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**John Connors - Criminal Conviction Set Aside On Judicial Review**

1. This judgment is delivered in respect of an application to quash a sentence of imprisonment imposed by the Circuit Court. The principal issue for determination in these judicial review proceedings is whether the Circuit Court judge's refusal to allow counsel an opportunity to take instructions from the accused person resulted in an unfair hearing.

2. These judicial review proceedings concern the circumstances in which a three-year sentence of imprisonment was imposed upon the applicant. For ease of exposition, the applicant will be referred to in this judgment as "the defendant", i.e. to reflect his status as the responding party in the criminal proceedings, rather than as applicant in these judicial review proceedings. This is because much of the discussion which follows refers to events in the criminal proceedings.

3. The defendant had entered a guilty plea before Carlow Circuit Criminal Court on 20 May 2021. More specifically, the defendant had pleaded guilty to an offence of burglary contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The offence had been committed in November 2014. A sum of €5,000 had been stolen during the course of the burglary.

4. The sentencing hearing took place on 21 July 2021. As of that date, the defendant was in custody for other offences and had to be conveyed to the courthouse by the prison service for the purpose of attending the sentencing hearing. For reasons which have not been fully explained, there had been a delay in the defendant being brought to the courtroom. As a result, the counsel and solicitor who had been appointed to represent the defendant did not have time to consult with him prior to the judge sitting. It has been explained that the counsel who had been briefed to represent the defendant had only recently come into the case and had not previously met with the defendant.

5. Accordingly, at the call-over of the list, counsel for the defendant sought a short adjournment to allow for a consultation with the defendant. This was refused.

**Conclusion and Proposed Form of Order**

38. A person, who is at risk of having a term of imprisonment imposed upon them, is entitled to a constitutionally fair hearing at first instance. This entitlement includes, inter alia, the right to effective legal representation. The refusal to afford an accused person a reasonable opportunity to consult with their legal representatives prior to a hearing, whether a full trial or a sentencing hearing, has the potential to undermine this right.

39. For the reasons explained at paragraphs 25 to 30 above, the refusal of the application for a short adjournment, to be measured in minutes, was in breach of fair procedures. The applicant/defendant was thus denied a constitutionally fair hearing at first instance. An appeal to the Court of Appeal does not provide a full remedy to this breach for the reasons explained in *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15). Rather, this is one of those truly exceptional cases where the appropriate remedy is by way of judicial review.

40. There was some debate at the hearing before me as to whether it is permissible to sever the sentence from the conviction. Counsel for the Director of Public Prosecutions submitted that this cannot be done in respect of an order of the Circuit Court. Counsel cited, in particular, *State (de Burca) v. O hUadhaigh* [1976] I.R. 85 (at 92). In reply, counsel for the

applicant/defendant submitted that his client did not seek to resile from his earlier plea of guilty and the matter might be remitted on that basis.

41. Subject to hearing further from counsel on this point, my provisional view is that the justice of the case can be met by setting aside the conviction and sentence; and remitting the criminal prosecution to the Circuit Court on the basis of a guilty plea. Put otherwise, the clock would be turned back to the point in the process at which the applicant/defendant had come before the Circuit Court for sentencing. The judge dealing with the matter can then enter a fresh conviction.

Result: Criminal conviction set aside on judicial review

**Young Offenders: Ethnic Groups - Transition to the Adult Prison Estate**

*Stephen Morgan:* To ask whether his Department has put support mechanisms in place to help support young people from ethnic minorities to transition to the adult prison estate.

*Damian Hinds:* The Transition of Young People from the Children and Young People Secure Estate to Adult Custody Policy Framework was published in April 2022. The Framework provides that individual circumstances and needs, including protected characteristics such as ethnicity, will be taken into account when young people in custody transition into the adult prison estate.

**Over-Representation of Young People From Gypsy, Roma and Traveller Communities**

*Stephen Morgan:* To ask the Secretary of State for Justice, if he will make an assessment of the implications for his policies of the report by the Traveller Movement entitled *Disrupting the School to Prison Pipeline*, published on 2 August 2022; and if he will take steps to implement the recommendations of that report.

*Damian Hinds:* The Ministry of Justice acknowledges the over-representation in the youth justice system of young people from the Gypsy, Roma and Traveller Communities and is working closely with the Youth Justice Board and other government partners to address this. This government is supporting those at risk of offending at the earliest opportunity by working with families and in schools to prevent the escalation of offending behaviour and further interaction with the justice system.

Current guidance for youth offending teams sets out expectations for ensuring that pre-sentence reports are sufficiently detailed to give sentencers a full picture of the child's background, including for Gypsy, Roma and Traveller children. We are giving frontline youth justice services the tools and data to understand the needs of ethnic minority children and are working to make sure alternatives to custody are used to divert children from all backgrounds away from the youth justice estate, where this is

**Mark Alexander 'A Phenomenology of Freedom: Finding Transcendence in Captivity'**

*A Starting Point for Debate:* Amidst the earliest traumas of my incarceration were moments of profound and surprising stillness. These flashes of beauty and hope illuminated the darkness of an otherwise unbearable void in space and time. Like an exile sequestered on some barren, walled island – removed from the comforts, distractions, and excesses of modernity – I found myself noticing the previously imperceptible mundanities of everyday life. Priorities started to realign, worldviews to shift, and suddenly I understood the meaning and value of that which I had always taken for granted: my freedom. But how to quantify this transformation theoretically, and was it typical or atypical of people in analogous circumstances?

Foucault conceived of knowledge not so much as the product of reason, but as the progressive inculcation of dominant modes of thought to the exclusion of those ideas in conflict with

mainstream discourse (Foucault, 2003). If discourse is power, then a criminology that lacks direct input from prisoners disempowers the very people it makes the subject of its study. ‘Convict criminology’ emerged in the 1990s in response to this concern by providing a counter-hegemonic academic platform for prisoner voices (Ross et al. 2014). In a veritable Pinocchio moment, the objectified subject became real. When I was introduced to this field I was intrigued by the notion that prisoners somehow had a ‘privileged’ insight into penological thought by virtue of their own experiences at the hand of the criminal justice system. Intuitively, I felt that there must be some kernel of truth to that claim, and so in the paper that follows, I intend to explore the matter so as to identify principles of general application.

As I intend to demonstrate, convict criminology is epistemologically distinct by virtue of its members’ dialectic experience. In many ways, the movement represents a prototypical form of ethnography in so much as it involves “sustained immersion in the culture or context to be studied” (Pakes, 2015: 17). I remember finding the transition from the relatively serene campus of a law school to the intimidating environment of a prison very disorienting indeed. Yet, “the fresh perspective offered by seeing one’s legal system with the eyes of an outsider” (Zedner, 1995: 18) was a revelation. This is often trumpeted as the advantage of an anthropological approach to comparative research, but analogies can be made within one’s own borders too. “Immersion in one’s own legal system tends, inevitably, to solidify assumptions and blunt critical faculties. Laws appear ‘natural’, modes of implementation ‘inevitable’, and relationships between criminal justice agencies ‘necessary’” (Zedner, 1995: 17). When seen from the inside looking out, however, everything I had once thought settled was forcibly shaken by the reality of my predicament and the lamentable instances of injustice that surrounded me. This demonstrates one of the principal advantages of incorporating insider perspectives into the discipline (Ross et al. 2015: 76).

Nevertheless, some consternation has been caused by those who have sought to claim “that people acquire uniquely inspired thinking through being in prison, and that the longer they are inside and the more brutal the conditions, the deeper their insight. Some [have] even ventured to imply that unless a person had been incarcerated... his [or] her writing on the subject was suspect or reduced in value” (Newbold and Ross, 2012: 4). For there to be any truth to these claims, it will be necessary to show that the experience of imprisonment is itself transformative, such that those who are subjected to it undergo a substantive ontological change that imbues their thinking with a ‘privileged insight’ unobtainable by any other means. This test will form the first horn of my argument.

The second horn of the issue relates to accusations of essentialism. “One of the great weaknesses of this ‘privileged knowledge’ approach is that it is based on the false assumption that all prisoners experience incarceration [in] the same way” (Newbold and Ross, 2012: 6). Clearly there are innumerable empirical permutations between jurisdictions and – over time – within individual institutions: be they in terms of living conditions, regime, political climate, or durations of captivity (Ashworth and Player, 1998: 254). This is before one even considers the unique idiosyncrasies and circumstances of each prisoner. Putting essentialist contentions to bed will require demonstrating that, in spite of all these complexities of subjective experience, it is still possible to distil certain universal principles of confinement (Aresti and Darke, 2016: 11). A distinction must be made however, between objective experience and subjective interpretation. That all prisoners share a common experience does not amount to saying that they will interpret those experiences in the same way, just as witnesses of the same car crash will invariably offer different accounts.

Before setting the first horn of our debate within a suitable framework, it is worth noting that prisoners are not the only people to experience forms of imprisonment in their lives. Hostages, victims of human trafficking and modern-day slavery, hospital patients, and the infirm all

suffer a degree of confinement and loss of freedom that makes their experiences phenomenologically equivalent to that of prisoners – at least up to a point. In proposing an ontological theory, it is important therefore to include their perspectives so as to avoid setting prisoners apart as some sort of distinct and enlightened group. Accordingly, I intend to present an all-embracing conception of ‘captivity’ with appropriate exceptions, rather than limiting myself to imprisonment within carceral institutions. I have avoided use of the term ‘carcerality’ as this is traditionally associated with coercive forms of confinement, and thus sits at odds with the nature of convalescence, monasticism, or survival as a castaway. An alternative formulation might be to extend the definition of carcerality to encompass such scenarios, but for the avoidance of doubt, all subsequent references to ‘captivity’ encapsulate these diverse conceptions.

*Part A* “The outer and inner journeys have at last met” – Waite, (1994: 255) Hegel’s ‘Master-Slave’ dichotomy For Hegel, to truly know ourselves is to be both conscious of our freedom and at one with it. Doing so requires experiencing “what Spirit is – this absolute substance which is the unity of the different independent self-consciousnesses which, in their opposition, enjoy perfect freedom and independence: ‘I’ that is ‘We’, and ‘We’ that is ‘I.’” (Hegel, 1977: §177). Hegel’s dialectical conception of freedom presents a striking framework within which to examine the process by which those in captivity might obtain certain existential insights.

In most cases we can define concepts, indeed our existence, through direct insight. ‘Light’ makes sense to us only in relation to ‘darkness’, ‘happiness’ through ‘sadness’, and so on. Not being born into bondage however, our apprehension of freedom lacks the same meaningful context. It is only at the moment at which freedom is lost that our conception of it can be most fully developed.

Hegel conceives of history as the very process by which the Idea of freedom is inexorably unfolded. The ‘End of History’ or “final cause of the World” is thus defined as the moment when freedom is fully actualised on earth. This is no easy task. Freedom is something which must “be first sought out and won” (Hegel, 1822: 26), with each shameful stage in our history – from the slave markets of Rome to the Gulags of the Soviet Union – forming an absolutely essential step in that process (Hegel, 1822: 16). We are not there yet. Mere knowledge of freedom Hegel tells us, is not enough – it must be put into universal practice. Indeed, one might look upon prisons themselves as yet another necessary evil – as yet to be transcended – in our march towards global freedom. ‘Phenomenology’ then, describes the process whereby we develop self-consciousness and knowledge in the course of our lived experience, with each painful moment in our lives being integral to the whole, precisely because it shapes who we are in the present (Hegel, 1977: §173). Most specifically – in Hegel’s terminology – Phenomenology is the path by which we obtain an enlightened understanding of the Spirit, or in other words, freedom itself. To explain this, Hegel adopts a scientific approach, harnessing the power of dialectic thought. The traditional positing of antithetical elements in an equation that is resolved only by synthesising those elements is here applied to cognition. To be conscious of self, is to be a dialectic being – aware “of the formal unity and law-governed regularity of... experience” (Rohlf, 2010). Hegel demonstrates this by imagining the first earthly encounter between two human beings, not in a theological Eden, but in a theoretical ‘state of nature’ devoid of all society and law. Since this is an entirely allegorical scenario, it can in fact be applied to almost any encounter, and is particularly well-suited to analysing power relations where there is an implied hierarchy between the parties involved.

Our consciousness of self and identity in the world is dependent partly upon conceiving of ourselves as distinct from other objects, and partly upon manifesting our will upon those objects (Hegel, 1952: §44). Objects provide us with tangible proof of our existence because we are able to exter-

nalise and project ourselves in the world through them. When we see another person we see more than just an object. We see ourselves mirrored in that person (Hegel, 1977: §179). The realisation that that person is not merely a reflection of ourselves, but a separate being moving with equal purpose through space and time is the point at which we become aware of what we are. We are made complete only through interaction with others (Hegel, 1977: §184). In our nascent state however, things are rather more complex. “The ‘first’ man who meets another man for the first time already attributes an... absolute value to himself” based on his newfound ability to shape the world around him. He “must therefore impose the idea that he has of himself on beings other than himself” to justify his own sense of supremacy (Kojève, 1938: 11). With each individual asserting their own domain of rights, the two become locked in a Hobbesian power struggle. Each seeks to expand the horizons of their own freedom by subjugating the other (Hegel, 1977: §187).

In this fight for recognition, the victor emerges as Master, the loser as Slave (Kojève, 1938: 7). In his subordination, “the Slave... recognises the value and reality of ‘autonomy’, of human freedom. However, he does not find it realised in himself, he finds it only in the Other” (Kojève, 1938: 21). Herein lies the potential for transformation. The Master, in objectifying and demeaning the Slave, is no longer able to see him or herself projected through another being and once again returns to living within a world of objects. Ironically, the Master’s own life is impoverished because he has negated the possibility of any dialectical synthesis that might have been gained through the mutual recognition of two self-consciousnesses. The Slave, by contrast, can potentially still achieve synthesis by transcending his or her dependant state of consciousness and becoming independent (Hegel, 1977: §189 – 193). “Possessing the idea of Freedom and not being free, he is led to transform the given (social) conditions of his existence – that is, to realise a historical progress... This progress has a meaning for him which it does not and cannot have for the Master” (Kojève, 1938: 50).

*The Captor-Captive Dichotomy:* We can start applying this model to what I call the ‘captor-captive’ dichotomy. The analogous plight of the hostage and victim of human trafficking or modern-day slavery is self-evident. For the prisoner, however, we might characterise the fight for recognition, or what Hegel calls the ‘life and death struggle’ (Hegel, 1977: §187), as the trial process itself. The state, in pursuing a conviction, seeks to neutralise the defendant – whose sphere of freedom it alleges to have conflicted with both that of society at large and its own supremacy as lawmaker. The act of trial symbolically reasserts the authority of those supreme moral and legal norms challenged by the defendant’s alleged act (Durkheim, 1973: 167). Subsequently, on conviction, punishment is then meted out by the state to visibly force the defendant into an act of submission. Cast out from society, and no longer party to the social contract, the prisoner experiences a form of civil death (Sykes, 1958: 63). The prison environment resembles a pre-social state of nature in which our subject is forced to revert to the primal position of the first man. Subjugated by the state, the prison becomes for him a site of contested boundaries and potential transformation. In the case of the hospital patient or the infirm, the fight takes on a very different character. They face a battle against illness or disease, and so it is their own body, not the will of another being, that becomes the instrument of their confinement. Their dialectical act of synthesis involves transcending their various afflictions. For all of our subjects then, we can argue that their state of captivity is not only demeaning but regressive.

While Hegel’s Slave is forced to work for the Master, creative expression in the course of his enslavement becomes a means of transcendence, because it enables the Slave to reaffirm his or her own identity in the external world. He rediscovers freedom in a new form, the freedom of thought and expression (Hegel, 1977: §196). From here, he might envisage creative uses of the practical

freedom he once had, but is currently denied. “The man who... must work – must repress the instinct that drives him to ‘consume’ immediately the ‘raw’ object... he educates himself, he ‘cultivates’ and ‘sublimates’ his instincts by repressing them” (Kojève, 1938: 23). The Master by comparison is consumed by material interests and so loses sight of his self (Kojève, 1938: 69).

For our prisoner in the captor-captive model, the equivalent to work is time (Kojève, 1938: 53). Time “has been abstracted by the courts like a monetary fine and in its place they have been given prison time. This is no longer a resource but a controller. It has to be served rather than used” (Cohen and Taylor, 1972: 9). Such an “irreplaceable loss of time” brings home the reality of the prisoner’s mortality (Ashworth and Player, 1998: 260). If the prisoner – driven by this fear – can bring himself to eschew impulsive hedonism and the converse evils of stoicism and nihilism, he or she might invest that time more wisely (Hegel, 1977: §195). “The Slave, who – through fear of death – grasps the (human) Nothingness that is at the foundation of his (natural) Being, understands himself, understands Man, better than the Master does” (Kojève, 1938: 48).

Few of us in today’s politically emancipated world, at least in the West, have to fight for our social status or freedom – it is arbitrarily inherited. What is crucial to the captive’s transcendence is the combination of fear and subjugation, because this is what is said to enable them to overcome the “petty finite interests” of their former lives (Hegel, 1977: p522). It is only antagonistic relations that are transformative.

This theoretical framework provides convict criminology with an ontological basis for the ‘privileged insight’ of its members, who can legitimately claim to have attained a higher state of consciousness through the dialectical overcoming of their captive selves and an enhanced apperception of freedom. There are no doubt other paths to – and forms of – ‘transcendence’ in the colloquial sense, but Hegel’s definition is very particular. He equates transcendence with an enlightened understanding of freedom. As such, captivity is the only means by which we can reach this transcendent state. Like the trials of Tamino in Mozart’s ‘Die Zauberflöte’, the passage through ordeal is the essential component in that process. In the communion of antithetical experiences – of being free, and of being subjugated – the captive undergoes a fundamental transformation that is integral to their sense of identity. It is a truly formative experience. “Only the Slave can transcend the given World... that forms him and fixes him in slavery and create a World that he has formed in which he will be free” (Kojève, 1938: 29).

It might be contended that a major shortcoming in my captor-captive model is that many prisoners simply don’t experience the kind of transcendence Hegel speaks of. Indeed, if they did, we might expect far lower rates of recidivism. Yet Hegel never claims that every Slave in history in fact attained “the final perfection” (Kojève, 1938: 23). Empirical analysis lies beyond the scope of this paper. What matters is that each and every human being has what Husserl would call a ‘real possibility’ or practical ability of finding transcendence in captivity. That possibility may well remain unactualised, but the point is that it “could be actualised by someone properly taking into account a multitude of individual epistemic perspectives, by means of intersubjective experience” (Bayer, 2016: 7). We may not be able to verify whether an academic claiming some ‘privileged insight’ from time spent in captivity has in fact achieved such transcendence, but I should think we ought to give them the benefit of the doubt. The aim of this paper is not to legitimise any individual claim, but to prove that the claims themselves as a species of proposition are not devoid of notional truth. One tantalising question remains. Might it be possible to induce or facilitate transcendence in prisoners – perhaps through guided reflection – and, if so, would this reduce the likelihood of their reoffending?

*Part B:* Let us now turn to the separate notion of ‘insider perspective’. Having a perspective on something does not necessarily entail having an insight into that thing – it is simply a point of view. What convict criminology claims is that those who have spent time in prison obtain a unique perspective by virtue of their peculiar vantage point. Just as a bungee jumper sees the ground hurtling towards him, while his onlookers see him hurtling towards the ground, position is everything in criminology. In this section I intend to demonstrate how all those who experience captivity in one form or another are subjected to certain essential abasements, privations, and effects that characterise their perspective as a captive. These are what I collectively call the ‘pains of captivity’. I will be grouping these objective pains in to a series of measurable ‘dimensions of captivity’ which form each captive’s subjective ‘web of experience’.

*Identity: A Feminist Comparison:* The problem of essentialism that any notion of ‘shared experience’ must address is not a new one. Feminist debate has agonised over the issue for some time, and much can be learnt from these exchanges. I am tempted to say that we are not looking to define a universal captive, like MacKinnon’s universal woman (Samuels, 2013: 133), but instead a universal predicament. The nuance however, is subtle. Indeed, Aresti and Darke (2016: 10) contend that “it would be difficult to argue that... the ‘prisoner’ identity is as equally as complex and consuming... as one’s gender identity”. Yet the pains common to an experience of captivity act upon the self in such a fundamental way that they must become deeply imbricated with our sense of identity (Sykes, 1958). This is the clear implication of the dialectical process outlined in the first horn of our argument, even if transcendence is not reached – because identity is shaped by experience.

Experience defines the beliefs which ground our attitude to life. Husserl describes this as our ‘life-world’ (Bayer, 2016). Whilst womanhood is both a state of being and a process of becoming that lasts an entire lifetime (Butler, 1990: 33), a captive – by contrast – inhabits a transient state between moments of freedom preceding and succeeding his or her captivity. Captives are therefore irreconcilably different from each other because – prior to confinement – they all come from different life-worlds. Moreover, their paths will diverge once again upon release. Feminism imagines that all women are affected in the same way by their shared oppression. I do not make this claim in the context of captives. What captives share is a common predicament, rather than a common identity. To the “I have now entered a new fellowship, a unique fellowship of endurance” – Waite (1994: 105) extent that there is such a thing as inmate identity, it denotes the empathetic capacity to identify with the experiences of other inmates, rather than a conception of self.

I intend to embrace the feminist concept of ‘intersectionality’ to develop a more inclusive, heteroglossic model that neutralises reductive essentialism (Samuels, 2013: 133). Harnessing this method will ensure that the personal characteristics of each captive – such as race, class, and sexual orientation (our variables) – can be factored in to measurements of the pains of captivity (our constants). It is these pains which constitute the shared experience I have outlined above.

*The Pains of Captivity:* That a universal experience of captivity can be distilled from the many varied forms that exist has already been well demonstrated by the many studies that purport to measure the effects of imprisonment. Liebling et al. (2011: 213) for example, have developed “a set of measures based on what staff and prisoners told us comprised the most important dimensions of prison life”. My focus is on the pains that generate these effects. I define these pains as curtailments rather than deprivations, since the rights and freedoms of the captive still exist, albeit in an atrophied form. This must be so if the captive is to be capable of transcendence, for the dialectic process could not function were its participants devoid of dimensions like autonomy. I enumerate sixteen dimen-

sions of pain through which “the gap between life in prison and life outside” (Franke, 1990: 91) is manifested. I intend to define and justify the distinctions between each dimension in a future paper, but offer a brief introduction here: 1. *Loss of Liberty:* Freedom equates to the world of ends available to us as right-bearing citizens in a particular socio-political environment. It also denotes the ability to pursue particular ends without coercion or restraint (Tasioulas, 2010: 656). In captivity, one’s world of ends is forcibly narrowed to a limited spectrum – like a prism that refracts just one or two colours. The colours lost in the captive’s diminished rainbow of life are sorely missed and experienced as a distinct bereavement. Dostoevsky’s character – Raskolnikov – is paradigmatic. He fails to comprehend the significance of his loss at first, marvelling at his fellow convicts who all “loved life and cherished it! It seemed to him indeed, that it was more loved and prized, more highly valued in prison than in freedom... How could one ray of sunlight mean so much to them?”. It was only once the fading spectrum of past riches became apparent that “almost against his will [he began] to notice what he had not previously suspected” (Dostoevsky, 2008: 521 – 522). Starved of stimuli, the captive mind yearns for nourishment. As Terry Waite (1994: 310) reflects in his memoir, “books appear to have a new power and force [in captivity]. The intensity with which they are read reveals depths which were previously hidden. I am gaining deeper insight into my own being”.

2. *Loss of Autonomy:* Every time we make a decision to do something, we manifest our capacity for free will and moral action. Captives are not only restricted in their ability to make such choices, but their fates are dependent upon decisions made by their captors (Sykes, 1958). This encapsulates a double attack upon their autonomous selves, since decisions – to be freely made – require independence of deliberation and choice, without the influence or manipulation of others (Christman, 2015: 3).

3. *Loss of Time:* Victor Serge vividly describes the palpable “unreality of time” for captives. “You feel the terror of facing an abyss... each minute may be marvellously – or horribly – profound. That depends to a certain extent on yourself” (Cohen and Taylor, 1972: 9). The irreplaceable loss of time and the opportunities that pass with it are an inescapable reality for those in captivity.

4. *Loss of Security:* Maslow (1987) prioritises the need for us to live in stable and predictable environments, free from physical and psychological attack, near the very top of his hierarchy of prerequisites to human self-actualisation. For prisoners, forcibly “thrown into prolonged intimacy with other men who in many cases have a long history of violent, aggressive behaviour”, the threat of arbitrary violence and serious disfigurement pervades every waking moment (Sykes, 1958).

5. *Loss of Goods and Services:* The importance of projecting our self-consciousness onto external objects was made apparent in my exposition of Hegel’s ‘Phenomenology of Spirit’. To be stripped of one’s personal possessions in captivity therefore carries all of the ceremonial symbolism of military degradation – as experienced by the likes of Alfred Dreyfus. It is a status dishonour attacking the captive “at the deepest layers of personality” (Sykes, 1958).

6. *Loss of Privacy:* The panoptic gaze reaches its apogee in the prison, where power is rendered simultaneously “visible and unverifiable” (Foucault, 1991: 201). The need for personal space or sanctuary is completely absent in captivity. This is compounded by the routine indignities of body searches, cell checks, and examinations of one’s personal property.

7. *Discipline and Control:* It goes without saying that captives will be subjected to significantly greater degrees of discipline and control in captivity than they would have been as free citizens. The captive finds himself infantilised by the system in its attempt to “re-impose the subservience of youth” (Sykes, 1958).

8. *Exploitation:* Many captives will be spared the indignity of economic or sexual exploita-



tion, but not all. More mundane forms of exploitation include the pricing of food and phone credit to captive audiences, or the rates of remuneration captives receive for their work. These are extremely profitable arrangements for prisons and the corporations they contract with.

9. *Poorer Living Standards*: Captives in the most part experience a fall in living standards whilst in captivity as compared to their previous lifestyle. The corresponding impact upon their long-term health and wellbeing is by no means insignificant.

10. *Loss of Sexual Intimacy*: In Maslow's model (1987), sexual expression comprises one of our most basic physiological needs. To be deprived of sexual intimacy in captivity therefore undermines effective human functioning. Separation and divorce are the all too common corollaries of prolonged detachment. Unable to express meaningful solidarity in the face of shared pains, relationships lose much of the former symbiosis essential to their survival.

11. *Isolation*: Finnis holds sociability, friendship, and participation in the community as one of his seven values of human striving (MacCormick, 1981: 101). This is redolent of Hegel's conception of recognition, since friendship can only be realised in our own lives when it is mutually realised in the life of another equal, self-conscious being. Such shared experiences are wholly absent in captivity.

12. *Disculturation*: One of the effects of prolonged isolation from the world is a loss of social currency. In many senses, the captive's world stops turning, while the real world carries on spinning. Popular culture, current affairs, and technological advancements may be completely lost on them.

13. *Shaming*: "The confinement of the [convicted prisoner] represents a deliberate, moral rejection... by the free community" (Sykes, 1958). This is a feature of imprisonment that distinguishes the prisoner from all other captives, who at least remain welcome – if not indeed elevated – in society. The prisoner is confronted by the reality of his condemnation in every waking moment. The heavy walls that encumber him shut out a world which can no longer bear to look upon him. They are walls of shame.

14. *Injustice and Uncertainty*: Whilst there is an inherent ambiguity in the idea of 'effective discipline' and the 'consistent' use of power in carceral environments, if that power is abused, then a very different kind of pain is experienced. Wrongly convicted prisoners, detainees held without trial, hostages, torture victims, and those subjected to human slavery or trafficking will feel this pain most acutely (Grounds, 2005). The absurdity and senselessness of their condition raises urgent existential questions for these captives.

15. *Vicarious Pains*: The captive is not the only party subjected to pain by virtue of his or her condition. "Imprisonment usually entails distress for an innocent spouse or child... it is simply accepted as an unavoidable side-effect" (Walker, 1991: 106). These vicarious pains cannot be excluded from our model, because they have wider social effects and will undoubtedly be experienced as painful for the captive as well. He may feel that he has burdened his family and friends unnecessarily and will be anxious to make things up to them in the future.

16. *Incidental Pains*: Captives experience various incidental effects by virtue of their captivity. The most obvious is role dispossession (Goffman, 1968). Parents and partners are no longer able to fulfil their role in relationships. Children may be dislocated, and the captive may lose their job, home, or personal possessions as a result of their absence. These are effects which, for the prisoner, "neither those who enacted the penal code nor those who administer it want the sentence to have" (Walker, 1991: 108).

*Webs of Experience*: My model develops Sykes' classic – but I would suggest reductive – list of the 'pains of imprisonment', adding further categories of pain that collectively form the basis of an

'insider perspective' to which all captives can relate. In spite of relativist claims, "the hard core of consensus... [is that life] in prison is depriving or frustrating in the extreme" (Sykes, 1958). If we imagine a spider diagram – upon which the pains of captivity are plotted – we would find that each captive's web is configured differently, but that they would all be clearly identifiable as webs. We might expect different patterns to emerge within specified sample groups: prisoners, hostages, and hospital patients, for example. We could then take sub-samples within each group. So, for prisoners we might want to compare short and long-termers; first timers as compared to repeat offenders; and so on. I offer an example of what this might look like in figure 1, using hypothetical averages, plotted on a radar chart. Exploration of factors influencing susceptibility to pain might themselves merit comparative analysis – generating more intricate webs. Whilst this conceptual framework should not be seen as necessarily fixed or complete, it might be harnessed to compare experiences of captivity across different jurisdictions based on survey responses across the sixteen different dimensions, much in the same way as quality of life studies are presently conducted (Liebling et al. 2011: 214).

The web of experience reflects a pluralistic approach. Different cultures will have "different eligible orderings of values" (Tasioulas, 2010: 659), which will be reflected in the weight attached to particular dimensions within each web of experience, and therefore the overall 'lean' of the web. International comparisons will be further affected by differential margins between life in captivity and life outside, which should be reflected in the overall 'expanse' of the web. The value of this model lies not only in demonstrating that a 'shared experience' of captivity exists, but that it can be measured.

*The Pains of Captivity - The 'Con / Non-Con' Dichotomy*: Having emphasised the importance of phenomenal experience, I want to turn now to the ongoing debate as to whether academics who have not spent time in captivity – so called 'non-cons' – can adopt an 'insider perspective'. To what extent can you 'put yourself in someone else's shoes?' (Aresti and Darke, 2016: 10). The comparison is really between observer and participant, a situation envisaged in my previous bungee jump analogy. Watching someone take the plunge might give me a funny feeling in my stomach, but until I try it for myself, I can really only hazard a guess as to what it's like.

I have endeavoured to show how a dialectic conception of freedom can lead to higher states of consciousness simply inaccessible to the 'non-con'. Moreover, since the sixteen pains of captivity represent a critical attack on the self (Goffman: 1968), the 'con' inhabits a Husserlian lifeworld unique to captives. Nevertheless, Aresti and Darke argue that "significant others' are well positioned to speak about the 'realities of prison' as their lives... are also shaped by their loved ones' confinement... For many, these experiences constitute a shared reality" (2016: 12) or intersubjective horizon. The impression given is that the experiences of cons and non-cons may in fact be equivalent, rather than simply of equal value. Intersubjective experience is problematic however, because it entails the "expectation that a being that looks and behaves more or less like myself... will generally perceive things from an egocentric viewpoint similar to my own" (Bayer, 2016: 5). The assumption is flawed by virtue of its very subjectivity.

We might illustrate this by considering the case of the father-to-be. His wife is pregnant, he lives with her in the same house, and he reads all the textbooks on pregnancy with her, even attending a few classes to really get a good idea of what she's going through. But he is not himself pregnant. As hard as he might try to empathise with her, he has no idea what it feels like to have another living being cohabit his own body, let alone how painful labour is. That his experience with his wife constitutes a 'shared reality' is neither here nor there, no matter how emotionally involved he is.

Belknap (2015: 8) has previously expressed her reluctance in defining "those who have not served time as convict criminologists". If non-cons could speak to the 'realities of prison', it is difficult to see what added value cons would bring to the discipline. The admission of non-cons

effectively dilutes the importance and distinctiveness of an 'insider perspective'. Yet distinguishing between non-con and con narratives is not a matter of discrediting any particular account. All perspectives are equally valid. If two commuters view the same train approaching a station, but from opposite platforms, neither of them is deceived. They both see a train. What criminologists seek to question is how they individually perceive that train, and what details are missed from their particular vantage points, given that they are standing on opposite sides of it. The non-con/con dichotomy is valuable because it highlights the fact that different perspectives in fact exist. It enables us to draw comparisons between those viewpoints and so more expertly deconstruct prevailing narratives. Convict criminology draws those discrepancies into sharper focus. To insist that our metaphorical commuters ought to be placed in the same group because their experiences 'overlap' is to miss the point that they are standing on different platforms. Non-con accounts are valuable, "so long as [they are] utilised alongside rather than in place of the inside knowledge and perspectives of prisoners" (Aresti and Darke, 2016: 7).

Having defined what constitutes the 'insider perspective', it is worth asking how long that perspective remains relevant to criminological discourse. Many "ex-convict academics use correspondence, phone-calls, and prison visits... to stay current with the conditions inside correctional facilities" (Richards and Ross, 2001: 184), but is this really sufficient?

It seems logical to infer that former captives must experience reverse-disculturation. Being removed from the realities of life in prison and re-socialised into mainstream society would, I suggest, gradually erode the relevance of their 'insider perspective'. "Researchers can understand only from the 'inside' – from the social context which is peculiar and relative to that time and place" (Perry, 2011: 260). This is why it's so important to have a fresh and vibrant membership within convict criminology that is not artificially limited to those holding a PhD (Newbold and Ross, 2012: 6). We cannot decry the underutilisation of prisoner voices whilst simultaneously placing filters on which voices are then heard. The only way to address the "incredibly limited or complete absence of men of colour, women, or... [the] LGBTQ [community]" within convict criminology is to open the door to a wider constituency (Belknap, 2015: 10).

*Conclusion:* "A Man Who's Warm Can't Understand a Man Who's Freezing" – Solzhenitsyn, (2000: 96) As Young (2011) notes, "it is clear that prison insider perspectives remain underdeveloped but rich in potential for expanding the criminological imagination". Convict criminology serves an important balancing function in a field where many "academic criminologists either fail to comprehend the lived experience of defendants and prisoners, or are simply misinformed" (Richards and Ross, 2001: 183). Just as the male feminist "must be willing to... acknowledge the limits of his experiences and understanding" (Crowe, 2011: 4), so too ought the 'non-con' criminologist to factor in the limitations of their phenomenologically distinct lifeworld into their work. Nevertheless, neither the 'privileged insight' nor the 'insider perspective' as expounded in this paper should be seen as a licence for sloppy research or arrogance (Newbold et al. 2014: 446).

In proposing a dialectic framework – the 'captor-captive' dichotomy – I have sought to reveal the process by which those subjected to experiences of imprisonment might gain a new appreciation for life. I have argued that this heightened sense of awareness and consciousness can be tapped into through a diversity of confining conditions and is not limited to prisons. The insight unenviably gained by captives through their imprisonment not only has transformative potential, but gives them a fresh perspective on the very legitimacy of imprisonment itself.

In this paper I have presented a model of the pains of captivity, across sixteen dimensions of pain, designed to raise awareness of the damaging effects of imprisonment. "The public, and many of those who work in and manage prisons, may underestimate how painful the prison experience is"

(Liebling et al. 2011: 224). It is hoped that by measuring pain across different webs of experience sociologists might be empowered to push back against the surging tide of penal populism. Prevailing views on criminal justice question whether the human right to liberty can be "credibly interpreted as imposing a duty not to subject [criminals] to a just punishment" (Tasioulas, 2010: 665). In response, I have presented conceptions of freedom, autonomy, and identity which emphasise the human dignity of captives as moral agents with intrinsic value (Raz, 1986: 177). Our status as human beings does not disappear when we make mistakes, however grave those may be. If we seek to encourage prisoners to make morally sound decisions, we have a duty to nurture their capabilities in autonomy-enhancing environments (Raz, 1986: 426). As Durkheim argues, there is "a real and irremediable contradiction in avenging the human dignity offended in the person of the victim by violating it in the person of the criminal. The only way... of alleviating [this antinomy] is to alleviate the punishment as much as possible" (Lukes and Prabhat, 2012: 376). One would be hard pushed to characterise the sixteen pains of captivity identified in this paper as anything other than cruel, degrading, or inhumane.

Since "it is the invisibility of the prisoner which makes it possible to maintain the ideological functions of the prison" (Mathieson, 2000: 16), convict criminology has a critical role to play in lifting the veil through counter-functional theorisation. Former captives with a phenomenological claim to 'privileged insight' are well placed to raise coherent challenges against entrenched penal ideologies and "articulate policy reforms that make the criminal justice system more humane" (Richards and Ross, 2001: 182). As Kojève insists, "The man who has not experienced the fear of death... remains fundamentally bound to the given World. At the most, he will want to 'reform' it... without modifying its essential characteristics. This man will act as a 'skilful' reformer, or better, conformer, but never as a true revolutionary" (Kojève, 1938: 29). Prisons, like Jurassic Park, are anachronistic institutions. Despite the incredible damage they inevitably cause, we stubbornly persist in remodelling and reengineering the system in the hope that these social dinosaurs can be contained. Hegel's vision of the Spirit unfolding through time, and manifested in the actualisation of freedom in the world, will require the abolition of prisons if it is ever to be fulfilled. When "the owl of Minerva takes flight" (Hegel, 1952: Preface), our descendants will look upon the use of imprisonment with the same horror and shame with which we view slavery, torture, and the death penalty today. We may not yet live in a form of society capable of providing such universal freedom, but it is incumbent upon us to take the next tentative steps towards that goal.

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### Fewer Prisons Run Full Regimes

Fewer and fewer prisons are running full regimes of activities and services, according to figures released exclusively to Inside Time. Most remaining Covid restrictions in prisons were lifted last May, but since then, many have struggled with staffing shortages. Out of 122 prisons in England and Wales, only 23 were able to run a "green regime" in August and September. This declined to 22 in October, and to only 19 in November. A green regime means full delivery of activities and services. When there are not enough prison officers on duty to unlock prisoners safely and escort them to workshops or classrooms, regimes can be reduced to "green-amber", "amber-red" or "red", meaning progressively lower levels of activity. Prisons Minister Damian Hinds said: "All prisons have systems in place for the day-to-day management of regime delivery.

This ensures that regimes are safe, decent, secure, resilient and sustainable.