en emploi avec un casier judiciaire, est-ce possible?" *Porte Ouverte* 16 :2 (Automne 2004) 7.

²⁹ Landreville, *supra* note 25.

The *Canadian Human Rights Act*³⁰ has attempted to address this problem. Section 3(1) notes that “[f]or all purposes of this Act, the prohibited grounds of discrimination are [...] conviction for which a pardon has been granted.” In addition, the *Canadian Human Rights Act* notes that:

It is a discriminatory practice, directly or indirectly,

- (a) to refuse to employ or continue to employ any individual, or
- (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.³¹

It is a discriminatory practice

- (a) to use or circulate any form of application for employment, or
- (b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.³²

It is a discriminatory practice for an employee organization on a prohibited ground of discrimination

- (a) to exclude an individual from full membership in the organization;
- (b) to expel or suspend a member of the organization; or
- (c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization pursuant to a collective agreement relate to the individual.³³

It is a discriminatory practice for an employer, employee organization or employer organization

- (a) to establish or pursue a policy or practice, or

³⁰ *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. [hereinafter *Canadian Human Rights Act*].

³¹ *Ibid* at s. 7.

³² *Ibid* at s. 8.

³³ *Ibid* at s. 9.

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.³⁴

Nevertheless, the *Canadian Human Rights Act* faces two main problems:

- 1) The protection is restricted to persons who have been granted a pardon, and it excludes ex-offenders who have not been granted a pardon.
- 2) It is very difficult to prove that a discriminatory practice has occurred towards an employee or a prospective employee on the grounds that the individual has a conviction for which a pardon has been granted³⁵ (unless this fact is expressly declared by the employer or the prospective employer).

With regard to the former, it is important to highlight that some Canadian provinces have expanded the grounds of discriminatory practices to include ex-offenders who have not been granted a pardon. This means that for some provinces, such as Quebec³⁶, British Columbia³⁷ and Ontario³⁸, it is a discriminatory practice as well to draw a distinction between employees or prospective employees who do not have a criminal record and

³⁴ *Ibid* at s. 10.

³⁵ *Comité avisé pour la clientèle judiciairisée adulte d'Emploi-Québec*, *supra* note 28 at 7.

³⁶ *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 at 18.2.

18.2. No one may dismiss, refuse to hire or otherwise penalize a person in his employment with the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence.

³⁷ *Human Rights Code*, R.S.B.C. 1996, c. 210 at 13.1.

13.1. A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment because of [...] that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

³⁸ *Human Rights Code*, R.S.O. 1990, c. H 19 at 5.1.

5.1. Every person has a right to equal treatment with respect to employment without discrimination because of [...] record of offences...

employees or perspectives employees that have a criminal record even though a pardon was not granted.

Pardon procedures are regulated by the *Criminal Records Act*³⁹ and the *Criminal Code*⁴⁰. A pardon allows people who were convicted of a criminal offence, but have completed their sentence and fulfilled the conditions established in the law, to have their criminal record kept separate and apart from other criminal records. However, the *Criminal Records Act* applies only to records kept within federal departments and agencies. Besides, the number of persons who have been granted a pardon is minor. The Solicitor General of Canada reported that from 1970 to 2003 only 291.392 pardons were granted.⁴¹

This situation draws attention to an important matter: what is the purpose of a criminal sanction? Section 718 of the *Canadian Criminal Code*⁴² notes that “[t]he fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: [...] (d) to assist in rehabilitating offenders.” Therefore, if we state that one of the purposes of a criminal sanction is the rehabilitation of offenders, and if the evaluation of a successful social reintegration of ex-offenders should take into consideration their employment status, we need to assure that ex-offenders have access to the labour market. Otherwise, the discourse of rehabilitation will contain a major contradiction.

Not only does a criminal record have consequences for ex-offenders seeking employment, but it also has consequences for ex-offenders purchasing insurance coverage or asking indemnification following a claim. Bernheim⁴³ explored several

³⁹ *Criminal Records Act*, *supra* note 24 at 3-5.

⁴⁰ *Criminal Code*, R.S.C. 1985, c. C-46 at 748 [*hereinafter Criminal Code*].

⁴¹ Canada, Solliciteur Général du Canada, *Aperçu statistique : Le système correctionnel et la mise en liberté sous conditions* (2003) at 98. Cited in *Landreville*, *supra* note 27 at 6.

⁴² *Criminal Code*, *supra* note 40.

⁴³ Jean-Claude Bernheim, *Le casier judiciaire et les assurances – État de la situation et position des assureurs* (Paper presented to the *Forum national sur le casier judiciaire : les enjeux économiques, sociaux,*

judicial cases in which Québec courts have confirmed that, in some situations, insurers can refuse insurance applications or insurance claims from ex-offenders who do not hold pardons issued by the National Parole Board. This sort of policy can be applied to ex-offenders' cohabitant partners or cohabitant parents as well. Insurance companies have adopted the principle that "living with a person that has a criminal record can be understood as having a criminal record."

Bernheim reported that the Québec Court, in a decision rendered by Godbout J. in 2001, has made a clear statement about this issue: "the right to have insurance is not a right by itself." Taking into consideration that current Canadian society is oriented towards a risk management model, and that 25 % of its population aged between 15 to 69 years old has a criminal record, the implications of such a decision are quite significant.

A criminal record, even if a pardon was granted, can also be an obstacle to international travel. As noted above, criminal information has become digitized and, consequently, can easily flow freely within society. In addition, international cooperation in the field of criminal justice has increased considerably. The implications of such developments are enormous. For instance, let's imagine a situation in which an individual is convicted of an offence in Canada. After the expiration of her sentence and the time period required by the *Criminal Records Act*, this person is granted a pardon. However, during the time in which this person was convicted and before the pardon was granted, her criminal record information was shared with other countries, for instance, Spain. In addition, since Spain is a member of the European Union, and a participant in the Schengen Information System, this information is in a data-base system accessible to all countries that are members to the European Union. Moreover, since each of these countries has its own national criminal jurisdiction, they are not required to recognize the legal effects of a pardon granted in Canada.

Consequently, this person may face two different problems. On one hand, Canadian provinces may not keep her criminal record separated from other criminal records (the

juridiques et politiques, Colline du Parlement, Ottawa, Novembre 2004) [unpublished]. See Jean-Claude Bernheim "Le droit à l'assurance existe-t-il?" *Porte Ouverte* 16 :2 (Automne 2004) 9.

Criminal Records Act only applies to records kept within federal departments and agencies). On the other hand, her criminal record information will have spread through all country members to the European Union (for instance, consider the situation in which this person decides to apply for a position to work in Germany, or asks for a visa for traveling to the Czech Republic). In conclusion, this person will end up with a pardon that only has a “rehabilitation” effect within Canadian federal institutions.

How do we deal with the problems mentioned above? One of the main dilemmas involved in the area of criminal records is the enduring conflict between values: the public concern about “security” and the right of offenders to privacy. How does society find a balance between both notions? A notable example of these compelling interests is the sex offender information registry.⁴⁴ These sorts of registries are established in the U.S.A., England, and Canada.⁴⁵ With regard to Canada, the *Sex Offender Information Registration Act*⁴⁶, not yet in force, regulates the registration of some sorts of sexual offenders. Even though this Act is concerned about the confidentiality of the information kept in the registry⁴⁷, it does not regulate the international exchange of information between law enforcement agencies (international cooperation related to criminal justice

⁴⁴ Nikolas Rose notes that one of the main characteristics of advanced liberal democracies is the concepts of risk thinking and risk management. These concepts are best captured by the dichotomy of inclusion and exclusion. With regard to exclusionary circuits and its population, he states that “a group of individuals emerge who appear intractably risky – ‘monstrous individuals’, who either cannot or do not wish to exercise the self-control upon conduct necessary in a culture of freedom. Sexual predators, pedophiles, the incorrigibly anti-social are representatives of a new ‘human kind’ [...] For such monstrous individuals a whole variety of paralegal forms of confinements are being devised [...] not so much in the name of law and order, but in the name of the community that they threaten, the name of the actual or potential victims they violate. It appears that the conventions of ‘rule of law’ must be waived for the protection of the community against a growing number of ‘predators’, who do not conform to either legalistic or psychiatric models of subjectivity.” *Rose, supra* note 7 at 333-334.

⁴⁵ Robin MacKay, *Bill C-23: Sex Offender Information Registration Act* (Ottawa: Library of Parliament, 2003).

⁴⁶ *Sex Offender Information Registration Act*, R.S.C. 2004, c. 10 [not in force yet] [hereinafter *Sex Offender Information Registration Act*].

⁴⁷ *Ibid, supra* note 46 at 8.1.b and 9.4.a.

issues). This means that if this information leaves Canada, it is regulated by the legislation of the country that acquired the information. For instance, if the U.S. requires information related to sexual offenders convicted in Canada, the provided information will be subjected to U.S. legislation. One of the characteristics of the U.S. sex offender information registries is that the information kept is completely available to general public.⁴⁸

Some Canadian provinces, such as Ontario, Manitoba, and Alberta, have enacted legislation that establishes registries of convicted sex offenders as well. Even though the public does not have access to these registries, all these registries regulate the possibility of publicly disclosing information about offenders considered to be a significant risk to the community. For instance, in the case of Manitoba, the strongest action that can be taken is full public notification, which is “a province-wide warning to all Manitobans, and includes a news release to major media outlets, which may include a photograph of the offender, a physical description, and the nature of his or her past offences.”⁴⁹ In the case of Alberta, the Alberta Solicitor General’s website allows the general population to access to information and photographs of individuals who are considered high-risk

⁴⁸ See U.S., Federal Bureau of Investigation, *State Sex Offender Registry Web Site*, on line: Federal Bureau of Investigation <www.fbi.gov/hq/cid/cac/states.htm>. Another interesting case-study with regard to international exchange of criminal information between law enforcement agencies is Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defense Act*, 1st Sess., 38th Parl., 2004 (referred to Committee on November 2, 2004). As MacKay notes, “[t]his bill adds offences, including repealed sexual offences, to the list of designated offences in the Criminal Code [for which a court *shall* or *may* make an order for the taking of samples from a person for DNA analysis], provides for the making of DNA data bank orders against a person who has committed a designated offence but who was not found not criminally responsible by reason of mental disorder, provides for the review of defective DNA data bank orders and for the destruction of the bodily substances taken under them, compels offenders to appear at a certain time and place to provide a DNA sample, and allows for a DNA data bank order to be made after sentence has been imposed.” Robin MacKay, *Bill C-13: An Act to amend the Criminal Code, the DNA Identification Act, and the National Defense Act*” (Ottawa: Library of Parliament, 2004) at 1.

⁴⁹ MacKay, *supra* note 45 at 10.

offenders.⁵⁰ This program extends beyond convicted sex offenders: it includes violent non-sexual offenders as well.

Conclusion - Policy recommendations

The purpose of this paper was to explore the theoretical links between the notions of “panopticon”, “disciplinary societies”, and “criminal records”. In addition, this paper was concerned about analyzing the socio-legal implications of criminal records and registries in current Canadian society. The main conclusion of this research is that a criminal record has relevant negative impacts on an individual’s life. In addition, due to the increase of international cooperation in the field of criminal justice and the fact that information is kept as digitized data, these negative impacts seem to increase. As D’Aoust asked, is it still possible to protect privacy in current societies which are characterized by a multiplication of data bases?⁵¹ Privacy protection is not an easy task, and it is a much more complicated task in the area of criminal law. One of the main dilemmas is the conflict between “community safety” and “the right to privacy of ex-offenders”.

This paper identified some possible measures to reduce the negative impacts of criminal records. First of all, it is important to rethink the use of criminal records. Which sorts of offences require information to be kept? Is it necessary to keep information about persons who were convicted for criminal offences such as crimes against property or drug-related offences? Second, it is important to inform ex-offenders about the socio-legal implications of pardons, and to encourage them to apply for pardons. In addition, it is necessary that governmental officials rethink the criteria for granting pardons, in an attempt to increase the possibility of criminal rehabilitation. Third, the insufficiencies of the *Canadian Human Rights Act* need to be addressed and to expand its protection

⁵⁰ Canada, Alberta Solicitor General, *High-risk offenders*, online: Alberta Solicitor General <http://www.solgen.gov.ab.ca/hro/hro_listing.aspx>.

⁵¹ Raymond D’Aoust, *Les incidences des banques de données* (Paper presented to the *Forum national sur le casier judiciaire : les enjeux économiques, sociaux, juridiques et politiques*, Colline du Parlement, Ottawa, Novembre 2004) [unpublished].

mechanisms to individuals who have been convicted for a crime and were not granted a pardon. Finally, with regard to criminal registries available to general public, it is important to assess their efficiency as crime reduction tools. The purpose of such an assessment is to evaluate whether these registries justify the infringement to privacy that they represent.

Ex-offenders have already “paid” their debt to society. There is a need to reduce the undesirable consequences of a criminal record on an offender’s life. Otherwise, ex-offender will never be allowed to reintegrate into society.