

**The surveillance of 'risky subjects': adiaphorisation through criminal records, and contested narratives of stigma**

GRACE, Jamie <<http://orcid.org/0000-0002-8862-0014>>

Available from Sheffield Hallam University Research Archive (SHURA) at:

<http://shura.shu.ac.uk/9312/>

---

This document is the author deposited version. You are advised to consult the publisher's version if you wish to cite from it.

**Published version**

GRACE, Jamie (2014). The surveillance of 'risky subjects': adiaphorisation through criminal records, and contested narratives of stigma. *Birkbeck Law Review*, 2 (2), 279-292.

---

**Copyright and re-use policy**

See <http://shura.shu.ac.uk/information.html>

# The Surveillance of ‘Risky Subjects’: Adiaphorisation through Criminal Records, and Contested Narratives of Stigma

JAMIE GRACE\*

The article examines the way that the construction, retention and sharing of ‘criminality information’ in a multi-agency, public protection ‘routine’ places the ‘risky’ in society under surveillance, but also examines the way that evolving human rights doctrines have started to enhance the procedural rights of ‘subjects’ to take part in this narrative of public protection, through their own enhanced procedural rights in contesting the validity and necessity of this stigmatising disclosure to myriad criminal justice, health and social care agencies, as well as (potentially) to members of the public deemed ‘at risk’. These enhanced procedural rights can be and should be seen as a kind of ‘inverse surveillance’ conducted by the ‘risky’.

## Introduction

It can be acknowledged that human rights, as enshrined as they are in the mechanism of the Human Rights Act 1998, have failed to thoroughly protect citizens in the UK from inappropriate state surveillance, such as the most intrusive kinds of undercover or covert policing tactics, and where those particular tactics are supposedly legitimate and authorised under the auspices of the Regulation of Investigatory Powers Act 2000 and by in some contexts by the police themselves.<sup>1</sup>

---

\* Senior Lecturer in Law, Sheffield Hallam University (email: j.grace@shu.ac.uk).

<sup>1</sup> Kingsley Hyland and Clive Walker, ‘Undercover Policing and Underwhelming Laws’ [2014] Crim LR 555.

The flourishing and complicity of state surveillance practices accords with the idea of an ‘amalgam of violence/law’ as put forward by Costas Douzinas<sup>2</sup>—now we can also talk confidently of ‘an amalgam of intrusion/law’<sup>3</sup>—as there is surveillance made overt by the state and our law,<sup>4</sup> and surveillance covert to the law itself.<sup>5</sup>

However, even in a most politically dominated field of surveillance and intrusion (specifically the monitoring and ‘risk-management’ of ‘subject’ ‘risky’ offenders through information sharing, in a public

---

<sup>2</sup> Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish 2007).

<sup>3</sup> Jamie Grace, ‘Privacy as Personal Resistance: Exploring Legal Narratology and the Need for a Legal Architecture for Personal Privacy Rights’ (2011) 4(1) *The Crit* 32.

<sup>4</sup> See Jamie Grace, ‘Privacy, Stigma and Public Protection: A Socio-Legal Analysis of Criminality Information Practices in the UK’ (2013) 41 *International Journal of Law, Crime and Justice* 303; Hyland and Walker (n 1). Also, note the way that the law regulating state surveillance shifts and responds to challenges to its hegemony, e.g. the way that the decision of the European Court of Justice in Case C-293/12 *Digital Rights Ireland* to declare the Data Retention Directive in breach of the principle of proportionality, given information privacy rights under the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, has resulted in the UK government using emergency Parliamentary procedures to rush the Data Retention and Investigatory Powers Act 2014 onto the statute book in order to (controversially) ‘replicate’ the powers under the Data Retention Directive, lest some ill-defined terror manifest itself. For this reason, the new Act may be subject to a challenge in judicial review brought by some of the very Members of the Parliament that created it: Alan Travis, ‘Drip Surveillance Law Faces Legal Challenge by MPs’ *The Guardian* (London, 22 July 2014) <[www.theguardian.com/world/2014/jul/22/drip-surveillance-law-legal-challenge-civil-liberties-campaigners](http://www.theguardian.com/world/2014/jul/22/drip-surveillance-law-legal-challenge-civil-liberties-campaigners)> accessed 14 November 2014. This legislative example is a classic instance of the recursivity of surveillance and security. For a discussion of the relationship between values of surveillance, security and liberty, see generally, Conor Gearty, *Liberty and Security* (Polity Press 2013).

<sup>5</sup> Much of the recent legal debate over the ‘Snowden revelations’ for example turns on a given interpretation of the statutory language of the Regulation of Investigatory Powers Act 2000 and in turn the Human Rights Act 1998, or an interpretation of the Article 8 jurisprudence of the Strasbourg court, in relation to ‘known unknowns’ of surveillance technologies (we know we don’t know exactly what surveillance neo-liberal governments place on our communications and movements) and thus the pragmatics of the technological realities and actualities of communications interceptions as broadly sketched out by the Regulation of Investigatory Powers Act 2000 and now also the Data Retention and Investigatory Powers Act 2014. See generally Jemima Stratford and Tim Johnston, ‘The Snowden “Revelations”: is GCHQ Breaking the Law?’ [2014] *EHRLR* 129.

protection ‘routine’ of ‘adiaphorisation’,<sup>6</sup> as Bauman and Donskis have described it),<sup>7</sup> the procedural (human) rights of the ‘risky’ can be observed as a counter-narrative to the hegemony of public protection.<sup>8</sup>

The UK Supreme Court has recently<sup>9</sup> had to consider how, given Article 8 of the European Convention on Human Rights, the sharing of criminal records, cautions and other ‘police intelligence’ in the ‘routine’ of public protection should be calibrated in a proportionate manner, since there are considerable tensions between the currency, relevancy, and the provenance of that ‘criminality information’ in the light of a risk that it may articulate.<sup>10</sup> In *T and another*, the Supreme Court determined that the provisions of the Police Act 1997 which allowed for the creation of Enhanced Criminal Record Certificates (ECRCs) for employment vetting purposes, as they operated prior to reforms in 2013, were incompatible with the right to respect for private and family life under Article 8(1) of the European Convention on Human Rights, since they could in some circumstances tolerate the unlawfully disproportionate inclusion of irrelevant information of poorer provenance, if read literally, given the purpose of providing a Certificate in the employment context concerned (working with young or ‘vulnerable’ people, including children). The Supreme Court did note that the litigation over the statutory processes of compiling an ECRC might continue (which I would argue is a legalistic form of ‘inverse surveillance’), as challenges to the reforms in mid-2013 could be expected.<sup>11</sup>

This Supreme Court decision has been the pinnacle of a period of development in the relevant common law stretching over ten years,

---

<sup>6</sup> Grace, ‘Privacy, Stigma and Public Protection’ (n 4) 318.

<sup>7</sup> Zygmunt Bauman and Leonidas Donskis, *Moral Blindness: The Loss of Sensitivity in Liquid Modernity* (Polity Press 2013).

<sup>8</sup> Grace, ‘Privacy, Stigma and Public Protection’ (n 4).

<sup>9</sup> *R (T and another) v Home Secretary and another* [2014] UKSC 35, [2014] 3 WLR 96.

<sup>10</sup> Jamie Grace, ‘Old Convictions Never Die, They Just Fade Away: The Permanency of Convictions and Cautions for Criminal Offences in the UK’ [2014] J Crim L 121.

<sup>11</sup> *R (T and another)* (n 9) [53].

and a considerable judicial movement toward respect for the claims brought by the risky in the light of their procedural (and human) rights.<sup>12</sup> This judicial respect for a counter-narrative to the hegemony of ‘the politics of public protection’ can be described as augmenting the inverse surveillance practiced by those who enter into litigation to challenge their adiaphorisation through the sharing of their criminality information in that public protection routine. Establishing the extent of this ‘inverse surveillance’ as conducted by the risky in the face of ‘public protection routines’ involving the disclosure and inter-agency sharing of their ‘criminality information’ is the chief original contribution of this piece to the broader literature on ‘inverse surveillance’.<sup>13</sup>

### Surveillance in the Form of a Public Protection Routine

Lord Reed has recently observed in *R (T and another) v Home Secretary and another*:

The United Kingdom has never had a secret police or internal intelligence agency comparable to those that have existed in some other European countries, the East German Stasi being a well-known example. There has however been growing concern in recent times about surveillance and the collection and use of personal data by the state. Some might argue that the grounds for such concern are illustrated ... by the information that about four million criminal record certificates are provided annually under Part V of the [Police Act 1997]. But such concern on this side of the Channel might be said to have arisen later, and to be less acutely felt, than in many other European countries, where for reasons of history there has been a more vigilant attitude towards [regulating] state surveillance. That concern and vigilance are reflected in the jurisprudence of the European Court of Human Rights

---

<sup>12</sup> Jamie Grace, “‘Too Well-Travelled’, Not Well-Formed? The Reform of “Criminality Information Sharing” in England and Wales’ (2013) 86 Pol J 29.

<sup>13</sup> Grace, ‘Privacy, Stigma and Public Protection’ (n 4).

in relation to the collection, storage and use by the state of personal data. The protection offered by the common law in this area has, by comparison, been of a limited nature.<sup>14</sup>

The common law powers of public bodies engaged in what we might call ‘public protection surveillance routines’ see a myriad of government agencies share information between themselves and with the public to further their own politics of public protection, and purportedly to reduce the risk of harm to members of the public, through monitoring and ‘safeguarding’ processes facilitated by the sharing of this ‘public protection risk information’, or what we could call ‘criminality information sharing’.

For the police alone this involves utilising a complex landscape of both statutory ‘gateways’ empowering information gathering,<sup>15</sup> ‘disclosure’ or sharing as well as common law powers, in a multitude of settings, including the creation of Enhanced Criminal Record Certificates through the Disclosure and Barring Service processes; providing data for ‘barring lists’ with regard to many public protection-sensitive employment roles; the operation of the (statutory) Child Sex Offender Disclosure Scheme; the operation of the parallel but common-law-derived Domestic Violence Disclosure Scheme;<sup>16</sup> the distribution and maintenance of the ‘Sex Offenders Register’; and the operation of local ‘Multi-Agency Public Protection Arrangements’ (MAPPAs) along with individual-offender-level ‘Multi-Agency Risk Assessment Conferences’ (MARACs) through to local force-by-force ‘naming and shaming’ schemes relating to convicted offenders, and even the comparative banality of local

---

<sup>14</sup> *R (T and another)* (n 9) [88].

<sup>15</sup> See the relevant discussion of the proliferation of such information-sharing ‘gateways’ on the statute book, across a multitude of different governance contexts, in: Law Commission, *Data Sharing Between Public Bodies: A Scoping Report* (Law Comm No 351, 2014) <[http://lawcommission.justice.gov.uk/docs/lc351\\_data-sharing.pdf](http://lawcommission.justice.gov.uk/docs/lc351_data-sharing.pdf)> accessed 14 November 2014.

<sup>16</sup> Jamie Grace, ‘Dodgy DVDS: Some Problems with the National Roll-Out of the Domestic Violence Disclosure Scheme’ (2014) 97 *Criminal Justice Matters* 18.

‘Pubwatch’ schemes operated in conjunction with Local Authorities.<sup>17</sup>

These public protection routines’ are underpinned and facilitated by surveillance technologies, including but not only the Police National Database, the Violent and Sexual Offenders Register (known as ‘ViSOR’), the (central) National Offender Management Information System (NOMIS or C-NOMIS), the Electronic Offender Assessment System (E-OASys), the much-critiqued National DNA Database (NDNAD), local police databases on interactions with offenders, victims and witnesses to crimes, as well as the particular databases held and operated by specialist units of the Metropolitan Police and so forth, such as the National Domestic Extremism and Disorder Intelligence Unit database of overt and covert surveillance records.

There can also be seen a supra- and inter-national or European context to the above ‘public protection information sharing routines’, in relation to the role of Interpol and the sharing of DNA profiles under the Prüm Treaty Articles and Decisions, the roles of Europol and Eurojust, Mutual Legal Assistance protocols and the European Investigation Order, as well as the European Arrest Warrant scheme, and the European Criminal Record Information System (E-CRIS) database, for example.

The next part of this piece will briefly consider the way that individuals have used the courts to challenge the operation of the landscape of ‘public protection information sharing’, as a (potentially effective) form of legalistic ‘inverse surveillance’.

## **Inverse Surveillance Conducted by the ‘Risky’: Challenging the Sharing of ‘Criminality Information’**

Challenges to the sharing of ‘criminality information’ for public protection purposes, mounted by ‘risky’ individuals in the courts

---

<sup>17</sup> These ‘criminality information sharing’ landscapes are also inclusive of the areas of health, social care and the regulation of issues including ‘anti-social behaviour’. See Jamie Grace, ‘A Broad Discretion to Share Patient Information for Public Protection Purposes: Statutory Powers of the NHS Commissioning Board’ (2013) 1 *Journal of Medical Law and Ethics* 77.

through the means of judicial review, will normally turn on the key considerations of whether the actual or proposed sharing of that information is *necessary, legitimate and proportionate* under Article 8 of the European Convention on Human Rights, which affords all individuals a *qualified* right to respect for their private and family life.<sup>18</sup>

The cumulative effect of the courts considering the last decade or more of ‘inverse surveillance’, of sorts, in the form of stigmatised individuals making these kinds of challenges has seen the judiciary, it is arguable, producing a multi-stranded test for correct *proportionality* in these kinds of criminality information sharing cases in judicial review—often involving a critique by the courts of whether an individual has been sought out for an opportunity to make representations on the sharing of information that has them as its ‘subject’, or whether they have been notified of the sharing of their stigmatising information as part of a public protection routine.<sup>19</sup>

Jamie Grace has argued that regard for ‘provenance’ or ‘certainty’ in relation to the potential sharing of a piece of public protection information is crucial, as is proper regard for both relevance and the passage of time where appropriate, in the context of a correct *proportionality* test to be applied in an instance of criminality information sharing, and that as such the relevant configuration of the proportionality test should be constructed in the following way:

In order that an item of criminality information is shared for the purposes of public protection [in a way that is lawful] it is suggested that the following question should be answered in the affirmative: Objectively speaking, is the information indicative of the (alleged) commission of a *sufficiently serious* offence which it is *reasonably certain* was committed by the individual concerned, that is *currently relevant* to the purpose for requiring [a disclosure for] the purpose of public protection, and which the individual [subject] concerned has had an opportunity

---

<sup>18</sup> Grace, “‘Too Well-Travelled’” (n 12).

<sup>19</sup> Grace, ‘Privacy, Stigma and Public Protection’ (n 4).



to comment meaningfully upon ([particularly] where the information is of an allegation, caution, arrest, charge, or prosecution not resulting in a conviction [rather than a conviction itself])?<sup>20</sup>

Lord Reed, in *R (T and another)*, has noted that the European Court of Human Rights determined that the sharing of ‘police intelligence’ and criminality information for public protection purposes engages Article 8 rights of (alleged) offenders, and can be unlawful, if little enough attention is paid to the factors of the passage of time, relevance in a particular context, and contextual notions of procedural fairness. Lord Reed has observed that:

In the light of the [ECtHR] judgment in *MM v United Kingdom* [2012], it is plain that the disclosure of the data relating to the respondents’ cautions [in the *T* case itself] is an interference with the right protected by article 8(1) ... That [ECtHR] judgment establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference ‘in accordance with the law’. That is so, as the court explained in *MM*, because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the [then] absence of any mechanism for independent review of a decision to disclose data under section 113A [Police Act 1997].<sup>21</sup>

To put this commentary into the context of the ‘risky’ and their procedural rights under the law, it is clear that the senior UK judiciary are forming the view over time that the surveillance of stigmatised individuals in terms of ‘criminality information sharing’ amidst a broader ‘public protection routine’ must be carefully constructed. By this it is meant a ‘careful construction’ in terms of a granularity balanced between factors of not just ‘risk’ and ‘likelihood of harm’ in the light of the ‘public interest’, or what is

---

<sup>20</sup> Grace, ‘Old Convictions Never Die’ (n 10) (emphasis added).

<sup>21</sup> *R (T and another)* (n 9) [119].

sometimes termed the requirement of a ‘pressing need for disclosure’, but also issues of *relevance*, *provenance* and *temporality* (i.e. the passage of time) as they inform a consideration of what is proportionate information-sharing as a form of surveillance in any particular instance of the ‘public protection routine’.

### **Entering the Narrative: Discussing the Procedural Rights of the ‘Risky’**

Societally, we must come to terms with the difficulty of tremendous potential fallibility in our midst. But it is human nature to marginalise those who we find reprehensible to such extent that they are categorised as irredeemable, or forever tainted in history. This process of moral marginalisation, or full ‘adiaphorisation’, is by definition, and logically, irreversible, or impossible to reverse. If we put a man outside the scope of our own morality, making him a monster, we cannot retrieve his reputation.

Bauman and Donskis have explored the manner in which individuals attracting the most grave stigma in society can, as a result of our ‘liquid fear’ and post-modern anxiety, become ‘adiaphorised’: made amoral, dehumanised, and devalued.<sup>22</sup> There are a raft of models for this process of dealing psychosocially with the stigmatised: the Other, the Stranger, the Monster,<sup>23</sup> or those covered in ‘dark glory’,<sup>24</sup> and the ‘risky’.<sup>25</sup>

However, as demonstrated by narratives concerning the pardoning under the Armed Forces Act 2006 of those executed for cowardice in the 1914-1918 conflict,<sup>26</sup> for example, and the eventual pardoning<sup>27</sup>

---

<sup>22</sup> Bauman and Donskis (n 7).

<sup>23</sup> Andrew Sharpe, ‘Structured Like a Monster: Understanding Human Difference Through a Legal Category’ (2007) 18 *Law Critique* 207.

<sup>24</sup> Sergio Tonkonoff, ‘The Dark Glory of Criminals: Notes on the Iconic Imagination of the Multitudes’ (2013) 24 *Law Critique* 153.

<sup>25</sup> Grace, ‘Privacy, Stigma and Public Protection’ (n 4).

<sup>26</sup> Richard Norton-Taylor, ‘Pardons for Executed Soldiers becomes Law’ *The Guardian* (London, 9 November 2006)

of great mathematician and ‘more deserving’ homosexual Alan Turing because of the reflected shame on society given what has been seen as a sorry tale featuring mid-twentieth century–homophobia–driven suicide,<sup>28</sup> there are ways, albeit very rare, of heroically rehabilitating the formerly reviled.

How this narrative structuring of rehabilitation (and in saving a person or people from the brink of adiaphorisation) can be applied to the function of public protection culture involving the risk management of the living, in the employment or domestic settings of the Enhanced Criminal Record Certificate<sup>29</sup> and the Domestic Violence Disclosure Scheme,<sup>30</sup> respectively, remains a difficult exercise, however. These operations of public protection surveillance through criminality information sharing depend upon the notion that malevolence is impossible to forget.<sup>31</sup>

If, as this author would argue, the processes and anxieties of stigmatisation in public protection contexts are forming a dominant narrative, this might not be the most efficacious or sustainable approach to thinking about the ‘risky’, since as Jane Fenton has noted:

Decisions about risk cannot always be predicted accurately and the ‘actuarial fallacy’ and related thinking lead to completely unreasonable expectations that social workers can always get it right if they just do their jobs correctly. So, risk has become dominant, essentially linked as it is to public protection, the neoliberal society we live in and the current ‘blame culture’. It is not a surprise that workers

---

<[www.theguardian.com/uk/2006/nov/09/military.immigrationpolicy](http://www.theguardian.com/uk/2006/nov/09/military.immigrationpolicy)> accessed 14 November 2014.

<sup>27</sup> BBC, ‘Royal Pardon for Codebreaker Alan Turing’ (BBC, 24 December 2013) <[www.bbc.co.uk/news/technology-25495315](http://www.bbc.co.uk/news/technology-25495315)> accessed 14 November 2014.

<sup>28</sup> Ally Fogg, ‘Alan Turing’s Pardon is Wrong’ *The Guardian* (London, 24 December 2014) <[www.theguardian.com/commentisfree/2013/dec/24/alan-turing-pardon-wrong-gay-men](http://www.theguardian.com/commentisfree/2013/dec/24/alan-turing-pardon-wrong-gay-men)> accessed 14 November 2014.

<sup>29</sup> Part V of the Police Act 1997 and in that context, Grace, “‘Too Well-Travelled” (n 12).

<sup>30</sup> Grace, ‘Dodgy DVDS’ (n 16).

<sup>31</sup> Grace, ‘Old Convictions Never Die’ (n 10).

worry about this. It seems that the task of creating a culture where workers can adopt autonomous and responsive approaches (essential for desistance work) and, thus, live with healthy ontological anxiety (as opposed to crippling, overwhelming anxiety) will depend on the ethical climate of the agency (support or blame) and the acceptance of the inevitability of reoffending.<sup>32</sup>

The exercise of actively relaxing and counteracting processes of stigmatisation of the (formerly) ‘risky’ is however dominated currently by the politics of public protection, despite (sometimes successful) legal challenges forming occasional and notable ‘peaks’ of ‘inverse surveillance.’<sup>33</sup>

## Suggestions and Conclusions

‘Poem’ (1995), by former probation officer Simon Armitage,<sup>34</sup> encapsulates the quandary we have as a society in determining who is deserving of stigma for the course of their behaviour, or their narrative, in life. If a man of some virtues, who ‘*praised his wife for every meal she made./ And once, for laughing, punched her in the face*’, is duly punished under the law, or is acquitted following due process, moves on and makes new intimate relationships, to what extent can we, in a culture of risk-management and public protection concerns, meaningfully ‘forget’ what he has (perhaps only allegedly) done? As Armitage observes in the last stanza of ‘Poem’, an overview

---

<sup>32</sup> Jane Fenton, ‘Risk Aversion and Anxiety in Scottish Criminal Justice Social Work: Can Desistance and Human Rights Agendas Have an Impact?’ (2013) 52(1) *The Howard Journal of Criminal Justice* 77.

<sup>33</sup> For Mike Nash, this is partly explained by processes of the public protection ‘reassurance con’. See Mike Nash, ‘A Reassurance Con? UK Public Protection for Modern Times’ (Inaugural Professorial Lecture at the Institute of Criminal Justice Studies, 25 April 2012) <[www.port.ac.uk/media/contacts-and-departments/icjs/nash-inaugural-lecture.pdf](http://www.port.ac.uk/media/contacts-and-departments/icjs/nash-inaugural-lecture.pdf)> accessed 14 November 2014. See also, Mike Nash, ‘Cut Price Public Protection?’ (2012) 51(3) *The Howard Journal of Criminal Justice* 261; and Mike Nash and Andrew Williams (eds) *Handbook of Public Protection* (Willan 2010).

<sup>34</sup> Simon Armitage, ‘Poem’ in Simon Armitage, *Zoom!* (Bloodaxe Books 1995).

of a 'life history' that includes incidents of domestic abuse and other criminality will of course be part of a lifelong patchwork of human behaviour: '*Here's how they rated him when they looked back: sometimes he did this, sometimes he did that*'.<sup>35</sup>

It is difficult to say which voice speaks with the greatest authority in the narrative tale of the 'adiaphorisation' of both the risky and the vulnerable—that of political actors with much to lose, the victims of tragedy, cruelty or injustice (whether vulnerable, risky, both or neither); or even (an)Other legal culture—in the form of the growing hegemony of the Europeanising, neo-liberal doctrines of human rights, which has ideological qualities of both security and liberty to make up interwoven strands of a new justice based on risk(s).

Jamie Grace has recently concluded, in commenting on 'inverse-surveillance' cases in the public protection arena, where the courts protect anonymity due to fears of the potential suicide by the 'risky' or their suffering vigilante attacks, such as in *ZY, Paul Higgins v Northern Ireland Courts and Tribunals Service*,<sup>36</sup> that

the positive obligation to prevent risks to life [for example shows] that the framework of human rights law in the UK [means] that however stigmatised we allow a 'risky' individual to become in their community, we cannot, and do not, allow them to become fully 'adiaphorised', that is, set outside of all legal norms and human rights values as an operation of our own anxiety over the public protection risks that they may pose or do pose ...<sup>37</sup>

However, it is proposed that if the postmodern critique of human rights in neoliberal state settings, and the 'amalgam of violence/law', or of *subjective* violence/law,<sup>38</sup> is applied to the notion of positive obligations to preserve life and dignity in the face of extreme stigmatisation for some individuals in society, then we can observe that the realities of our notions of (in)dignity and rehabilitation from that stigma are extremely vulnerable, rooted as they are in ideologies

---

<sup>35</sup> *ibid.*

<sup>36</sup> [2013] NIQB 8.

<sup>37</sup> Grace, 'Privacy, Stigma and Public Protection' (n 4) 318.

<sup>38</sup> Douzinas (n 2).

of control, security, power and, thus, sovereignty. We should not be distracted from the predomination of the power of state surveillance by the media furore and what has been perceived as a threat to press freedom occasioned by the decision of the European Court of Justice in *Google Spain*<sup>39</sup> to recognise the ‘right to be forgotten’ (in some online contexts only of course), with the notion that search engine websites must now remove links to stigmatising newspaper articles and other content on the web. This ‘right to be forgotten’ is an extremely limited and novel one, in practice, and the ramifications of it are still unclear, and do not impact at all on issues involving the stigmatising process of the ‘public protection routine’ of ‘criminality information sharing’.

There are hints of this in the construction of the notion of the (statutory) pardon—forgiven, as the cliché sometimes goes—but not forgotten. The idea of a pardon for Alan Turing is a contemporary example of this difficulty of forgetting, even in the attempt to somehow make amends for the heteronormativity of historical offences of ‘gross indecency between men’—a sop to our sensibilities over the criminalisation of one of the fathers of the information age, and a ‘war hero’. Furthermore, the difficulty and unease we may encounter in ourselves, in terms of approaching the notion of a pardon for a dead man, is seen in statutory pardons for servicemen executed for disciplinary offences (such as cowardice, casting away arms, disobedience and desertion in the face of psychological horror) in 1914–18, as found in the Armed Forces Act 2006: and their statutory recognition thereby as ‘victims of the First World War’.<sup>40</sup> But a pardon is not the expunging of any record, it is historical obfuscation, of the worst (since it is the most meaningless) sort. These statutory or other pardons do not ‘affect any conviction or sentence’ from the past.<sup>41</sup> We are meant to, and can only, infer that: ‘These men were meant to feel shame, and stigma, and even to die in this manner, in the time in which they lived. They are victims in the moment and in the cause of their passing. This is irrevocable.’

---

<sup>39</sup> Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD)* (OJ C 212/4, 13 May 2014).

<sup>40</sup> Section 359 of the Armed Forces Act 2006.

<sup>41</sup> Section 359(4) of the Armed Forces Act 2006.

On a last and different point, the politics of public protection are such that the moral ‘marginalisation’, the ‘Othering’, or the ‘adiaphorisation’ of the ‘risky’ is completely accepted, and expected. This process has become normalised and has occurred to such an extent that occasional breaks in this public protection narrative are jarring and disconcerting, I propose. But we should not feel surprised that individuals might want desperately to become less stigmatised, or return from the state of *adiaphoria*—it is the very nature of stigma that we try to ‘cover’ it, or ‘pass’ on it, in order that we might prevent or preclude the ‘bridging’ of our (non)stigmatised lives with the more shameful histories of our personae.<sup>42</sup>

This ‘jarring’, disconcerting effect created by the ‘inverse surveillance’ conducted by individuals who (sometimes successfully) challenge, through claims in judicial review for example, the sharing of the public protection risk information which stigmatises them as ‘risky subjects’ is a vital sign, and symptom, of the critical limitations of the law—which can never fully allow for true ‘forgetting’ of the ‘risky’ or the more wholly ‘monstrous’—as well as a symptom of the ever-hungry, hegemonous politics of public protection.

---

<sup>42</sup> Erving Goffman, *The Presentation of Self in Everyday Life* (Doubleday 1959) and Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1968).