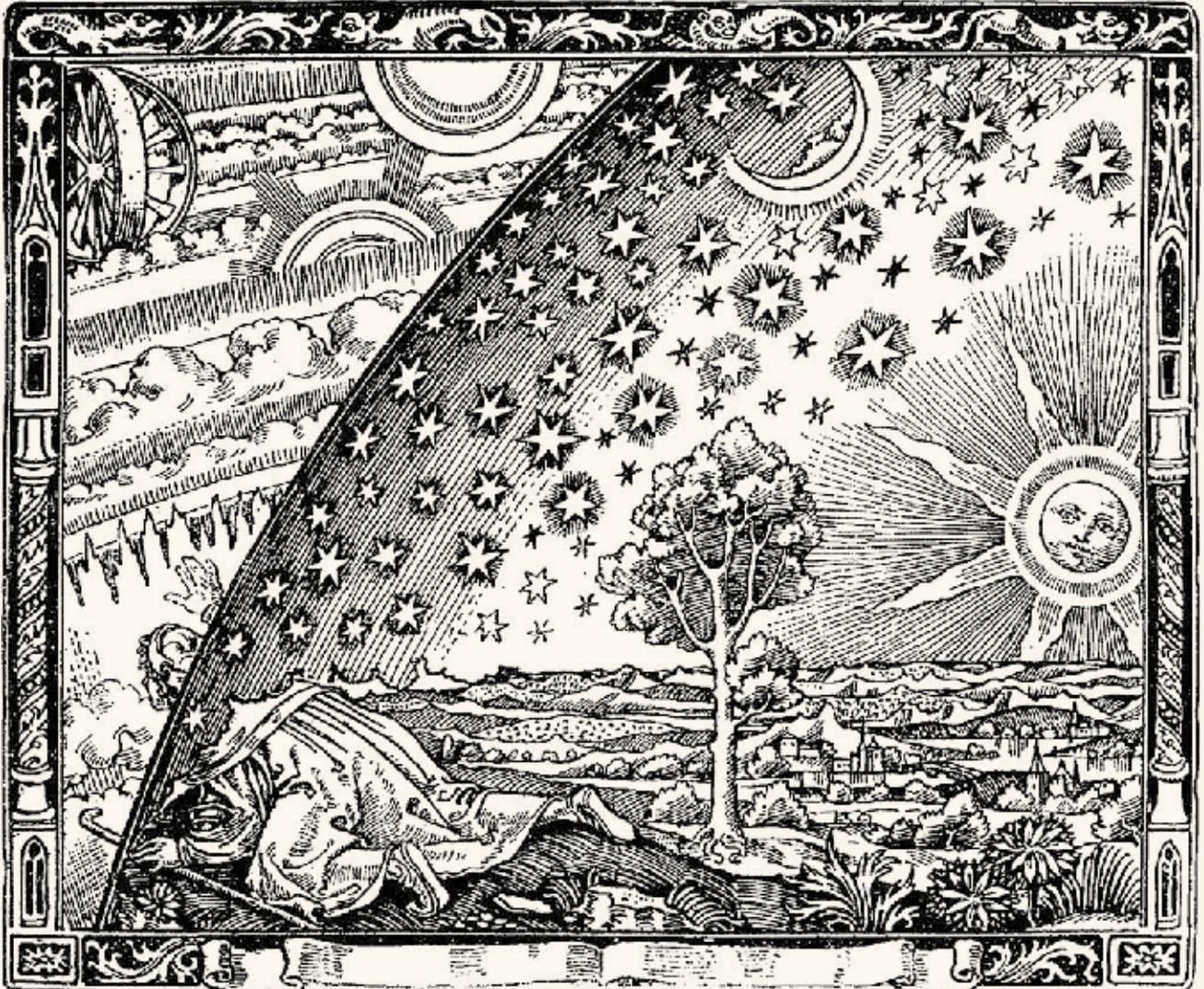


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# REIMAGINING PUNISHMENT AND JUSTICE

**ATTEMPTS** to reimagine the ways in which we deal with problems of crime and justice often involve imagining alternatives to punishment as a response to crime: they might look to programmes of “restorative justice” that seek to mediate and reconcile, rather than to punish; or to therapeutic endeavours to cure or rehabilitate, rather than to punish. Such approaches reflect the ambition to find more constructive, more humane, alternatives to the oppressive and harmful forms of coercion that criminal punishment often involves; but we should also, I will argue, try to reimagine criminal punishment itself as a more constructive, more humane response to crime, a response that does justice to both victims and offenders as members of the civic community.

A reimagination of criminal punishment must begin with those who are punished, those who punish (or in whose name punishment is imposed), and the relationship between them. Penal practice, penal rhetoric and penal theory too often portray punishment as an essentially exclusionary imposition: to punish someone is to exclude him/her (or to mark his/her exclusion) from membership of the civic community. Imprisonment makes this most dramatically obvious: the prison

walls physically exclude the prisoner from ordinary society. Such a conception of punishment encourages a matching conception of those who are punished as other: “we”, the law-abiding, punish “them”, the dangerous outsiders or the enemy, against whom “we” need to be protected. It then becomes easier to justify such treatment of those whom we punish, by arguing that those who commit crimes thereby exclude themselves from civic community. They forfeit their civic standing; we may therefore, for the sake of deterrence, incapacitation, or retribution, subject them to kinds of coercion that would otherwise be illegitimate. This view of offenders as having lost the status of citizens is vividly expressed in the outrage aroused in many British politicians by the suggestion that prisoners should be allowed to vote: only citizens are entitled to vote; imprisoned offenders are no longer full citizens.

It is also worth noting that on this conception of punishment, the role of the person being punished is essentially passive: we inflict punishment on him/her; his/her role is simply to undergo the punishment, though we might hope that he/she will recognise that this imposition is justified.

# PUNISHMENT AS CIVIC ENGAGEMENT

**Antony Duff**



### There is another way to conceive criminal punishment

There is, however, another way to conceive criminal punishment, which can make it more appropriate as part of a democratic polity's criminal law. We should begin by imagining a democratic liberal political community, whose members recognise each other as fellow participants in the civic enterprise of living together as a polity - as fellow citizens. Such recognition is generously inclusive, and egalitarian: all members, however diverse their ways of life might be, are recognised as fellows; all are recognised as equals, with an equal claim on the concern and respect of their fellows. (Such concern is also extended to non-citizens, who are here as guests, as would-be members, or as refugees.) In such a polity, the criminal law will be a common law: not a law imposed on its members by an alien sovereign, but a law that is their law as citizens; a law that they make and sustain for themselves as a reflection of their shared public values, to which they must therefore be willing to subject themselves and each other. Such a criminal law will define, as crimes, a set of public wrongs: wrongs which might have individual victims, but which properly concern all members of the polity as violations of their shared values. Murder, rape, assaults, thefts or robberies, are attacks on identifiable victims: but they are also public wrongs, which concern the public as a whole, since they are wrongs of which we must, given the values to which we are committed as a political community, take notice.

What kind of notice should we take? One kind of notice-taking is exclusionary: we see the wrong as negating the wrongdoer's membership of the polity, and therefore think that we can justifiably subject him/her to exclusionary punishment - punishment that both marks and gives real effect to that exclusion. But such an exclusionary response is not inevitable: we could instead see and respond to the wrongdoer as a fellow citizen. We must not ignore the wrong, or play down its significance: that would fail to do justice to the victim of wrong and to the wrongdoer. Instead, we call him/her to answer for the wrong, through the criminal trial.

At a trial, the defendant is called to answer to a charge of criminal wrongdoing, by entering a plea of "Guilty" or "Not Guilty"; if he/she pleads "Guilty", or the prosecution proves his/her guilt, he/she is then held to account for that wrong by a conviction, which formally censures him/her for his/her wrongdoing. In societies like our own, which retain vestiges of undemocratic monarchical power, the case is listed as "*Her Majesty's Advocate v D*", or "*Regina v D*", suggesting that defendants are called to answer to the monarch. In a democratic polity, however, defendants must answer to, and are held to account by, their fellow citizens: the case should be listed, as it is in some American states, as "*People v D*".

An important point to notice here is in calling the defendant to answer, and holding the convicted wrongdoer to account, we treat them as members of the political community: it is as their fellow citizens that we have the standing thus to hold them responsible - answerable to us. Notice too that the trial gives the defendant an active role: although he/she is not legally compelled to take part, he/she is called to answer, to account for his/her conduct, to his/her fellows.

### What then of punishment?

We can now see punishment, not as a burden to be undergone, but as a civic duty that the offender ought to undertake. If I have committed a public wrong, I have incurred a debt to my fellow citizens: I owe them apologetic reparation for that wrong - an attempt to "make up" for it, and thus to repair my civic relationship both with the victim of my crime and with my fellow citizens. That is what punishment provides: a reparative ritual that the offender is required to undertake as a way of formally making up for his/her crime (Bennett 2008; Duff and Marshall 2016). "Community Payback" sentences are the clearest examples of punishment as thus understood: the offender is required to undertake a number of hours of unpaid work, on some project of communal value, as a mode of formal reparation for his/her crime. He/she is required to undertake this work as a citizen, not as an outsider or as one who has lost his/her civic standing: it is a debt that he/she owes as a citizen to his/her fellow citizens.

Punishment as thus understood could be a civic, and civilized, enterprise: it could be something that citizens impose on each other, and accept for themselves, as full members of the political community. For punishment to have this character, it must of course be of an appropriate kind: the modes of punishment must be such that citizens can undertake them without thereby demeaning themselves. Imprisonment is the most obvious challenge here (and imprisonment *should* be problematic on any morally plausible account of criminal punishment): can we reimagine imprisonment (taking open prisons and self-governing prisoners as a model) as a punishment that is undertaken by citizens, rather than being merely imposed on those who are thereby excluded from the polity's civic life?

A final note of caution is necessary. The task of reimagining criminal punishment as a civic enterprise is challenging enough, but a yet more challenging task is also involved. If we are to call those who commit crimes to account, as citizens, and require them to undertake such punitive reparations as the debt that they owe to their fellow citizens, we must be able to show that they have indeed been treated as citizens, as full members of the polity; for it is only as citizens that they can have a duty to answer to their fellows in this way. But it is not clear that this condition is satisfied, for many of those who appear in our criminal courts. It is not clear that we have, collectively, treated them with the concern and respect to which citizens are entitled; many of them have suffered deprivations, exclusions from social benefits that constitute kinds of systemic injustice. Punishment as a civic enterprise depends on a functioning polity whose members treat each other as equal fellows; until we achieve such a polity, the legitimacy of our penal practices is, at best, doubtful.

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