

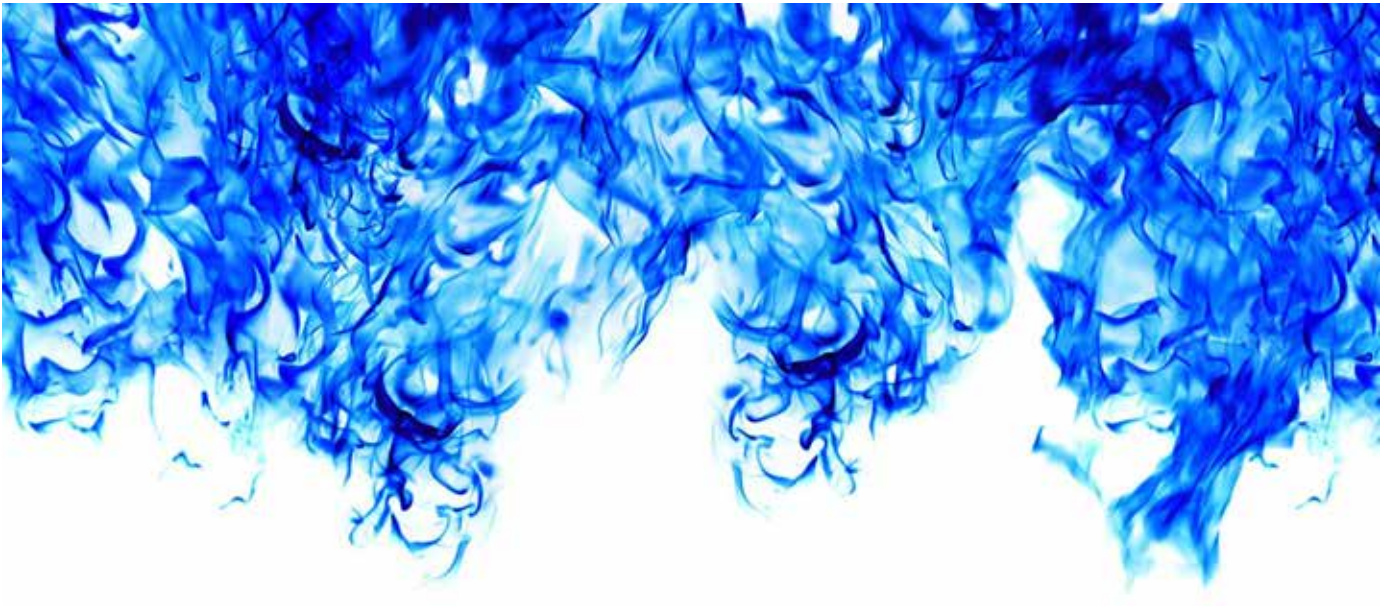
scottish justice ' matters

Volume 4 | Number 1 | March 2016

ISSN 2052-7950



REIMAGINING PUNISHMENT AND JUSTICE



RECOGNISING CITIZENSHIP

A RESPONSE TO ANTONY DUFF'S 'PUNISHMENT AS CIVIC ENGAGEMENT'

Pete White

I LIKE A LOT of what Antony Duff says in the preceding article on 'reimagination of criminal punishment' but I have been struggling to think of how the ideas he writes about might work in practice. How, in practical terms, can justice and punishment be something that does not exclude those that it is doled out to but rather holds them fairly accountable to their wider communities, ideally ones in which they are invested? How can punishment avoid the isolation of individuals and instead be about strengthening communities and repairing broken relationships?

Then, to my surprise and that of others, no doubt, I thought about football!

Every day of the week on football pitches and parks of all kinds and at all levels across the country the rules of football are used whether the game is being played by amateurs or professionals, people of widely varied ages and backgrounds. Those watching these games may not agree with all the

decisions made by match officials but, when an offence is deemed to have been committed, an agreed system of warnings, both formal and informal, is available to be followed up with, if necessary, a public punishment handed out there and then. There is the informal 'quiet word', the public display of a yellow card as a formal warning and, in more serious cases, the display of a red card used to bring about immediate punishment of the offender by their removal from the field of play for the remainder of the match. This immediate and visible punitive removal from the field of play also affects the offender's team (family) by reducing their capacity to deal with the matters in hand. The crowd (the wider community) will be split in their response to the offence committed right in front of them and will feel more than justified in sharing these responses energetically and maybe even with some vehemence both as the game continues and afterwards.

How do the players (family members) who remain on the pitch to face uneven odds respond to the actions of their now absent team (family) member whose absence has made their life more challenging? Often the members of the short-handed team (family) rise to the challenge and perform at a higher level. Nonetheless, having had to work harder to cover the absence of a team (family) member they are then expected to cope with their return even if there is resentment at the offence and the resultant absence.

Men and women in sport are frequently arranged in ways that equate to a hierarchy to reduce differences in capability so as to make their sport somehow fairer. Even though the people involved in the highest echelons of sport are usually better rewarded than those below them the rules of the game are supposedly the same across the country. In the wider world do we, as citizens, conduct ourselves in ways that have any similarities with sports men and women both on the park and in the crowd? Does the community allow for 'offenders' to return from prison without further sanction once both the visible and invisible parts of their punishment are seen to have been completed? Do we all have access to the same rules and playing field?

This analogy is simplistic but I make no apologies for this. I suggest it demonstrates that where we can feel as though we relate to the rules of the game and that the punishments are reasonable then it is evident that we have the capacity to accept that a wrongdoer can be identified, publicly held to account and then allowed to re-join their team. How come the exercise of justice and punishment is so different? What makes real life so different from sport?

The rules of football are, as far as I can tell, based on the shared understanding that all players are equal in the eyes of these rules regardless of ability or wealth. This is somewhat different from what might be seen in terms of criminal justice in Scotland and elsewhere. It could be argued that in what Professor Duff states as "In societies like our own, which retain vestiges of undemocratic monarchical power . . ." there is a judicial defence of privilege (see also the article by Bill Munro on 'Blind Justice' in this issue). People who are found guilty of committing crimes are not treated as being entitled to be seen as citizens and are treated in a less than civilised manner. Of course there are situations where public safety must be taken into account with the use of imprisonment but these are a minority of cases. If the defendant in a criminal case were seen throughout as being a citizen and so an equal of and by the person sitting in judgement would this result in so many sentences based on imprisonment?

Although there is much to be done to make it possible for this and other questions of the status of the judiciary versus that of 'normal' citizens to seem approachable and reconcilable with the reality of punishment as civic engagement significant progress is being made. It is now the case that the Scottish Parliament and the Justice Division of the Scottish Government recognise people with convictions as key stakeholders in matters relating to justice. We have taken our place as citizens and participate in processes relating, for example, to the redesign of community justice and the independent monitoring of prisons having been recognised as people with convictions rather than 'ex-prisoners' and 'ex-offenders'.

There is a massive humanitarian need to repair the damage of generations of poverty, deprivation and marginalisation behind offending in Scotland. If this nation is to become the safer and better place we would like it to be then we all have a part to play. This includes taking on board the reality that punishment as civic engagement represents an opportunity for us to recognise the citizenship of people who offend throughout their punishment and beyond.

Let's not wait - it all could and should start here and now . . .

Antony Duff's reply.

PETE WHITE draws an illuminating analogy between criminal justice and football. In a decently functioning football match, players are punished for breaking the rules without thereby losing their standing as equal participants in the game: why can't those who commit crimes be punished without thereby losing their standing as equal members of the polity - as citizens? I'd highlight three points from his discussion.

First, as he makes clear, football can function as it does (especially at the amateur levels of the game) only insofar as those involved - players, officials, spectators - understand the game as a shared activity in which they all participate, and whose rules they respect: only then are the referee's decisions seen as legitimate. Analogously, criminal punishment, and the verdicts of the courts than convict and sentence offenders, can be, and be seen as, legitimate only insofar as those involved - as defendants, as officials, and as citizens in whose name the courts act - can see themselves as collectively engaged in a civic enterprise of living together as fellow citizens, bound by laws that they can respect. Insofar as this precondition is not met, the legitimacy of our penal system is undermined.

Second, White's conception of football is egalitarian: in particular, though referees have authority over the players, they are their equals. As he notes, this is not true of our existing criminal process: the language of the law, the architecture of the courtroom, the conduct of the trial, combine to set the defendant in an inferior position. If we are to have a criminal law fit for citizens, we must think about how criminal courts can be so reformed that defendants are manifestly treated, and respected, as equal citizens.

Third, White rightly emphasises the problem of prison: how many people we imprison, and how we treat them afterwards. We should remember that even in countries as fond of imprisonment as ours, the majority of punishments are non-custodial: but (as even David Cameron now recognises in England), we must think hard not just about whom we imprison, but about how our prisons are run. In particular, can we make the prison walls more porous, so that those in prison can maintain their connections with the ordinary civic world; can we find ways of welcoming them back into that world (perhaps by rituals of re-entry) so as to make clear that their exclusion was neither total nor permanent?

Pete White is chief executive of Positive Prison? Positive Futures . . . www.positiveprison.org

Antony Duff is professor emeritus of Philosophy at the University of Stirling, and formerly a professor in the University of Minnesota Law School.