REIMAGINING PUNISHMENT AND JUSTICE
OUR THEME for this ninth edition of Scottish Justice Matters is reimagining punishment, which can, as our guest editors Bill Munro and Margaret Malloch argue, range from philosophical considerations of Utopias to, in present day Scotland, the use of imaginative projects around reducing the use and rethinking the role of prison, particularly, but not only for women.

In its broadest sense, reimagining punishment requires us to expose and question what Simon describes as the ‘penal imaginary’, which includes many taken for granted assumptions about punishment and justice: about, as Nellis and Munro in different ways argue, the relative power of courts and sentencers and their relationships with the state. Duff asks us to reflect on how punishment involves ‘us’ doing things to ‘them’ - and suggests a different approach based on civic engagement and recognising that ‘they’ are equal citizens.

Prisons have long dominated popular and professional notions of the ultimate punishment and, despite successive attempts across the globe to drastically reduce their use, they retain their popularity among sentencers, perhaps because as Tata and Strang argue in addition to their retributive and deterrent role, they provide a ‘safe’ option for offenders whose lives are blighted by a host of housing, health, personal and economic problems. And, as Strang, Scotland’s Chief Inspector of Prisons also argues they can do good, providing space for counselling, support, developing creativity and education as the contribution on the use of reading groups in prison also illustrates. Nonetheless they can also do much harm and should be used sparingly.

The dominance of incarceration in our thinking about punishment is underlined by the often used term ‘alternatives to custody’ for all sentences which are not prison, which also require, as Nellis cogently argues, considerable reimagining, particularly the organisation and role of Criminal Justice Social Work. Security issues can be addressed by a more imaginative use of Electronic Monitoring, and Malloch’s interview with Burgess illustrates the potential of imaginative community projects along with some of the resource and other organisational restraints which limit this potential. Community projects can also, as illustrated in the Mixing the Colours project, challenge prejudices about, for example, sectarianism and gender, and enable participants to share experiences.

Conceptions of punishment and criminalisation move beyond the legal and institutional confines of the criminal justice process, to the sanctions imposed on welfare claimants and to the treatment of refugees, asylum seekers and migrants, a good example of which is provided by Giupponi who points to the many issues this poses for human rights. It also extends to, as Crawford illustrates, the use of evictions to deal with rent arrears. Like prisons, these do little to solve the structural problems leading to arrears, are costly, but are justified by professionals who can see few alternatives. Reimagining could involve, for example, the provision of a basic universal housing allowance.

Our current issues articles carry on these themes. To Tata, efforts to tackle the presumption against short sentences require a fundamental rethinking of the role of prison as a last resort. Mercado’s account of mentoring, describes some of the issues faced by those on release, underlining the inability of prisons to deal with structural issues. The new Scottish Sentencing Council, described by Tennant, has a considerable role to play in affecting the use of prison and community sentences. The book review deals with an interesting study of the many complex factors involved with desistance.

The development of imaginative approaches necessarily involves policy makers, and in this, our last ‘Take 5’ before the Scottish Parliamentary elections, MSPs outline what justice priorities should be thereafter.

Hazel Croall and Mary Munro
Scottish Justice Matters is a publication of the Scottish Consortium of Crime and Criminal Justice (SCCCJ). The Consortium is an alliance of organisations and individuals committed to better criminal justice policies. It works to stimulate well informed debate and to promote discussion and analysis of new ideas. It seeks a rational, humane, constructive and rights-based approach to questions of justice and crime in Scotland.

Editorial Board
Niall Campbell, Hazel Croall, Hannah Graham, Nancy Loucks, Mike McCarron, Alan Mairs, Maggie Mellon, Mary Munro, Alec Spencer, Alan Staff, Cyrus Tata

Managing editor: Mary Munro
Consulting editor: Hazel Croall

Thematic editors for this edition: Bill Munro and Margaret Malloch

Administrator: Helen Rolph

If you would like to contribute to SJM or have a proposal for content, please contact editor@scottishjusticematters.com

Website: www.scottishjusticematters.com
Twitter: @SJMJournal
Magcloud: www.magcloud.com
Issuu: www.issuu.com
Facebook: facebook.com/pages/Scottish-Justice-Matters/
Soundcloud: soundcloud.com/sjmjournal
Pinterest: www.pinterest.com/SJMJournal/

SJM is free to read digitally but relies on grants, advertising and donations.
To make a donation please go to: www.scottishjusticematters.com

Email us at: editor@scottishjusticematters.com

Copyright: Creative Commons Attribution-NonCommercial-NoDerivs 2.5 UK: Scotland license. Before using any of the contents, visit: https://wiki.creativecommons.org/wiki/UK:_Scotland

Disclaimer: Publication of opinion in SJM does not imply endorsement by the SCCCJ. So far as we are aware, people used in the images have consented to such use.

ISSN 2052-7950 (Print)
ISSN 2052-7969 (Online)

Scottish Consortium on Crime and Criminal Justice is a registered charity [SC029241]

Scottish Justice Matters is available on the MagCloud and issuu digital services. Here you can download and view for free. If you would prefer a printed copy, MagCloud offers a print-on-demand service.

www.magcloud.com
www.issuu.com

Volume 4:1 March 2016

Contents

Theme: Reimagining Punishment and Justice
- Reimagining Punishment and Justice by Margaret Malloch and Bill Munro
- Blind Justice by Bill Munro
- Prison-University Reading Groups by The Greenock and Shotts Reading Groups
- What Good is Prison? by David Strang
- Gender and Criminal Justice: Challenging Prejudice by Rachel Thain-Gray, Rebecca Jones and Margaret Malloch
- Reimagining Eviction as Punishment for Poverty by Joe Crawford
- Criminalising Migrants by Belén Olmos Giupponi
- Punishment as Civic Engagement by Antony Duff
- Recognising Citizenship by Pete White
- The Limits of Penal Reimagining by Mike Nellis

Current issues
- How Can Prison Sentencing be Reduced in Scotland? by Cyrus Tata
- A New Era: The Scottish Sentencing Council by Ondine Tennant
- Punishment Beyond the Gate by Sharon Mercado

International
- Harder Than it Might Seem by Jonathan Simon

Interview
- Margaret Malloch interviews Nick Burgess, Criminal Justice Service Manager at Falkirk Council

Regular features
- Restorative Justice in Scotland: An Update
- Take Five: five politicians respond to SJM’s questions

Statistics
- Comparing Trends in Convictions and Non-Court Disposals in Scotland by Ben Matthews

Reviews
- Book Review: Offending and Desistance: The Importance of Social Relations by Beth Weaver. Reviewed by David Orr
- Film Review: 16 Years Till Summer, directed by Lou McLoughlan. Reviewed by Nate Kunitskaya

Current Legislation and Events
- Scottish Justice Brief
THIS SPECIAL EDITION of Scottish Justice Matters is focused upon Reimagining Punishment and Justice and we hope the ideas it contains will play an important part in the development of new ways of thinking about punishment and justice by exposing contradictions in the gap between the desire for a better future and the constructed ‘naturalness’ of existing conditions. For us, the discussions and debates that emerged around the Scottish Referendum in 2014 epitomised many of these contradictions, notably the relationship between a desire for social change and a reluctance to move beyond the ‘already known’. This has been a characteristic of many aspects of social life, as well as a feature of Scottish criminal justice.

In recent years the distinctiveness of Scottish identity, and justice, has been redefined. The decision to shelve the construction of a new, large, national prison for women at Inverclyde denoted an atmosphere where innovative developments could potentially be introduced, and where the voices of wider penal reformers appeared to be heard. Nevertheless, the context which surrounds the Scottish criminal justice system is reflective of national and international developments more broadly, where limitations often appear to exert an influence on the potential to imagine or to reimagine what transformative elements may be possible and/or desirable.

In recent years the distinctiveness of Scottish identity, and justice, has been redefined.

‘Punishment’ and ‘justice’ are complex concepts, both historically nuanced and ideologically saturated. What does it mean to ‘reimagine’ them? And is it possible to reimagine ‘justice’ alongside ‘punishment’?

We have brought together a number of contributors from practice and academia to explore their visions for justice and to consider the tension between the imaginary, a vision which we consider to be captive to a particular ideological representation, and the imagination, here defined as the creative openness towards new conceptions and social practices.

The concepts of ‘imagining’, ‘imagination’, and ‘imaginary’ hold complex and contradictory meanings. Pat Carlen (2008) used the concept of the imaginary to show how various political and populist ideologies structure a representation, or image, of penal policy and practice. Such representations depict the dominant discourse of governance as natural and inevitable, and thereby close off alternative, more imaginative discourses on justice and penal practice. Combating these representations, going beyond them to envision something ‘otherwise’, is the work of the imagination.

Overview

Reimagining Punishment and Justice includes a range of different perspectives on the theme, with contributions from practitioners and academics, located within criminal justice and from broader disciplines outside it. They provide examples of pressures exerted by ‘the imaginary’ as it is exercised across broad social spheres. Importantly, all of our contributors have attempted to help us to reimagine things differently.

Bill Munro explores ‘Justice’ and the imaginary of its representations, attempting to trace the hidden and often unjust relationships which bind the individual to the law and to the state. Importantly, he opposes the traditional humanistic meanings of blindfolded Justice, signifying that the judiciary should stand apart from the sovereign, with alternative constructions that interpreted the blindfold as representing Justice’s ‘unseeing’ relationship to the political order.

The role of the imagination is seen in the exciting examples of innovation provided by the Greenock and Shotts Prisons Reading Groups, a collaborative contribution from a group of students and staff who reflect upon how their experience impacted on their understanding of learning and punishment. Focusing on equality, education and community, the reading group members reflect on these themes for reimagining justice.

Rachel Thain–Gray, Rebecca Jones and Margaret Malloch consider the ways in which women’s experiences of...
‘sectarianism’ in Scotland are inextricably linked with issues of women’s safety. *Mixing the Colours* project at Glasgow Women’s Library brings women together to share experiences and to find collective ways of addressing conflict within groups and communities. Using collective action theory, the project provides a space for women to challenge structural inequalities and to ensure that recipients of prejudice, discrimination and hatred, are central to the process of change.

David Strang, HM Chief Inspector of Prisons for Scotland, notes that his work in prisons questions how good we actually want our prisons to be. Attempting to address this thorny question, he considers the significance of imprisonment, relationships and hope. The centrality of relationships is also emphasised in Antony Duff’s contribution, where rather than imagining alternatives to punishment as a response to crime, he instead attempts to reimagine criminal punishment itself, as civic engagement. Something which can only be effected, as he points out, in a democratic liberal political community where those called to account are citizens, with the necessary membership of the polity. Pete White of *Positive Prisons? Positive Futures …* provides a response to Professor Duff, using a sporting analogy to consider how the exercise of justice and punishment as civic engagement is progressing in Scotland today.

Mike Nellis sets out the limits of penal reimagining within a Scotland where a new society may be emergent, but where innovations must go beyond existing power relationships and where key organisations must take on the role of reimagining themselves in terms of cultural legacies and innovative practices. Nick Burgess, a local authority Service Manager in Criminal Justice Social Work in interview with Margaret Malloch, highlights a number of innovative interventions within the community in Central Scotland but also the very real constraints that workers encounter in the current environment. He reflects on areas that he would like to see given more attention.

Simon (2007) has argued that the technologies, discourses and metaphors of justice and punishment have become visible features of all kinds of institutions particularly that of health, education, and housing and that states deploy crime to make invisible other social ‘problems’ it cannot, or no longer cares to treat at its roots. Joe Crawford explores this blurring of crime and social welfare discourses in the rationalisation of eviction in the social rented housing sector in Scotland, highlighting the relevance of structural factors in the accumulation of rent arrears and the symbolic punitive function of eviction. He provides some possible solutions, both radical and practical, as a way of reimagining this problematic practice.

The uses of technologies, discourses and metaphors of punishment is also evident in the area of immigration. In Scotland the need for a fair and humane asylum and immigration policy has been evident in the controversies surrounding some of the practices employed at Dungavel: from issues of abuse, vulnerability of those detained, child detention, to the length of time people can be detained under immigration powers. Britain is the only country in the EU which has no cap on how long people can be detained under immigration powers. Belén Olmos Giupponi considers migration and the criminalisation of undocumented migrants in the European Union. Taking a focus on international law, she notes that despite the vision of human rights obligations set out in international and European law, this is not always enacted in practice at the level of member states.

From an international perspective, Jonathon Simon illustrates the challenges of reimagining justice in the context of mass incarceration in the USA. Using the example of America’s carceral state he argues that the current crisis of mass incarceration requires reimagining the possibilities of penal justice in contemporary democracies.

**Key Themes**

Reimagining a better world generally involves future aspirations for the good of all. This necessarily concerns how best to organise society and the distribution of ‘justice’ plays a key role in this process. However, principles of ‘justice’ become meaningless or even unjust if society is structurally unequal. So it is important that assumptions about ‘punishment’ and ‘justice’, and indeed what we understand as ‘crime’, are considered with specific attention to how they influence current practice and future imaginings. Inevitably, visions of a ‘just’, ‘crime free’ society raise questions around material and social inequalities, private ownership and power relations (see Malloch and Munro, 2013). Similarly, recognition of the intersectionality of class, ethnicity and gender relations becomes evident as the basis for overlapping structural inequalities that determine and shape processes of criminalisation.

Our contributions highlight the extent to which the possibilities of reimagining punishment and justice first require acknowledging inequality as a core problem of justice. The limitations of our ability to ‘reimagine’ and the difficulties inherent in breaking out of the framework of neoliberal economic thinking are important. The problem of ‘starting from where we are’, while advocating realism can actually result in entrenchment in existing limitations with a vision constrained by lack of imagination of how things might be otherwise.

Perhaps we should aspire to place more emphasis on the imagination and less on ‘evidence’, itself only a partial view of ‘what is’ and something that is often overlooked when justification for the prison is invoked (Barton et al, 2007). Fundamental reform requires imaginative alternatives but also a radical change in structures of power and the rethinking of dominant cultures, both institutionally and politically.

**Margaret Malloch** is reader in criminology with the Scottish Centre for Crime and Justice Research, University of Stirling.

**Bill Munro** is lecturer in criminology at the University of Stirling.


DURING the early Renaissance a number of engravings produced outside of Italy (Dürer (1498) and Bruegel (1561-62)) represented allegories of Justice that offered a very different reading from the later and more familiar Enlightenment interpretations of Justice. What was distinctive about these engravings was the appearance of Justice wearing a blindfold. However, instead of symbolising the impartiality of Justice, as the blindfold commonly does from the C17 onwards, these engravings represent Justice as being blind to its own origins in legal deception and arbitrary violence. Not only in these engravings is Justice made blind to its obscene and violent origins but, it may be interpreted, that these negative attributes are also hidden from us. We are in a sense blind to them.

This article will seek to explore both the relationship of Justice to the history of its representations and its ‘unseeing’ relationship to the political order. It will examine the shifting historical conceptions of Justice as a way of reimagining the hidden relationships which bind the individual to the law and to the state.

Early Renaissance Representations of Justice (Divine Justice)

Panofsky (1972) writes that the blindness of Justice which was meant to assure her impartiality is foreign to both classical and mediaeval thought and that the figure of blindfold Justice is a humanistic invention of more recent origin. Before the 16th century, illustrated manuscripts, paintings, and statues usually depicted her as being able to see. Giotto’s Justice fresco of 1305 in Padua; Lorenzetti’s ‘Allegories of Good and Bad Government’ of 1338/39 in Siena, and Justitia by Rafael in 1511, all depict Justice as being able to see.

Panofsky (1972) suggests that the blindfold over Justitia’s eyes only became a common motif during the 17th century with the emergence of the idea that the judiciary should stand apart from the sovereign. Justice blindfolded cannot see the signs that a sovereign might send to direct the ruling in a particular case. Panofsky however, argues that the blindness of Justice has an earlier origin and appears to originate in an Egyptian allegory transmitted by Plutarch in which the chief justice was shown eyeless in order to illustrate his impartiality, while his colleagues had no hands with which to take bribes. This rather brutal image did not appeal to classical antiquity which, on the contrary, imagined Justice with an awe-inspiring and piercing gaze.

Blind Justice (Worldly Justice)

Justice with eyes bandaged occurs in Sebastian Brant’s Narrenschiff (1494) a satirical narrative on the theme of the Ship of Fools, illustrated by Albrecht Dürer and shown opposite. In Dürer’s wood block print the fool bandages the eyes of Justice in order to deceive and to defeat her true purpose. The blindness of Justice here puts her on the wrong side of the moral order and follows an iconological tradition that associates blindness - whether narrowly interpreted as ‘unable to see’ or as ‘incapable of being seen’ or as ‘preventing the eye or mind from seeing’ - with what is dark, hidden, secret or even evil.

In the Middle Ages we find an established association of day (ruled by the sun) with life and the New Testament, and of night (ruled by the moon) with death and the Old Testament. These connections are emphasised in numerous representations of the crucifixion where the various symbols of good, including the personification of the church, appear on the right side of Christ while the symbols of evil, including the personification of the synagogue, are on his left. Blindness during this period came to be denoted by a new symbol: the bandage or blindfold. This mediaeval motif differs from the attributes of classical personifications in that it gives a visible form to a metaphor, instead of indicating a function. The bandage first made its appearance around 975 in a mediaeval miniature, where night is represented as a blindfolded woman. This mediaeval motif differs from the attributes of classical personifications in that it gives a visible form to a metaphor, instead of indicating a function. The bandage first made its appearance around 975 in a mediaeval miniature, where night is represented as a blindfolded woman. This motif later came to be transferred first to the blindfolded representation of the synagogue, again like Justitia represented in the form of a woman, and then to such personifications as infidelity, and to death. A powerful depiction of the blindfolded figure of the Synagogue can be seen at Reims Cathedral ca. 1236-41. In this sculpture, which represents the synagogue, with its broken spear and the book of law falling from her hand, we already begin to see the future form of the blindfolded Justitia. Thus blind Justice had her origins in the night, synagogue, infidelity and death: all mediaeval personifications that were represented by the blindfold.
Bruegel’s engraving of Justice (Justitia) from his Seven Virtues of 1561-1562 (right) has the familiar classical symbols of sword and the scales but again, as in the Dürrer woodblock we see the figure of Justice blindfolded. In this engraving we have justice being led through scenes of torture and execution. Justice in this representation is blindfolded to avoid seeing the violence that is being carried out in her name. Not only is Justice here seen as the negation of Justice, but as the origin of injustice.

Both Dürrer and Bruegel created allegories of Justice that offered a very different reading from the earlier Renaissance representations. Technologically both Dürrer and Bruegel’s allegories were represented in the medium of print, outside the systems of patronage necessary for the art of fresco. Both situate Justice in the real world; the realism of a German townhouse in the Dürrer; the terrifyingly real flesh and blood of the carnival of punishment in the Bruegel. However, in contrast to the new technical advances and audiences of both artists and the emergence of greater realism in the depiction of their subjects, both turn to the medieval past as a way of reimagining the previously clear sighted classical figure of Justice. A reimagining that borrowed the blindfold to expose the violence and un-freedom of Justice’s origins. One hundred years after Bruegel’s engraving of Justice, Pascal (1966) in his Pensées (1662) follows a similar theme when he writes of the imaginary justice and the ‘mystifying’ power behind the Law. He argued that because the truth could only threaten the political order, then the people must be deceived and not allowed to see the inaugural violence in which law is rooted. Law must therefore be perceived as authoritative and eternal (see Bourdieu, 2000). For Pascal, at the base of any legal system is something which is not law, something which is pre-legal.

The question arises as to why then at the time of Pascal’s Pensées - if the emergence of the representation of blindfolded Justice should expose the entanglement of Justice with, violence, the night and worldly power - should that same symbol offer the contrary interpretation of Just impartiality? It may well be, as has been suggested, that this later interpretation was established with

the Enlightenment idea that the judiciary should stand separately from the sovereign. However, another explanation may lie in the ideological investment involved in bringing about this separation between Justice and the sovereign and in the necessity in doing so, to overlook, not only the injustices carried out in her name, but also the distance between Justice as an ideal and how it is realised, or very often not, in the work of law and the process of the trial.

The separation of the judiciary from the sovereign expressed a shift from traditional forms of authority, forms which rests on the belief in the sanctity of immemorial traditions, to modern legal forms of authority, where legitimacy is guaranteed by legality alone. For Weber (1978), legality legitimated something in the legal system upon which legality was founded but which was not law. The something which is not law, the something which is pre-legal was the threat of physical force or coercion.

In modern societies based on legal authority this pre-legal form of violence often appeared to those subject to it, in a masked or more ‘innocent’ form. The close binding of legality and legitimacy in modern legal forms masks the distance between the ‘innocent’ ideal of Justice and those spaces at ‘the dark side of these processes’, which Foucault (1991: 222) found the tiny, everyday, physical mechanisms [...] non-egalitarian and asymmetrical that we call the disciplines. It is in making visible this blindness concealed that both Dürrer and Bruegel struggled for in their reimagining of Justice.

**Bill Munro** is co-editor of this issue of *Scottish Justice Matters* and is a lecturer in criminology, School of Applied Social Sciences, University of Stirling.

---


AT OUR very first meeting, prison-based students sat on one side of the room, and university-based students sat on the other. Gradually, we all became just students, sitting together as one group around the table. Some of us are talkative, others more quiet. We make relevant points, and we digress. There are agreements and disagreements, weighty conversation and tea breaks.

Since 2014, university-level reading groups have been meeting monthly; first in Shotts prison, then in Greenock and now also in Cornton Vale. The reading groups are facilitated by New College Lanarkshire, the Scottish Centre for Crime and Criminal Justice Research (SCCJR) and the Scottish Prison Service (SPS), and they bring together PhD students in Scottish Universities with undergraduate Open University students in prison. Every month a different topic of readings is chosen by reading group members. So far we have covered such issues as animal rights; the sociology of food; class; consumerism; zemiology (the study of social harms); metaphor; the portrayal of women in the media; the geography of space; and much more.

Reading groups are an ordinary activity that can create an extraordinary space of interaction. It’s not all positive; there are challenges both personal and institutional that we continue to work through. The important point is we are trying to work through them together. This article is built around quotes from many of us who have been involved for a while, as insiders and outsiders, men and women, students and teachers. The quotes are organised around three, inter-related themes for reimagining justice: equality, education and community.

### Equality

Equality is more than a principle. It is a practice of seeing and treating each other the same, and an experience of feeling part of a group and a conversation.

“Even though it technically is us and them, there is that elephant in the room, it doesn’t feel like that, it feels equal.”

“The reading group has become something to look forward to, it is somewhere neutral. Prisoners become students and our voices are heard equally with the students from the universities. These groups have been nothing but positive on a personal level and I think the PhD students have had the opportunity to see us not only as prisoners but as people who are able to contribute both to the immediate debates within the reading groups but also as being able to contribute to society as a whole.”

“I particularly enjoy the reading group as it is a group of like-minded people all sharing ideas on the same subject. It’s nice to be able to do this with other students and in a relaxed atmosphere. We are all equal and we aren’t treated any different being prisoners.”

“I came from another country hoping to find in Scotland a different way of doing punishment. It is my conviction that the reading groups are a way of achieving this. In the group, everyone is equal. There are no differences, and everyone is treated as a normal student.”

“I had some reservations at the beginning of the groups: I thought prison learners might be intimidated academically, I thought the university students might be intimidated by the
environment. There have been no such issues as the groups are essentially about people coming together. The egalitarian nature of the groups has helped ensure that any labels are left behind for a couple of hours. This has been their biggest success.”

Education

Education is more than acquiring information or a skill set; it is an awakening to the world and our possibilities in it, to a shared journey of curiosity, frustration and growth.

“A reading group is far more than a place of education - it is a place where all thoughts matter.”

“The reading groups have been about much more than academic learning. They have been about people coming together on an equal footing to discuss, debate and learn from each other. That interaction has been extremely powerful.”

This power extends beyond the meeting itself: “We often talk about our readings to our partners, flatmates, friends and families.”

Reading groups are “liberating and confidence building in an otherwise depressing environment. The varied subject matter also means that the groups are interesting and thought provoking.”

“Through the group, we are all improving our education. We often read things we know little about or may have never even heard of. We’re broadening our knowledge, our vocabulary and horizons.”

“Getting used to reading difficult papers is a good skill to achieve and the more we do it the easier it becomes.”

“The reading groups are amongst the most stimulating and thought-provoking discussions I will have in any one month. I often come away with a completely new take on things. Seemingly dull articles become interesting, topics that I do not care about come to seem worthwhile. The sessions are enjoyable, full of quick-fire repartee.”

“The varied academic backgrounds and interests of the members are a particularly enjoyable reminder of the pleasure of shared learning. However, my learning from the group was not limited to the range of readings covered as the group itself also raises important questions about the role and place of universities in their communities. The reading groups demonstrate not only that opportunities to participate in academic life can be reimagined in creative ways, but also that universities can, and should, play a key role in addressing some of the barriers students face, so that all can partake of the joys and advantages higher education can bring.”

“Universities have a responsibility to make education as accessible as possible to everyone and promoting it as something that can be enjoyable, social and meaningful to everyone.”

However, “I also have come to appreciate the complicated and constraining nature that education can have for prisoners in navigating their time in prisons and we should be mindful that groups like this do not become a tool of discipline or part of the curriculum. In that sense I feel like there is a constant need for resisting the potential for being compromised as a group and to highlight to people that we are part of internal politics.”

Community

Community means more than being from the same area or having a shared interest; it is the sense of place, belonging and solidarity that emerges through regular, meaningful interaction.

Sometimes a feeling of community emerges through shared anxieties.

“The language used can be difficult to understand. I don’t always feel comfortable asking people what they mean because I feel everyone else understands.”

It also emerges through a welcome sense of escape from our lives outside the reading group. “When I joined the reading group I was in the final year of my PhD; a time characterised by large numbers of hours sitting alone at my laptop. The reading group was a welcome respite from what was perhaps the most isolating period of my degree.”

It “removes you from prison for a couple of hours … it makes you feel normal in that time.” “When you’re doing something like this, you almost literally forget that you’re in prison.”

And finally, discussion of the readings themselves builds connections.

“From my perspective it gave me a chance to read more widely than I ordinarily would have. I felt that there was a great rapport within the reading group that I was part of, and felt that everyone was free to express their views. It was quite an informal environment, which I think helped especially in the early stages of the groups where people perhaps did not know what to expect.”

“The reading group creates a university space where those within it debate issues on equal terms. This empowers in a concrete way; where one begins to believe in oneself as part of academe.”

Through our reading groups we engage in an activity common in universities all over the world. The difference is that our reading groups meet in prison. And yet in this place, we are also making a new space, one where people can come together as the community we might be, and where learning is the vehicle of both a shared journey and a shared future. The pleasures of the reading groups have been deep and often unexpected as we learn about and from each other as well as about our own potential to be part of something positive.

We want to highlight the value of reading groups without denying there are complications on both sides. The different environments of prison and university each come with their own institutional cultures and powers. The reading groups can feel like a space outside of these, but also subject to them. We cannot be naïve or passive about constraints, continually working to protect spaces such as this that allow us to enact and embody the messages and values that we seek to promote as part of just societies.

Biographical note: We are students and teachers at Edinburgh, Glasgow and Open Universities.
What is imprisonment for?

To answer the question ‘what good does prison do?’ we need to identify why we send people to prison. I am clear that imprisonment is an essential element of an effective criminal justice system, which contributes to the rule of law and the security and safety of our society. For many serious crimes, imprisonment may be the fair and just sentence for the court to impose. To mark the seriousness of the crime, particularly when a life has been taken or serious harm and damage has been done, imprisonment is the appropriate penalty. It is a reflection of the value that we place on a human life. Justice demands imprisonment.

But we also use imprisonment to protect the public in general, and the most vulnerable in particular, from further harm, damage and loss. Imprisonment may be necessary to prevent further serious offending in the community.

We all want people who leave prison at the end of their sentence to return to the community less likely to reoffend. Ideally we want them to reintegrate as responsible citizens. So, while the purpose of a sentence is punishment as a consequence of crimes committed and for the prevention of further offences, the effect should be to do as much good as possible.

One criticism I often hear is that ‘prisons are too good’. Life is too comfortable inside it is suggested. Modern prisons are bright, well-equipped spacious buildings; prison cells have been likened to student accommodation, with en-suite toilet and shower, equipped with televisions. Prisoners are encouraged to make the most of the opportunities in prison to work, to learn new skills, to engage in leisure activities. These critics argue that prison should be a hardship, an unpleasant experience, uncomfortable. They say that modern prisons are not a deterrent.

I inspect prisons and report on the condition in prisons and the treatment of prisoners. It is a fundamental principle of international human rights that people detained by the state should be held in conditions of decency, reflecting their intrinsic value as human beings, irrespective of whatever crime they may have committed. No prison in Scotland is luxurious.
I am certain that imprisonment is a punishment. The punishment is the deprivation of liberty. However modern or well-equipped prisons are today, imprisonment is undoubtedly a punishment and an unpleasant experience that very few would choose. Being deprived of your liberty is a severe penalty. Denied the freedoms that people not in prison enjoy, can you imagine what it would be like to be taken from your home, family and friends, removed from society, with no choice where you sleep, little choice about how you spend your day, and what you eat? How well would you cope with no access to emails and the internet, or the outside freedoms and activities that you currently enjoy?

In 2008, the report of the Scottish Prisons Commission Scotland’s Choice identified that too many people are sent to prison each year. This is still the case. I meet people in prison who should not be there. Too many people with mental health problems, addicted to alcohol and drugs, who are vulnerable to self-harm or suicide end up in our prisons. Many have themselves been victims of abuse and trauma earlier in their lives, especially women who have suffered sexual and physical violence. Compared to other European countries we imprison approximately 50 per cent more than the average and about twice those that imprison the fewest.

The reality is that imprisoning people does harm. It may be necessary, and it does some good, but it does cause harm. Lives are wasted in unproductive years of inactivity, at great public expense. A prison sentence in your personal history makes it more difficult to find employment. Prisons breed bullying, intimidation, fear and resentment. But perhaps the greatest harm is that it damages relationships.

What about relationships?

Imprisonment damages relationships. Families are at risk of breaking up, children deprived of a mother or father. In a wider sense, we see evidence of broken and damaged relationships in nearly every aspect of the criminal justice system. At the root of most crimes lies a broken relationship either as a cause or a result, most obviously in assault, violence or abuse. Victims of crime often suffer lifelong effects as a result of the harm and damage done to them. I speak to people in prison who feel pain: the pain that they have inflicted. They know that they are in prison as a result of their own actions, as a consequence of their own behaviour. They have damaged the lives of others, most directly the victim of their crime: but they have also caused suffering to their families and damage to themselves. Their lives are often littered with fractured relationships. And not just broken relationships, but broken lives: characterised by poor health, a lack of education, employment and constructive opportunities, and often an inability to trust.

For many people in prison in Scotland the level of poverty in their background is undeniable. For many, their backgrounds and life experience before their involvement in the criminal justice system are characterised by a lack of education and employment, by poor health and housing, by a lack of support for their vulnerabilities: all factors which contribute to offending.

The solution to these problems lies not with prisons and the criminal justice system, but with wider services and society.

Are there grounds for hope?

Across prisons in Scotland, I see many areas where prisons do a great deal of good.

Our prisons care for some very vulnerable people, providing protection from harm to themselves and to others. They tackle poor health and provide treatment and support for those with addictions and mental ill health.

Staff/prisoner relationships are always key in a prison. I have been very impressed with the commitment of staff to build positive relationships with prisoners, building trust, sticking with them, not judging them on their past record, yet challenging their behaviour. All prisons in Scotland encourage and facilitate positive links with families and the wider community: relationships which can assist and support a successful return to the community.

Much good work is done in prison to prepare people for successful reintegration into the community as responsible citizens. Opportunities are provided for education and training, learning new skills and equipping prisoners with qualifications which will assist them in gaining employment. Throughcare support is provided for people leaving prison, with support not ending at the gate but continuing into the community, linking up with organisations who work with prisoners prior to their liberation.

Prisons provide opportunity for creativity including art, drama, poetry, writing, music, drawing, painting. Hidden talents are uncovered and powerful avenues for change are opened up. The important task of restoring, or building for the first time, a sense of positive identity, purpose and confidence for people in prison is key to enabling them to make a constructive contribution to their community on release.

What good is prison?

My conclusion is that prisons can do good and in Scotland they are. Scotland is sending fewer people to prison. After an inexorable rise over the last two decades, the number of people in prison has begun to stabilise and shows signs of reversal. The daily average population is at a seven year low. Most encouragingly, the number of young men detained in HMYOI Polmont is half the level it was in 2008.

There are other measures which can make further contributions: an expanded presumption against short sentences, increased use of non-custodial sentencing to encourage community payback, and diversion from prosecution. All of these are more constructive than imprisonment, are able to address underlying problems and are more likely to lead to a reduction in reoffending.

There is also hope for individuals who are imprisoned. Prison provides opportunities to make a fresh start and can be a potential turning point. Everyone deserves a second chance.

I have argued that imprisonment is both necessary and harmful. It should be reserved for the few for whom it is absolutely necessary.

But prisons also have the potential to do significant good: for individual lives and to contribute to a safer Scotland.

David Strang is HM Chief Inspector of Prisons for Scotland.

See also Scottish Justice Matters (December 2013) Testing Times (1MB) David Strang talks to Nancy Loucks about his new role as Chief Inspector of Prisons for Scotland: also audio on: https://soundcloud.com/sjmjournal/nancy-loucks-interviews-hm
THERE have been many recent attempts to ‘reimagine’ justice in Scotland in relation to gender and the criminal justice system. Part of the process of ‘reimagining’ punishment and justice requires overcoming existing barriers and finding a space to rethink power, change institutions and systems of state. To do so, requires looking and thinking in different ways.

In relation to gender, of particular note is the space that has been created by the decision to find an alternative to the proposed prison at Inverclyde. The discussions, debates and actions that followed the decision by Cabinet Secretary for Justice, Michael Matheson have illustrated the significance of this issue.

The Scottish Women’s Convention, Women for Independence, Engender and Glasgow Women’s Library have been proactive, in different ways, in ensuring women’s issues remain high on the policy and profile agenda. These organisations and groups have drawn attention to violence against women, women in politics, constitutional change and gender, and suggested ways to tackle gender discrimination and broader prejudice in ways which often challenge mainstream responses.

The Scottish Government’s recent attention to ‘sectarianism’ provided an opportunity for collaboration around local projects and networks. In particular, there was recognition that women’s involvement in defining ‘sectarianism’, recounting experiences and positing solutions had been overlooked.

Debates around sectarianism often seem to have been conducted within a largely male and masculine context: frequently led by men with much attention given to football and ‘violence’. Facilitated discussions by Scottish Women’s Convention and Engender highlighted that women were often reticent about discussing sectarianism, that they felt it was more prevalent in some areas of Scotland than others, and that sectarianism appeared to create or represent ‘division’. Studies commissioned by the Scottish Government and Advisory Group on Tackling Sectarianism (Goodall et al, 2015; Hamilton-Smith et al, 2015; Hinchliffe et al, 2015) on different aspects of ‘sectarianism’ acknowledged how certain displays of masculinity (Engender referred to ‘toxic masculinities’) meant that women would limit their own freedom (i.e. avoid going out, using public transport, going into city centres), curtailing their movement in public, and sometimes in private, space. It was evident that women engaged in strategies of self-management and avoidance of risk in leisure spaces on a daily basis. Current debates surrounding the appropriateness (or not) of criminalising so-called ‘offensive’ behaviour have been ongoing within feminist academic and activist communities for many years.

Despite the long tradition of feminist analysis in relation to control of public and private space, the absence of women’s accounts (until recently) and women’s experiences of ‘sectarianism’, seem to exclude and invalidate women’s concerns about wider social issues within local communities.
Women’s views add an important analysis to existing debates and highlight the ways in which ‘sectarian’ divisions sustain ‘patriarchal structures’ by limiting women’s control over (and sometimes access to) public space and social, structural hierarchies of power.

Addressing the issues of ‘sectarianism’ and women’s safety are inextricably linked, both theoretically and practically. So perhaps it is appropriate that we take on board how women have attempted to reclaim that space through practical strategies such as the development of Women’s Centres, establishing collectives, groups, networks and coalitions, to make women’s views visible: in doing so, not only challenging sectarianism but also highlighting the effects of poverty and exclusion and highlighting the importance of community control over local resources.

This has often taken the form of ‘consciousness-raising as method’: the collective critical reconstitution of the meaning of women’s social experience, as women live through it, and where the pursuit of consciousness is a form of ‘political practice’. And of course, the analysis that the personal is political came out of consciousness-raising; that what individual women believed was a personal problem, was in fact an issue that was shared and understood by many other women.

Collective action is a political practice; by providing a space for women to be close, it is also possible to consider how far they have been separated and how that separation obscures broader collective experiences. Consciousness-raising shows women (and men) their situation in a way that also suggests they can act to change it. It creates a shared reality that ‘clears a space in the world’ within which they can begin to move. And once that has happened, the consequences are significant both for women, and for wider society. By understanding women’s experiences of ‘sectarianism’ it becomes possible to do something about it while also making the connections between sectarianism and sexism; class, racism and homophobia.

The *Mixing the Colours* project at Glasgow Women’s Library is a project that was set up to bring women together to share experiences and find collective ways to address conflict within groups and communities. During the last three years, this project’s specialism has been to address and challenge prejudice with a focus on religious and cultural diversity, using a combination of ‘prejudice reduction’ and ‘collective action’ theories and creative methods. Utilising expertise in the ways that gender intersects with other forms of prejudice, *Mixing the Colours* tested different methods of exploring sectarianism. The women who participated were at the core of the project’s work, providing creative testimony to change minds and challenge prejudice.

Using collective action theory, the project’s main working values were to acknowledge the structural inequalities faced by women and ensure that those experiencing prejudice, discrimination and hatred were central to the process of challenging prejudice. By supporting women to speak about their experiences and produce the materials for interventions such as a film, publication, performances, podcasts and oral histories, *Mixing the Colours* ensured participants’ role as the ‘agents of change’. Participants designed the content and context of the project, readdressing societal power imbalance and developing a strong collective identity, something which Dixon and Levine (2012) claim can foster self-esteem in the face of discrimination, and support disadvantaged groups in their struggle for collective equality.

*Mixing the Colours* has given me a forum to express and explore the scar that sectarianism has left on me but also filled me with hope that the issue is being addressed by positive action to stamp it out across Scotland. (Participant).

Prejudice reduction methods are generally understood to create positive ‘outgroup’ characteristics and cross-group liking. This model, however, is said to be most beneficial for those groups who are most disadvantaged. *Mixing the Colours* utilised this method in combination with the collective action of participants to facilitate positive inter-group contact, as an effective means of prejudice reduction. By hosting educational ‘interventions’ to reduce prejudice and discrimination in wider society (with mixed gender groups), the project created opportunities for people to hear perspectives outside of their own experience, culture, religion, ethnic group and gender.

*Mixing the Colours* participants produced a publication of their stories, which were largely fiction based on fact. They have performed their stories at public events across Scotland to mixed audiences to encourage empathetic responses, perspective-taking, reduction of negative attitudes and promotion of inclusivity. Audiences reported that hearing the writers read their stories and engaging with them in lively discussion was beneficial. In the majority of cases, audiences reported the highest levels of increased understanding at events that featured the *Mixing the Colours* writers performing their own work. When project workers delivered the stories at events, levels of reported understanding were lower. As one attendee at a Tron Theatre Event where women had presented their stories noted: “So refreshing, moving and interesting to hear women’s experiences of different aspects of sectarianism in their own words.”

The learning gained from this method of working is being applied to the new ‘Equality in Progress’ project at Glasgow Women’s Library, which will support marginalised and excluded women instigate meaningful systemic change to increase their own access to, and representation in, public sector services.

**Rachel Thain-Gray** is *Mixing the Colours* development worker at Glasgow Women’s Library

**Rebecca Jones** is *Mixing the Colours* administrative assistant at Glasgow Women’s Library

**Margaret Malloch** is co-editor of this *SJM* and is a member of the Scottish Centre for Crime and Justice Research, University of Stirling.

---


THIS article draws upon findings from a study which examined evictions in the social rented housing sector in Scotland. The research consisted of a series of interviews with 35 housing professionals, 15 of whom worked for housing associations and 20 of whom worked for local authorities (Crawford, 2015). The study highlighted the relevance of structural factors, such as insecure and irregular employment, low wages and diminishing job security for the recent increase in rent arrears; the outlook for the future is one where poverty levels look set to rise, along with evictions for rent arrears.

The proliferation of ‘regulation and inspection regimes’: for example, in the creation of the Scottish Housing Regulator created by the Housing (Scotland) Act 2010, embodies what Wacquant (2012) calls the liberal/paternal state; a state with two faces, one which looks favourably upon those at the top of the social structure and one which looks menacingly upon those at the bottom. It creates a state which practices uplifting liberalism for the advantaged and punitive paternalism for the disadvantaged. This can be seen in the relationship between social and private forms of housing as evidenced by the replacement of the mansion tax with the so-called ‘bedroom tax. The outcome of this was a substantial reduction in the tax burden of the wealthiest home-owners in the UK while at the same time, imposing a tax on social tenants (the least affluent households in the UK) for each bedroom they had which was ‘deemed’ to be superfluous to requirement. Tax fraud (now at an estimated £16 billion) has resulted from what an independent government auditor claims is the HMRC’s reluctance to pursue the wealthiest culprits, while a number of third-sector agencies have reported a significant increase in the levels of punitive benefit sanctions affecting the most vulnerable such as the homeless and those suffering from physical and mental ill-health.

There are, arguably, a number of drivers for this liberal/paternal regime, ranging from the creation of responsible consumers (of both goods and services) to the creation of a workforce that can be coerced into taking low quality jobs with low, or indeed, no pay. However, the employment situation is only going to get worse as automation, rationalisation and continued austerity steadily reduce the numbers of paid jobs year on year (Brynjolfsson and McAfee, 2016). Current estimates suggest that in the coming decade as much as 35% of jobs will have been lost to automation and software innovations. The sectors which will be most adversely affected are those which require fewer skills, thus augmenting even further, the widening inequality gap.

The Social Construction of Evictions

Historically, there has been a shift from an industrial economy based on production and manufacture to a financialised one based on consumption and debt. At the same time there has been an epochal shift in forms of housing tenure from social housing, dominant from the 1950s to the 70s, to mortgage funded home ownership.

Our research exposed a number of stark contradictions in relation to social housing policy, practice and evictions in Scotland. Here are some examples.

Housing professionals when discussing rent arrears, almost exclusively attributed their accumulation to what academics call ‘structural’ causes. The most common of these were (in order of frequency) the inadequacy of the housing benefit system, the current economic situation, hardship caused by insecure and part time employment, multiple debts, and the rise in the cost of living (including rising rents). The ‘causes’ suggested for the accumulation of rent arrears were presented in such a way that ‘structural’ factors and not individual failings...
were viewed by housing professionals as being at the root of the problem. Despite this, when interviewees were asked about alternatives to eviction, they exclusively contended that there were no alternatives to eviction, that rent needed to be paid, and failure to do so should result in removal from the property. There were two (out of 35) who tentatively suggested that households ‘could’ be moved to a less desirable area as a punishment, but otherwise all interviewees agreed that evictions were necessary as an ‘ultimate sanction’ against non-payment of rent.

One local authority claimed to spend £1.6m annually (over and above regular housing management costs) collecting just £1m in rent from what they called ‘hard-to-reach’ tenants. Most interviewees acknowledged that evictions cost the landlord many times more than the rent arrears (a sum of money which is almost always written-off as unrecoverable after the eviction has taken place), and all interviewees who worked for a local authority acknowledged that there were added costs when households with children needed to be re-accommodated, often by the same local authority who had evicted them. Households to whom the local authority had no further duty to accommodate either had to find alternatives in the private rented sector, or were added to the ‘hidden homelessness’ problem by being temporarily absorbed into the households of family or friends. In the worst cases, periods of street homelessness and rough sleeping present a real possibility for some. Many interviewees talked about the ‘moral’ difficulties associated with evictions particularly when there were young children involved. Despite these contradictions, the entire cohort of housing professionals interviewed could justify their role in the eviction process if they could satisfy themselves that they had rigidly and faithfully adhered to the managerial demands placed upon them by the legislation.

We also found that the contradictions inherent in the data arise from the contradictions which are built into the Scottish Government’s own legal interventions. On one hand, the Housing (Scotland) Act 2010 prescribes that eviction should be a very last resort, reducing homelessness during a period when demand on social housing stock far outstrips supply. This places a strong emphasis on tenancy sustainment, increases levels of landlord involvement in the management of rent arrears, and augments the number of managerial mechanisms for dealing with tenants who were unable to pay their rent.

On the other hand, the same Act brought into existence a body called the Scottish Housing Regulator, to police and enforce ‘good practice’ in housing management. The main means, by which the interests of this ‘audit culture’ are furthered, particularly in the field of social housing management, is through the universal imposition of a strict ‘regulation and inspection’ regime. The expanding reach and growing remit of the ‘Regulator’ placed an enormous managerial burden upon landlords to not only manage rent arrears but to do so in a way that led to the micro-management of tenants themselves.

**Reimagining Evictions**

One solution to the problem of evictions is to consider a basic housing allowance, similar to the idea of a basic income, as recently introduced by the government of Finland. The Finnish model provides every citizen with a basic income of 800 Euros a month, which they can augment through paid work, and which offers universal protection from the worst excesses of poverty. The taxation system can then be designed to progressively tax those on the highest wages in order that the scheme is both affordable and deliverable.

A universal basic housing allowance can prevent the need for families to be evicted for rent arrears while creating a fairer system whereby those on the highest wages with the most expensive properties can be taxed progressively in order to make the system both efficient and effective. Thus, through the introduction of both a universal basic income and a universal basic housing allowance, the essential needs of individuals and families can be adequately met, removing the need for both food banks and evictions.

**Dr Joe Crawford** is a research fellow at the Centre for Housing Research, Department of Geography and Sustainable Development, University of St Andrews.

---


**Crawford J (2015) A Political Sociology of Eviction Practices in the Scottish Social Rented Housing Sector, University of Stirling**

http://hdl.handle.net/1893/22336

As far back as the 16th century, revolutionary legal scholars argued for the existence of the *ius migrandi* as a right granted and protected under international law. In this libertarian approach the right of free mobility is a natural right which cannot legitimately be restricted unless there are exceptional circumstances.

This idea is embodied and reflected in articles 13 and 14 of the 1948 Universal Declaration of Human Rights, protecting freedom of movement and guaranteeing asylum respectively. However, the libertarian approach currently faces significant obstacles. Migrants are confronted with increasing restrictions that curtail their freedom of movement. Asylum continues to be a state-based procedure in which, in practice, there is a presumption that the country of origin is safe unless otherwise proven. Whenever a ‘migration crisis’ arises, borders controls are tightened. This is particularly true in Europe where modifications in the EU member states’ asylum policy and the implementation of the EU return policy have led to a growing ‘securitisation’ of EU migration policy and the criminalisation of undocumented migrants.

Asylum has been included as one of the main areas of cooperation at EU level, with the Dublin system for allocation of responsibility for processing asylum claims. The Treaty of Amsterdam (1999) upgraded cooperation by including asylum policy in the founding treaties as well as so-called ‘international protection’. Several other non-binding resolutions on asylum matters have been adopted by the EU. The establishment of a Common European Asylum Policy has been marked by the difficulties in articulating an efficient and meaningful system to deal with asylum claims. Traditionally, the United Kingdom has kept out of the application of EU asylum provisions.

Currently, refugee law is a substitute protection, ‘in addition to identifying serious harm potentially at risk in the country of origin, a decision on whether or not an individual faces a risk of being persecuted must also comprehend scrutiny of the state’s ability and willingness effectively to respond to that risk’ (Hathaway and Foster 2014). The Asylum quarterly report (EU, Eurostat) reveals that the number of first time asylum applicants increased by more than 150 % in the third quarter of 2015 compared with the same quarter of 2014 and almost doubled compared with the second quarter of 2015 (UK Refugee Council, 2013). The ‘refugee crisis’ has raised concerns on the unsustainability of the current system.

If an individual fails to secure refugee status he or she falls into the category of illegally staying or undocumented migrant, subject to deportation unless the status of internationally protected person is granted under EU law. This has led to controversial cases, such as those where migrants who were denied refugee status were returned to their countries of origin and exposed again to the risk they had fled, in some cases, death. This is the background in which the current legal framework, modelled upon the Return Directive adopted in 2008, sets out the rules and principles to be applied by Member States to third country nationals who do not fulfil, or no longer...
fulfil, conditions of entry in accordance with EU legislation. The scenario is fragmented as the United Kingdom and Ireland opted out of this part of EU Law and therefore are not obliged to fulfil the Directive. The consequence of this opt out is that neither the United Kingdom nor Ireland have a time limit on the detention of migrants. This in turn leads to the prolonged detention of vulnerable people despite a presumption that detention should only be considered in exceptional circumstances.

In many cases migrants who fail to obtain this legal status are returned, thus it is crucial to observe how the Return Directive is being implemented in the years after its adoption. As in other cases, EU countries were supposed to implemented the Directive by the most appropriate means. However, many EU member states, for example Italy, did not pass any new modifications and Italian authorities only implemented the Directive after being criticised in 2010 by the Court of Justice of the EU (El Dridi case) on the grounds that some of its legal procedures (especially the long period of imprisonment as punishment for refusing to leave the country after receiving a deportation order) were in conflict with the Return Directive.

A comparative study published in 2014 based on fieldwork carried out in Italy, Spain and Cyprus has revealed that, in practice, the effective enforcement of the Directive has hardened the conditions imposed on undocumented migrants (Di Filippo 2016). At the same time, the EU Fundamental Rights Agency and the Council of Europe have emphasised the need for State authorities to comply with minimum procedural guarantees (such as providing legal assistance to immigrants) and respecting human rights when carrying out removals (they must be safe, dignified and humane). In the El Dridi case, the Court examined the admissibility of criminalising the non-compliance of a repatriation order following a period for voluntary departure. In its judgement, the Court recalled that in principle Member states are allowed to adopt measures - including criminal law measures - to avoid the irregular stay of third-country nationals in their respective countries. However, the Court specified that although criminal law falls into the third-country nationals in their respective countries. However, the Court specified that although criminal law falls into the responsibility of each Member State, this particular branch could be subordinated to European Union law. As a result “States may not apply rules, even criminal law rules, which may jeopardise the achievement of the objectives pursued by the Directive, depriving it of its effectiveness”. Therefore, the Court established the need to balance Member States’ power in matters regarding undocumented third-country nationals under deportation orders with the need to safeguard “the effet utile of the directive”.

In a similar case, the Achoughbabian judgement decided in December 2011, the Court reasserted the findings of the El Dridi judgement and confirmed that the Return Directive 2008/115 does not preclude penal sanctions in line with national criminal legal procedure with regards to undocumented third-country nationals who are residing in the territory of a member state without any justified grounds for non-return (par. 48). However, penal sanctions could only be applied if the return procedure had already been requested. This safeguard does not apply in the United Kingdom and Ireland where the status of such third-country nationals without justified grounds is already treated as a penal condition and not as a transitional one.

Not surprisingly, after El Dridi v Italy (2011) several other cases on the implementation of the Directive emerged inaugurating a “new era” in CJEU case law. In further cases related to the compatibility of national legislation imposing certain penal sanctions for illegal staying (assignment to stay at home; immediate expulsion) and domestic law provisions criminalising non-compliance with an entry ban, the Court reaffirmed these criteria.

As anticipated by previous NGOs reports, the return of immigrants has also raised concerns around the protection of children’s rights. Cases heard before the European Court of Human Rights, concerning the return of third-country nationals including children have resulted in the European Court of Human Rights concluding that there have been violations of Article 8 of the ECHR due to flaws in the decision-making process, in particular, the failure to protect the ‘welfare principle’, the lack of consideration of the best interests of the child and ineffective coordination between the authorities in determining and protecting such interests.

Taking into consideration the manner in which the return policy is carried out in the different EU Member States and different controversial situations for the respect of human rights arising from asylum cases, one can conclude that serious constraints are imposed on the right to migrate and to obtain asylum. Despite the ‘good intentions’ as the recent case law appears to suggest, when EU Member States are faced with migration, the outcome is not always favourable to compliance with human rights obligations imposed by regional European law and customary international law.

Despite the protection guaranteed in international human rights law, the implementation of EU law is not only limiting in practice the libertarian approach which supports the idea of international human rights law geared to protect migrants and refugees, but also tolerates the criminalisation of migrants and those who support and aid them. A critical reimagining of ius migrandi is perhaps a necessary beginning to a humane and just asylum policy.

Belén Olmos Giupponi is a lecturer in Law at the University of Stirling

---


Cases

Case C-61/11, El Dridi, supra n. 25.

Case C-329/11, Achughbabian [2011] I-12695 (France).

Case C-430/11, Sagor [2012] ECR 777 regarding the compatibility of Italian law with the Directive. Case C-297/12, Filev and Osmani [2013] supra n. 98 (Germany). Case C-166/13, Case C-166/13, Mukarubega [2014] supra n. 98, Request for a preliminary ruling (France).
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 reimagining 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.
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.

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

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 monarchal 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 whom 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.
EVEN IF one sets aside the more renowned landmarks in utopian thought, envisaging (reimagining) a better society than the present one - better government, independent nationhood, increased productivity, less crime, more security, higher standards of living, reduced taxes, peace and harmony etc. – is hardly the newest game in town. It has long been the stock promise of every political party at election time (and sometimes in-between), of every CEO to his shareholders and nowadays of every Silicon Valley entrepreneur and their home grown emulators who can package their products as ‘social innovations’ and pitch them as putatively ‘disruptive technologies’. Envisioning, predicting, anticipating and dealing with change in this or that sphere of social life is a commonplace and enduring trope of much science fiction, encompassing dystopias as often as utopias, and ‘scenario planning’ in respect of upcoming military risks was at the very core of the Cold War thinking that, in the USA, mutated into the field of futurology.

Penality has always figured in these various modalities of reimagining, although often superficially, adrift from any informed understanding of how penal change actually occurs. Utopian projections of orderly societies from Thomas More (1516) onwards have almost been obliged to say something about the eradication of crime and the means by which the troublesome can be checked, problems which ‘common sense’ tends to present as intractable. In Edward Bellamy’s Looking Backward 2000-1887 penitential imprisonment had been abolished some fifty years before the millennial centenary of America’s imagined socialist revolution. William Morris’s (1890) counterpoint to Bellamy, set in an imagined 1952 England, seemed to favour widespread use of reparation. For all the familiar histories of dashed hopes, however (and notwithstanding the ease with which some utopias morph into dystopias) Oscar Wilde (1891) was right to say that no map of the world would be complete without utopia. Attempts to reach it rarely effect something truly transformative, but can galvanise some improvements, which may not otherwise have come into being. Making a radical demand to get a moderate result might seem like insipid politics to some – and it is certainly legitimate to always hope and try for more – but quite often in the fractious and frustrating context of democratic politics, that’s just how it is, until the next bid for further progress.

There is a rather a lot of institutional and cultural ‘reimagining’ going on these days, not least in respect of penal affairs. Even David Cameron is getting in on the act, reimagining Britain’s relationship with Europe one day and a new Conservative vision of ‘penal reform’ the next, one which includes “groundbreaking” (and probably large scale) use of satellite tracking, slyly projecting the hope that commercially managed monitoring technology will achieve the reductions in reoffending that the much weakened (privatised) probation service can no longer do. Sociologist Anthony Elliot (2013) attributes much of the contemporary reimagining (or institutional and cultural “re-invention” as he prefers to call it) to the creative destruction entailed by each new iteration of neoliberal reforms. When all that is solid regularly melts into air (jobs, relationships, public services, brands), it becomes psychologically necessary to make a virtue of instability, flexibility and adaptability, to constantly embrace the new.
One business processing company's current (by no means original) advertising slogan, pitched at potential customers but expressive of an undeniably existential truth, is “If you don’t shape the future someone else will”.

In Scotland, much recent penal reimagining can be understood less as an echo of neoliberal rumblings elsewhere in the world, and more as reverberations from the larger constitutional “reimagining” entailed and inspired by an ascendant SNP government and its ideal of independence from the United Kingdom. The Scottish Prison Commission (2008), the McLeish report, was the prime mover here, simply because it grounded its proposals for significantly reducing the prison population over a ten year period in an imagined sense of what Scotland, as a country, was aspiring to be. Immediate practical consequences - the community payback order (a good example of a “moderate result”) - were perhaps less important than the new conversation that McLeish’s report started, whose momentum is yet to play out. Justice Secretary Michael Matheson would probably not have made his bold decision to halt the building of HMP Inverclyde without the abrasive, radical demand of the Howard League Scotland and Women for Independence for decisive action, but it was the prior authoritative reimagining of the Mcleish and Angiolini reports (Commission on Women Prisoners 2012) which made it defensible on the day. At a deeper level, Matheson’s argument, whilst publicly stressing its rational, evidence-based aspects, was all of a piece with the SNP’s conviction that new horizons in which the Scottish Prison Service is taking the lead in reducing prisoner numbers is to be achieved, the relationship of means to ends remains vague, and the outcome problematic. The longstanding fragmentation of CJSW across 32 local authorities, its overstretched resources, its lack of an unquestioned axiom of structural social work and of anti-oppressive practice. The relentless genericism of social work training in Scotland may go someway to explaining this sad state of affairs but it is important that CJSW finds the courage to reimagine its better professional self and rise to the challenge of the times. The Justice Secretary can’t do it all on his own. Mike Nellis is an emeritus professor of criminal justice at the Law School, University of Strathclyde.

Nonetheless, reimagination exercises can all too easily confuse or conflate goals and means, get slanted to fit existing power relationships in the penal field, and be distorted by unspoken deference to the authority of sentencers (whose relationship to government is never publicly, or perhaps even privately, reimagined). The Scottish Government’s attempted “re-configuration” (its own word) of community justice services illustrates the point about goals.

No one can dispute the scale or depth of the administrative changes it proposes but because it says nothing about the cultures and practices that must change if the goal of reducing prisoner numbers is to be achieved, the relationship of means to ends remains vague, and the outcome problematic. The decision to stall Inverclyde has led paradoxically to a situation in which the Scottish Prison Service is taking the lead in the Angiolini-inspired mission to reduce the use of custody of women, which is not what anyone, least of all Angiolini herself, imagined would or should be the case. To be fair to SPS, it is seriously attempting to “redefine custody” for some women, and some unexpected good may come of that, but its dominance in a debate from which it had been expected to tactfully withdraw speaks volumes about the difficulties of realising alternatives for women in a community justice sector that is too fragmented and under-resourced to envisage itself taking this lead (see also, McConnell and Carine in the November 2015 issue of the SJM).

Criminal Justice Social Work (CJSW) is the weak link in Scotland’s penal reimagining. While tremendously well skilled at face-to-face work, it desperately needs to reimagine itself as an organisation, a profession, committed to the reduction of the prison population and to the creative forms of practice, including but not privileging more integrated uses of EM, necessary to achieve it. Its complacency in this respect, over the years, given Scotland’s notoriously high rates of imprisonment, is simply astonishing. Social Work Scotland’s projection of its plans for 2016-2020 can barely muster one paragraph about its role in relation to the upcoming reconfiguration of community justice, and shows no grasp whatsoever of the measures necessary to challenge the overuse of imprisonment, surely an unquestioned axiom of structural social work and of anti-oppressive practice. The longstanding fragmentation of CJSW, its lack of a distinct professional identity and a strong professional body, and the relentless genericism of social work training in Scotland may go someway to explaining this sad state of affairs but it is important that CJSW finds the courage to reimagine its better professional self and rise to the challenge of the times. The Justice Secretary can’t do it all on his own.

it is important that CJSW finds the courage to reimagine its better professional self and rise to the challenge of the times

Mike Nellis is an emeritus professor of criminal justice at the Law School, University of Strathclyde.

Currently, Scotland has one of the highest proportionate rates of imprisonment in Western Europe, which the Justice Secretary, Michael Matheson, has described as “totally unacceptable”. He wants to reduce radically the size of the prison population so that investment can be switched from incarceration to community penalties. Presently, extending the existing presumption against passing short custodial sentences appears to be the main tool in the Government’s box. Yet, will extending the Presumption work? If not, what else can be done?

Hitting the Target: Sentence Length or Case Seriousness?

Importantly, the argument for reducing the prison population tends to be based not only on its relative ineffectiveness compared to non-custodial sanctions in similar cases (e.g. Chiciros et al (2007); Scottish Government, 2011). It is also based on the view that imprisoning some people for some kinds of offences is unnecessary and disproportionate. Indeed this view can be traced back at least as far as the 2008 Prison Commission report which argued for the reduction in the use of short prison sentences on grounds of proportionality and that prison should be reserved for those committing the most serious offences and those posing a risk of serious harm (Scottish Prison Commission, 2008).

So in other words the real problem is not short-terms of imprisonment per se. Rather, it seems that the Presumption policy is using length of imprisonment as a proxy for those cases deemed less serious or posing a lesser risk of serious harm. Yet sentence-length is a very crude proxy for offence seriousness and risk of serious harm. Arguably, it would be a more direct and clearer method to specify the target directly: the kinds of cases which, as a matter of proportionality, should be normally non-imprisonable. This is the sort of careful work which could be led by the Scottish Sentencing Council (see the article on the SSC in this issue).

That said, the immediate option being presented by the Scottish Government is to extend the presumption against short custodial sentences. Will it work?

What difference will Extending the Presumption Make?

Currently, there is a presumption against custodial sentences of three months or less. In its recent public consultation, the Scottish Government suggested that the Presumption should be extended from three to six, nine or even 12 months. According to the Government’s own commissioned research, the three month Presumption “has had little impact on sentencing decisions” (Scottish Government, 2015a). One reason is sentence inflation. Rather than passing sentences of say three months, some sentencers, appear to have passed slightly longer sentences. This phenomenon, predicted at the time of the passage of the legislation, has been found in other jurisdictions (Tata, 2013; Government of Western Australia, 2015).

So should the Presumption be extended?

No fresh legislation is needed: the current Presumption period could be increased by statutory instrument. So far so simple. But let us consider section 17 of the Criminal Justice and Licensing (S) Act 2010:

A court must not pass a sentence of imprisonment for a term of three months or less on a person unless the court considers that no other method of dealing with the person is appropriate (emphasis added).

This caveat could hardly be more permissive: do not impose a sentence of x months or less unless considered appropriate. Does any sentencer make a decision which she or he considers inappropriate?

How can Prison Sentencing be Reduced in Scotland?

Cyrus Tata
Little wonder, then, that “there was little sign of [the Presumption] figuring prominently or explicitly in decision-making” (Scottish Government, 2015a).

True, under s17 a reason must be stated for imposing a short sentence, but this is hardly a challenging requirement. In such circumstances, the reasons given are likely to be terse, bland, and uninformative.

Therefore, an extension even to 12 months is unlikely to have much effect on sentencing practice: it will be a reminder to sentencers of the existing injunction that custody should be ‘the last resort’.

**So What Else Can be Done?**

**Relinquish the Policy of ‘Custody as the Last Resort’**

The prevailing approach that ‘custody is the last resort’ renders custody as the default. When other options do not seem to work, there is always prison. Prison is the only option which does not have to prove itself. While non-custodial sentences and social services seem so stretched, imprisonment appears as the dependable, credible and well-resourced back-stop. As one sheriff interviewee put it: “really when I’m imposing short [prison] sentences, that’s when we’ve run out of ideas!” (Scottish Government, 2015b)

The policy and mentality of ‘custody as the last resort’ is a central problem. We need to relinquish it. Little will change unless and until we invert that thinking by beginning to specify certain circumstances and purposes as normally non-imprisonable.

**Create a Public Principle Defining what Prison Sentencing is Not For**

Although it is uncomfortable to admit it, many people end up in prison not because their offending is particularly serious, nor because they are a risk of serious harm. They end up in prison because there does not appear to be anywhere else that can address their chronic physical, mental health, addiction, homelessness and other personal needs. While non-custodial sentences and social services are so stretched, imprisonment, on the other hand, appears as the dependable, credible and well-resourced default. Indeed, it is not entirely uncommon for people to say that they would prefer to be in prison because of a lack of help and support in the community. That is, surely, an indictment of our spending priorities.

The result is self-perpetuating: resources are sucked into the seemingly credible, robust and reliable option of imprisonment at the expense of community-based programmes which appear as weak, unreliable and poorly explained.

This phenomenon will become even more acute, unless action is taken to preclude it. We will soon see further deep cuts to community justice and community services. Meanwhile, prison regimes are improving. One cannot necessarily, therefore, blame individual sentencers, prosecutors, social workers for seeing imprisonment as the only ‘safe haven’ individuals presenting with deep-seated and complex needs. Yet in *policy terms* it is a senseless waste of resources and human potential.

A way to counteract this is to articulate a two-part public principle. First, the test for imprisonment should depend on the seriousness of offending and risk of harm. Secondly, addressing personal needs should not be a *ground for* imposing a prison sentence. Such a principle could be set out in a Sentencing Guideline judgement and also through guidance to social workers. Importantly, this principle would also concentrate policy minds: a clear target to ensure that there is sufficient resourcing of community justice and services.

**Devise more creative ways of dealing with breach of community orders**

It is often noted that some individuals appear to choose not to comply with community penalties and so custody is inevitable to uphold the authority of the court.

Yet, whether we sufficiently understand the journey away from offending is important here. The lessons from the desistance research are crucial: this shows us that the journey away from crime is far more contingent than we had previously realised. Offending is not something which can be switched off like a tap. Lapses and relapses are inevitable, and the confidence of the individual that decision-makers really want him/her to succeed is important. Thus, the increased use of review hearings, (recommended by the Prison Commission and the Commission on Women Offenders), may be valuable.

Could Electronic Monitoring (EM) be used instead of custody in the case of many individuals deemed unwilling or unable to comply? Can the more imaginative use of EM be configured as the ‘ultimate sanction’ to fill the space of prison? EM could provide some assurance about control and if *combined with* human and humane social work support be a less damaging (and expensive) way of responding to breach (Nellis, 2014).

Nothing much will change unless and until we relinquish the policy of ‘custody as a last resort’ (of which the Presumption is one example). Such thinking in fact renders custody as the default, a back-up when ‘alternatives’ are thought to fail.

Instead, we need to *exclude* certain purposes (such as rehabilitation) as a *ground for* imposing imprisonment, and begin careful work to specify certain kinds of cases as normally non-imprisonable.

**Dr Cyrus Tata** is professor of Law and Criminal Justice at Strathclyde University

---

See also blog posts on [http://scottishjusticematters.com/author/cyrus-tata/](http://scottishjusticematters.com/author/cyrus-tata/)


Government of Western Australia (2015) *Prohibition of the Six Month Sentence*


Scottish Government (2015a) *Consultation on Proposals to Strengthen the Presumption against Short Periods of Imprisonment*

Scottish Government (2015b) *Evaluation of Community Payback Orders, Criminal Justice Social Work Reports and the Presumption Against Short Sentences*


Tata C (2013) ‘The Struggle for Sentencing Reform’ in Ashworth and Roberts (eds) *Sentencing Guidelines* (OUP);
THE SCOTTISH SENTENCING COUNCIL was established in October 2015 to promote consistency in sentencing, and will provide guidelines on a systematic basis in Scotland for the first time. It was formally launched at an event in Parliament House in November and held its inaugural meeting in December.

**History**

Introducing a mechanism to promote consistency in sentencing in Scotland was a key recommendation of the Sentencing Commission, chaired by the late Lord Macfadyen, in its 2006 report *The Scope to Improve Sentencing in Scotland*. The Commission found that a perceived lack of consistency was damaging to public confidence, and concluded that “it would lead to a material improvement in the criminal justice system if there were a framework to promote, that could be seen by the public to promote, greater consistency in sentencing”. The Scottish Prisons Commission, which reported in 2008, also supported the creation of a sentencing council for Scotland, to “drive forward consistency and improve the effectiveness of sentencing”.

In 2009, after consultation, the Scottish Government brought forward legislative proposals for the establishment of a Scottish Sentencing Council to the Scottish Parliament. The Government’s stated policy aims were to “help ensure greater consistency, fairness and transparency in sentencing and thereby increase public confidence in the integrity of the Scottish criminal justice system.”

**Objectives and functions**

Under the Criminal Justice and Licensing (Scotland) Act 2010, the Council has statutory objectives to:

- promote consistency in sentencing practice;
- assist the development of policy in relation to sentencing; and
- promote greater awareness and understanding of sentencing policy and practice.

All of the Council’s work must be carried out in pursuance of these objectives.

One of the Council’s primary functions is the preparation of sentencing guidelines to assist the Scottish criminal courts when sentencing offenders. It also has responsibilities to publish guideline judgments issued by the appeal courts and to publish information about sentencing.

**Sentencing Guidelines**

The High Court and Sheriff Appeal Court, when deciding criminal appeals, can require the Council to prepare or review sentencing guidelines on any matter, while the Scottish Ministers may, at any time, request that the Council prepare or review guidelines. The Council must have regard to, but may decide not to comply with, a ministerial request; it must, however, comply with a request from the Courts. It will also be open to the Council to prepare guidelines at its own instance or at the suggestion of others.

The selection and prioritisation of guideline topics will be a critical question which the Council will need to address early in its work programme. The Council is currently preparing a business plan, to be published in autumn 2016. This will set out how it will carry out its functions over a three year period and what guidelines it will prepare.

The Council has broad discretion in how it develops guidelines and will need now to consider the most appropriate format, topics and content.

Guidelines can deal with the principles and purposes of sentencing; with sentencing levels; or with sentences for particular types of offence or even types of offender. A first question is whether guidelines should be offence or offender specific.

Guidelines must be approved by the High Court before they can come into effect. Once given effect, the courts must have regard to any applicable guidelines when sentencing an offender. If a court considers that there is reason to depart from a guideline, it must state those reasons when doing so. This requirement will help ensure the sentencing process is transparent and help make it clear how guidelines operate in practice.

**Membership**

Membership of the Scottish Sentencing Council encompasses a wide range of expertise and experience across the criminal justice system. In addition to the Lord Justice Clerk, the *ex officio* Chair of the Council, the membership is as follows:

- **The Hon. Lord Turnbull**, Lead Preliminary Hearings Judge and Administrative Judge for First Instance Criminal Cases
- **Sheriff Principal Ian R. Abercrombie QC**, Sheriff Principal of South Strathclyde, Dumfries and Galloway
- **Sheriff Norman McFadyen**, sheriff of Lothian and Borders sitting in Edinburgh
- **Allan Findlay**, stipendiary magistrate in Glasgow and Strathkelvin, sitting in Glasgow
- **Gillian Thomson**, Justice of the Peace in Tayside, Central and Fife, sitting in Stirling
- **Catherine Dyer**, Crown Agent for Scotland, prosecutor member
- **Stephen O’Rourke**, advocate member, Terra Firma Chambers
- **John Scott QC**, solicitor member, Capital Defence Lawyers
- **Assistant Chief Constable Val Thomson**, police constable member
- **Sue Moody**, victims expert, Chair of the Scottish Refugee Council
- **Professor Neil Hutton**, lay member, Professor of Law at the University of Strathclyde

---

Scottish Justice Matters : March 2016
The Lord Advocate Frank Mulholland QC; Cabinet Secretary for Justice, Michael Matheson; and former Chair of the Council, Lord Carloway, then Lord Justice Clerk (pictured above left to right) at the launch of the SSC at Parliament Hall, Edinburgh in November 2015.

The Council has extensive experience of sentencing matters. Membership includes representation from each court tier, from both a judicial, prosecution and defence perspective, and importantly, includes lay members. Collectively, the Council has a broad and deep understanding of the impacts of sentencing on offenders, victims, families, communities and society more widely. This will help to ensure that the Council is able to take into account the range of diverse issues relevant to the sentencing process in carrying out its work.

**Lessons from elsewhere**

There are well established sentencing guideline frameworks in other jurisdictions, notably the United States (which has a federal Sentencing Commission and guideline systems in over a third of its states), Australia (with sentencing advisory bodies in four of its six states), and England and Wales (where a Council was created in 2010).

While the High Court in Scotland has had, since 1996, the ability to issue guideline judgments in appeals (in which the Court sets out the appropriate sentence in cases similar to that before it), the Sentencing Council will provide a mechanism for producing sentencing guidelines on a systematic basis for the very first time. Given the fundamental nature of the task in hand, the Council is eager to learn lessons from elsewhere to help develop the best approach for Scotland. This will be especially important in the Council’s formative years, during which the foundations of this new framework for sentencing will be laid.

With this in mind, research is being carried out into sentencing systems in other countries. This will include a programme of engagement involving counterpart bodies in neighbouring UK jurisdictions and beyond. The Council has already established links with the Sentencing Council for England and Wales and with colleagues in Ireland, Northern Ireland and Australia.

**Research and information**

As well as benefiting from the experience of other established systems, it will also be essential to gain a comprehensive picture of the current practices in Scotland. Members will soon be embarking on a series of visits and events designed to broaden understanding of different aspects of the sentencing process and highlight examples of best practice. The Council will also be able to carry out, commission and disseminate research relevant to sentencing, as well as the effects and efficacy of different disposals. It is important that the Council’s decisions are informed by robust evidence and that the potential effects of guidelines are as well understood as possible. A research commissioning framework is currently being developed, with the principles of fairness, transparency and best practice in procurement in mind. This will enable the Council to launch commissioned projects swiftly.

In developing individual guidelines, the Council will actively consult and seek input from those with relevant experience and knowledge, including judicial office holders, practitioners, those working in the administration of criminal justice, academics, and, not least, individuals with experience of the criminal justice system.

**Openness and inclusion**

In addition to the work described above, a number of decisions were made at the Council’s first meeting demonstrating its commitment to transparency and to working productively with others.

- All sentencing guidelines will be subject to full public consultation before being finalised. Other measures include:
  - easy read documents prepared where appropriate for the public to help explain the sentencing process generally and the Council's work in particular
  - details of Council meetings published on the Council’s website, including non-confidential or sensitive meeting papers
  - website development to provide explanatory information on sentencing, including a jargon-buster

It is hoped that all of this work will also serve to support the Council’s objective to promote greater understanding and awareness of sentencing.

The advent of the Sentencing Council marks the start of what Lord Carloway has termed “a new era for sentencing” in Scotland (Scottish Sentencing Council, 18.11.15). Through the Council there will be opportunities to: understand better the effects and efficacy of different sentencing options; provide the courts with better tools and information for carrying out what is often a difficult and complex task; expand the field of knowledge in relation to sentencing; and demystify the process for the public, and thereby improve public confidence, in the criminal justice system.

**Ondine Tennant** is the secretary to the Scottish Sentencing Council. She is part of the senior management team of the Scottish Courts and Tribunals Service and previously had responsibility for establishing the Scottish Civil Justice Council.
"The purpose of punishment, is nothing other than to dissuade the criminal from doing fresh harm to his compatriots and to keep other people from doing the same." (Beccaria, 1764)

**BREAKING** the cycle of offending requires more than the willingness of a young man or woman to engage with a mentor. It is a journey that can be full of obstacles, depending on their own individual circumstances and for most it can seem like their punishment continues after leaving the prison gates.

In 2004, I was sitting at a table in a social work building, completing a 200 hours community service order. I was learning how to do cross stich and making handicrafts to be sold at craft fairs, the sale of any goods to be donated to local charities such as Woman’s Aid. This might not seem like punishment (see the Scottish Daily Express by Mills R, Feb 2011 for example of a media view), but for me it offered a safe environment to contemplate my past and look to the future. The offence I had been convicted of did carry a custodial sentence but being given a community order meant the impact of my family, finance, housing and employment was lessened.

However, the whole process from being charged to sentence took almost two years, and for that period, my life was in limbo. Indeed the wheels of criminal justice turned very slowly, and this is echoed by the young men I work with now. It is very hard to move on and make positive changes in your life when you have outstanding charges still to be dealt with.

As I neared the end of my order, I was allocated a worker from a voluntary agency that specialised in employment and disclosure, and they sowed the seeds of using my own experiences to better the lives of others. However, I needed to go on my own personal journey and understand why and how I got into offending, if I was to use my experiences in a positive way. It was not about justifying my behaviour but accepting the impact of factors, such as poor mental health, and domestic abuse, had on my life.

It was a long journey, with barriers to overcome and included achieving a BA (Hons) in criminology, before I reached my current occupation with The Wise Group, working as a mentor for the New Routes PSP.

Since inception, over 1800 young men have signed up voluntarily to the programme, which shows there is willingness for them to turn their life around. It is a job I feel very passionate about and enjoy every moment of. My role is challenging and frustrating but also very rewarding. It has made me realise that whilst there is no excuse for offending, there is always a reason. It is possible to change your life around with the right guidance and support. Mentoring is not rocket science and can be summed up simply by helping someone to help themselves, it encourages and supports people to develop their skills, improve their performance and become the person they want to be (Parsloe 1995).

"Don’t let your past dictate your future", is something I frequently say to the young men on my caseload. With the exception of a small minority, most young men I work with do want to lead a crime free life, move on and often speak about their hopes and aspirations when they meet me for the first time in a prison setting. The young men I work with are aged 18 - 25, serving less than four years and are prolific offenders. They have in excess of 10 convictions, although some have built up over 50. For most, this is not their first time they have been in prison, and many have done sentences in Polmont YOI prior to going to adult prison. 

The tough image of a 21 year old man walking out of the prison gate with a swagger hides the young boy who has no idea where he will be sleeping that night

However, whilst it is accepted that those who commit crime need to be punished, one has to question whether the use of short term sentences serve any purpose. Prison is seen as the ‘gold standard’ by the general public and politicians; however it fails to achieve one of its primary aims, which is to reduce offending. There will always be theoretical and policy debate on how society deals with offenders and new sentencing systems are frequently being introduced or recommended, all with a set of general principles to guide them, however it would be wrong to use the assumption that sentencing is society’s major defence against lawbreaking, and the protection of the public. Punishing someone who has committed crime has to be beneficial not just to the community but to the offender also. It can be very frustrating working with a young man who is making positive steps to move forward, and then having to stop any progress they are making due to another short term sentence being imposed for an outstanding charge. It could also be argued that imprisonment is for some young men an extension of the time they have already spent as a
child in a residential or secure unit. They have become institutionalised and reintegrating back into the community after spending most of their young life in the ‘cared for’ setting is a difficult task.

They face challenges with housing, benefits, substance misuse and mental health before they can start to look at long term goals such as training or employment. Therefore, it could be argued that the reintegration of offenders back into the community is a process that continues long after an offender has completed their sentence and desisting from further crime.

**even the shortest of prison sentences becomes a lifelong punishment, far beyond the prison gate**

All of the young men on my caseload have experienced difficulties reintegrating back into the community, but especially those who are homeless on liberation. Within the area that I work, the options are very limited. The majority are offered a place in a homeless unit, which is often miles from their family, and this can have an impact on family support and relationships. The tough image of a 21 year old man walking out of the prison gate with a swagger hides the young boy who has no idea where he will be sleeping that night. Being told there is nowhere except a place in homeless unit, will often be enough for previous behaviours to return. They have awareness that the use of alcohol or drugs is prevalent within the units, and some have reported how difficult it is to avoid substance misuse when it is so openly available. Therefore, it not a surprise when someone decides to sleep rough or ‘sofa surf’ rather than go to a homeless unit. However, regardless of the accommodation that is offered having someone guide the young man through the process can ensure a smoother journey for all parties concerned. Whether it is trying to access housing, make a claim for benefits or get registered with a G.P. (the list goes on), hoops have to be jumped through.

Reflecting back I firmly believe that having someone at my side to guide me through some of the difficulties I was experiencing definitely made a difference. As someone who has been through the criminal justice system I can empathise with the young men on my case load when they feel the door is consistently being shut in their face. Every person on my case load is an individual and they will all have their own story of when and how their criminality began. However, just as the offender needs to change their attitudes and behaviour so does the systemic obstacles put in place by the statutory sector need to change. It is the third sector that often leads the way in new innovative approaches to working with offenders, and they are not afraid to put their head above the parapet. Although even with third sector led schemes aimed at supporting ex-offenders into employment, opportunities can be halted by the bureaucracy of an excessively complicated benefits systems. An example of this would be a young man who was offered a real job after engaging with a community employment project, only to be told he could not take it because he had been placed on a DWP work programme, and therefore obliged only to take offers from the programme provider because of their ‘payment by results’ funding.

I too have been refused employment due to an organisation having the ‘fear factor’ of employing someone with a criminal record, the risk of the media running a story “Charity employs ex-offender!” was too great. Attitudes need to change if those that have committed crime are to be reintegrated into the community, otherwise it can seem like even the shortest of prison sentences becomes a lifelong punishment, far beyond the prison gate.

**Sharon Mercado** is a mentor with the Wise Group, “an inclusive organisation that values diversity, and fully embraces the employment of people with an offending past”.

---

**References**

Beccaria C (1764), *Dei delitti e delle pene, (On Crimes and Punishments)*


FOR THOSE OF US who have charted the supersizing of America’s carceral state, the last five years have witnessed shifts in penal discourse that none of us imagined (or at least weren’t clever enough to predict in print). Perhaps the first bell was the Supreme Court’s 2011 decision in *Brown v. Plata*, upholding a mass prison population reduction order against California and signaling an end to judicial tolerance of the inhumane conditions arising from chronic over-crowding and disease burdened prison populations that have become normal in the era of mass incarceration. Courts have intervened in moments of populist punitiveness in the past only to see the backlash feed the punitive turn. In 2014, California voters signalled their approval of the Court’s action by approving a referendum that reduced sentences for specific drug and property crimes, resulting in further immediate reductions in the prison population.

Last year, 2015, saw a bipartisan bill to reduce drug sentences introduced in Congress with wide support (albeit uncertain immediate prospects in a Presidential election year). President Obama broke new ground, visiting a federal prison, decrying overcrowding and the futility of long sentences for non-violent drug crimes, and most recently taking steps to reduce the use of solitary confinement in federal prisons.

Courts have intervened in moments of populist punitiveness in the past only to see the backlash feed the punitive turn

So far the actual reductions in the scale of the carceral state have been extremely modest, and much of it has consisted of shifting populations. For example, the majority of people who avoided prison thanks to *Brown v. Plata*, served sentences of probation, or even incarceration in jail rather than a prison (the former in the US is mostly limited to people awaiting trial or serving short sentences for less serious crimes). It remains most uncertain how much this shift in tone and direction of penal discourse (and its considerable “cooling” to borrow Loader and Spark’s notion of a heated penal climate) will ultimately produce significant reductions of the US carceral state. These shifts in discourse may have to be pushed much further before we can expect the political and policy shifts necessary to produce significant long-term reductions; and which will be resisted strongly by existing interest groups within the carceral state. This runs up against retail political calculations (which so far are encouraging for politicians willing to test the sentiments of voters) and those of our penal imaginary (Carlen 2008), the set of anchoring presumptions, assumptions, and associations, passed with little change from one generation to another or reconfigured for a rising generation by dramatic and structurally significant historical events.

In my most recent book, *Mass Incarceration on Trial* (2014), I explored *Brown v. Plata* with an eye toward the transformative interruption of the penal imaginary that had set off the carceral boom in the late 1970s, and how it might be further transformed by the crisis of mass incarceration exemplified and accentuated by *Brown v. Plata*. In the photographs appended to the majority opinion (itself a highly unusual practice), Americans willing to look could see some startling social facts about the prison population. They could see older and disabled prisoners; visible symbols for the 40 percent of prisoners suffering from chronic illnesses like diabetes and hepatitis. They could see California’s
efforts to address the severity of mental illness in the population through booth-sized cages designed to keep psychotic prisoners from suicide. Above all they could see hyper overcrowding, in irregular areas filled with three-tiered bunks, like some kind of emergency refugee camp.

These images, and the social facts for which they speak, have real salience for the penal imaginary that was established by the transformative penal crisis of the 1970s that saw high crime rates, urban and prison riots, and other signs of social disorder, combined with the wrenching transformation produced by the beginnings of globalisation, shatter the post-war welterist consensus (Hall et al. 1979; Garland 2001). For many, the uprising at Attica prison in 1971, and the subsequent massacre of both people and the truth by the state exemplified the new way of seeing prisoners. Portrayed as savagely murdering the prison officers who were taken captive during the uprising and held as hostages (but actually killed mostly by the massive assault force of state police and corrective officers who retook the prison in a surprise attack accompanied by tear gas), the mostly black and Latino prisoners were seen afterwards as irremediable enemies of society, only contained by the most violent and stringent means (Thompson 2014).

the current penal crisis is entirely internal, produced by over-long sentences and parole revocation practices rather than crime

In contrast, the current penal crisis is entirely internal, produced by over-long sentences and parole revocation practices rather than crime, which remains at or near a generational low. Contrast the famous images of prisoners holding guards at knife point on the walls of the prison at Attica, with Plata’s portraits of prisoners as vulnerable and suffering subjects. This may be a moment when, to answer a question that Bernard Harcourt asked some years ago (2008), it might be possible for the public to reimagine the convict. This might also be a point where the basic legitimacy of the extended and aggressive version of the carceral state (including prisons and police) evident since the 1970s, is questioned.

Since the book I have reflected further and think it requires more than revisiting the features of our penal imaginary laid down by the transformative crisis of the 1970s. We can already see some of the effects and limits of this partial recasting. The war on drugs, dependent on an image of people convicted of drug crimes as being potentially violent and incapable of being rehabilitated, is now widely discredited and drug admissions to prisons have gone down since the start of this century. The high cost of incarceration, once irrelevant to the seemingly inelastic demand for incapacitation through incarceration, is now becoming a crucial part of the political discussion (Aviram 2015). Yet even the success of alternatives to incarceration for low level drug and property crimes comes with substitution of community supervision sanctions like probation that impose high costs and often provide few services to people whose life in the community is typically already at the economic and social margins. Further, reform is absolutely stalled at low-level crimes. More serious drug and property crimes, and virtually all crimes definable as violent or against the person, are currently off the table for sentencing reform.

My current research concerns how far back we may need to go in our generationally transmitted penal imaginary to unlock ourselves from the extended version of the carceral state produced by the last transformative shock in the 1970s.

The closest transformative moment, associated with the Progressive movement in the US at the turn of the 20th century, and associated discursively with both eugenics and social work, has left us with an extended system of community based penal supervisions which seem likely to entrap those who might be decarcerated by current reforms. This era, with its strong embrace of scientific racism, has also left us a legacy of associating violent crime with African Americans (it used to be called “black crime” but today is framed in seemingly more neutral terms as “black on black crime”). A century earlier, the birth of the penitentiary (Foucault 1977; Melossi and Pavarini 1982) and the parallel construction of large urban police forces, transformed the carceral state from a small network of courts and jails (along with public execution sites) to a permanent and massive bureaucracy, unlikely to accept any permanent reduction in the scale of the supersized carceral state without serious challenge to its legitimacy. Finally, the birth of the modern nation state, beginning in England as early as the 16th century, sees the public seizure of penal justice as a crucial anchor to legitimacy. Drawing on the biblical casting of punishment as a holy enterprise (so long as directed at the guilty), this early re-moralization of the penal enterprise (the first of many to come) has left governance through crime as a powerful handle in each generation.

Today’s crisis of mass incarceration in the US (and parallel developments in the UK and beyond) opens a crucial opportunity to reimagine what we want from penal justice in contemporary democracies. Indeed, unless that discussion becomes one committed to plumbing the deepest chambers of imagination, it is unlikely that this opportunity will see more than a light redressing of the narrative behind mass incarceration.

Jonathan Simon is the Adrian A Kragen professor of law, UC Berkeley, California, USA.

Margaret Malloch interviews Nick Burgess, Criminal Justice Service Manager, Falkirk Council.

**MM:** Can you begin by telling me about some of the things that have been happening in Central Scotland and your vision for Criminal Justice Social Work? I'm particularly interested in the reconstruction of the walled garden in Dollar Park.

**NB:** We have been trying to be as imaginative as possible, allowing managers and staff to share ideas and make a difference, being aware that you learn from things that don't always work out. Dollar Park (Falkirk Council 17.8.15) came about largely because there was some grant funding available to improve areas for public access so we worked closely with Friends of the Dollar Park Project, a community group, to look at what we could actually do and what our commitment could be. We took a brave decision, I think, locally over several years that we would concentrate unpaid work resources on developing the walled garden. It meant that we were there six days a week, sometimes two or more squads were down there working. And now we contribute to the maintenance of the garden with funds from Fiscal Work Orders under the supervision of the Cyrenians coordinator.

Most needs of persons with convictions are well known: poverty, inequality, attitudes, substance misuse or trauma, education and employment. Where it comes to those needs, we try and work with our partners as best we can, with joint time and/or funds to respond to these needs. Although 75% of people get through their orders successfully, some fall through the net or lose their way after the order has finished. How can we support these people? We need to improve follow on universal services so that they don’t come back through the court system.

We have created increasingly comprehensive resources for women including a mentoring scheme to provide follow-on support. We work in partnership with the Alcohol and Drug Partnership and health. We’ve got our own women’s development worker paid for by Criminal Justice and we’ve been working with the Community Justice Authority to get more money for a healthcare assistant. Our intention is to offer a dedicated space for women where they will be seen separately from men. I’m not sure that that is very different in regards to some other areas but a lot of it’s been organically grown.

**MM:** So it sounds like the model you have is responsive to local needs?

**NB:** We hope it’s responsive; we have a lot of requirements from central government, but local flexibility is also needed. The important thing is to get hold of the money, have an idea about where the gaps are, and how you try and fill them. Sometimes that’s not so good when you’re not sure what’s happening with other services and we know that there is vastly reduced funding across some of our partners. We have to consider who our natural allies are for the future and how we can transform services when we’re in that situation. I think the next few months are going to be pretty difficult.

**MM:** And are you referring specifically to non-statutory agencies?

**NB:** Well the non-governmental organisations and particularly the third sector are often very reliant on the money they get from the public sector. And because our funding is annual it makes it doubly difficult. And the sorts of services that we require particularly around the employability field change quite radically. It makes it extremely difficult for supervising officers to have a good grip of all of that; it’s a bit splintered. I’m hopeful that with the Scottish Bill going through that will at least help some of the employability side.

We do peer mentoring for women with the Cyrenians and that grew out of the employability project that the Cyrenians were doing for us and the employment and training unit. But again that’s a bit tricky because there’s quite a cluttered landscape regarding women offenders. We’ve got the Shine Project which deals with mentoring for some women. They might want to start peer mentoring, so you’ve got what we’re trying to do locally and how do you fit that in nationally?

Some of the services that we purchase, like the Richmond Fellowship, provide additional support in line with the Supporting People Guidance. We knew that mental health, autism and learning disabilities were a feature for quite a few people in Criminal Justice. So we went through a procurement exercise and asked the third sector to provide support regarding not only mental health but also around the Supporting People Principles: keeping your front door secure against others, being able to budget properly, to shop, eat nutritious food, to support universal services.
Through that we’ve got a key worker approach and a mental health support worker. That was a way locally of trying to be responsive to needs when people come into crisis. That seems to be working quite well at the moment. How much we’ll be able to do that over the next few years I don’t know because the funding is likely to radically change for Criminal Justice from 2017.

**MM:** So when you say change do you mean reduce?

**NB:** We suspect that the total amount of money will remain the same for Scotland. At the moment the formula is two-thirds workload and one-third need, however, we expect the formula to change to 50% workload and 50% the economic and social impact of crime. So there is some debate about how the economic and social impact of crime is measured. What it’s likely to mean is that local authorities with fewer areas of multiple deprivation are likely to have funding reduced over time compared to those with greater preponderance of those areas, who will have their funding increased.

Given that Criminal Justice Social Work is a reactive service, you can have areas with lower crime rates and higher rates of court orders so local authorities do need the resources to deal with the number of individuals sent by the courts regardless of deprivation.

**MM:** Given that context, how do you continue to address some of the needs that you’ve identified and how do you bring other agencies together?

**NB:** The Christie Commission (Scottish Government 2011) set the scene for public bodies to transform services. I see the Integration Joint Boards and abolition of Community Justice Authorities in the light of that report.

In any period of change, particularly when finances are so tight we have to use the overarching strategy set by governance, alongside our professional view of how to achieve common goals with our partners.

I expect we will be forming, storming and norming and hopefully performing in due course!

**MM:** In England there are attempts to introduce payment by results. Do you see that happening here?

**NB:** No I don’t think the Scottish Government has an appetite for that. And I don’t see how we would make that work. The needs of the populous haven’t really changed. I would much rather look at how we concentrate on areas of multiple deprivation. For example I was at a meeting last week about educational attainment. Children who come from the catchment area in an area of Falkirk have an 8% chance of getting five GCSEs at age 15-16. If you come from the highest performing area you’ve got a 70% chance. 70% as opposed to 8%!

What priority services do we need for such areas to improve that? It’s just continuing that cycle of deprivation if we don’t address it. So I would hope that we can try and do something better for the areas where more of the problems tend to be concentrated. We know that 50% of our service users come from areas of multiple deprivation in Falkirk: only a few streets to be honest. We know that we can do something about it because we had similar issues in another area in the 1990s. There were really big problems there, but the Council with a bit of effort, took over a flat and had services going into the area and eventually we sorted it out. We need to do more for areas with concentrated problems in a more collective sense with health, and everyone else.

**MM:** Why do you think that isn’t happening?

**NB:** I think the Christie Report provided backing for joining up services, but five years on there is still much to do … I think there are things that we can do in Criminal Justice, for example, around poverty we might have the council’s debt advice and welfare benefits team come along and at the same time as we’re doing the literacy assessments people get an opportunity for a benefits health check. We’re also looking at a health check as well with the health improvement team. We’re trying to get a healthcare assistant so we’re hoping that if we can frontload some of those checks right at the start of an order it will save time later on and hopefully a person can make more rapid progress.


Falkirk Council (17.8.15) Community payback restores walled garden

RESTORATIVE JUSTICE IN SCOTLAND

Scottish Justice Matters is delighted to host the announcement of a new practice support network for restorative justice practitioners in Scotland.

In support of the maintenance and development of good practice in restorative approaches in Scotland, the Scottish Restorative Justice Forum (SRJF) is establishing a practice network for restorative practitioners in Scotland. The idea was endorsed at a mapping event held by the SRJF on 27 November 2015. This notice outlines the purpose of the practice network, its potential benefits and solicits your support in implementing this initiative being developed by experienced practitioners, Ian McDonough and Niall Kearney.

The purpose of the practice network is to provide practitioners with a ‘safe space’ to develop their knowledge and reflect on issues in practice, and also to benefit from the experience of peers whose work, in the same or similar area, is underpinned by restorative principles. It is not intended to take the place of formal management or case supervision.

Improving knowledge and reflecting on practice are recognised as important elements in the overall provision of supervision, and are therefore associated with the delivery of a number of benefits, including:

- supporting staff in their work
- providing more effective practice
- contributing to staff retention

Recognising the financial restraints on many sectors in the current climate, there is no upfront charge for this initiative. There is, however, an expectation that staff will be released to attend as part of their normal working hours as long as there is no adverse impact to local service delivery. In addition, we ask that agencies involved would be willing on occasion to host the practice network.

We anticipate that the practice network will meet quarterly for approximately two hours and will take the following general format: input and discussion on a technical aspect of practice (30 mins); discussion on specific current practice issues (60 mins); identification of future technical inputs and practice issues, and any other business (30 mins). We intend to issue certificates to those who attend as evidence of their commitment to continuing professional development.

We hope that you will see the advantages of enabling staff engaged in restorative work to become involved in the network. We take this opportunity to thank you for your continuing support for the development of good restorative practices in Scotland.

If you are interested in joining the practitioner network (or for other information about the RJ Forum) please register your interest at: http://eepurl.com/bloUlf or email Miranda Nicoll at: MNicoll@sacro.org.uk

Joanna Shapland on behalf of the Scottish Restorative Justice Forum

Ulster University will be running the well regarded Foundation course in Restorative Practices at the University of Strathclyde in June.

Monday 6th June - Friday 10th June 2016 (9am-5pm) followed by a reflective learning module (distance learning).

Completion of both parts leads to RJC accreditation.

Please contact Tim Chapman for more details including fees:
tj.chapman@ulster.ac.uk

1 Social Care Institute for Excellence research briefings - 43 Effective supervision in social work and social care
As we head towards the Scottish Parliamentary elections in May 2016, what do you think should be the important criminal justice issue that voters should focus on and why?

Christine Grahame MSP, Scottish National Party

The key question in criminal justice is how we deliver justice for victims while effectively reducing crime and reoffending.

As was announced last June, work is underway on plans for a new, smaller national prison for women, and for small community custody units. Women’s imprisonment is an important test due to the high number of short sentences given to women offenders. The smaller community-based custodial units will provide accommodation as women serve out their sentence, with access to intensive support to help overcome issues such as alcohol, drugs, mental health and domestic abuse trauma which evidence shows can often be a driver of offending behaviour. The units will be located in areas close to the communities of female offenders so that family contact can be maintained.

There will also be more use of community-based alternatives to short-term prison sentences, including restricting liberty through the increased use of electronic monitoring, combined with support in the community, and more funding will be made available for community-based services which provide robust and effective alternatives to custody.

The Scottish Government is looking critically at the presumption against short sentences, which would affect both men and women if changed.

We are supporting new efforts to deliver effective alternatives to custody: the national roll out of Fiscal Work Orders provides an efficient response to more minor offending, while Community Payback Orders providing the court with a robust and flexible community sentencing tool.

Simply locking women up in a large facility doesn’t work. We’ve seen the damaging impact that going in and out of prison has for the women, for their families and for their communities.

Rather than being pre-occupied with old arguments over “tough” or “soft” options, the SNP’s aim is to develop a smarter, progressive approach to criminal justice that tackles the underlying causes of crime.

John Finnie MSP, Scottish Green Party

As a former police officer, watching politicians compete in displays of macho posturing on justice policy can be a painful experience. Westminster politics in particular has long been locked in an arms race about who can be toughest on criminals.

This all goes down well with certain tabloids of course, but it doesn’t reduce crime.

I’m proud that Greens don’t care about looking tough on criminals; instead in the coming election we’ll be arguing for what is proven to genuinely reduce crime - accountable local policing, serious crime prevention, constructive sentencing and rehabilitation. I want to show how the Scottish Greens will tackle justice matters in the next Parliament.

The single national police force doesn’t have to be the unaccountable monolith it has become. By devolving more spending power and decision-making to local level, overseen by democratically controlled police authorities, we would be able to make the police accountable to the people they are supposed to serve.

Poverty, homelessness, addiction and mental illness continue to be factors which all contribute to offending: creating victims, damaging our communities and wasting our potential. The Scottish Greens will invest in addressing the underlying causes of offending.

In 2014/2015, 6% of all statutory homeless applications to our local authorities were from those leaving prison and a startling 30% of those released from prison will be unsure of where they will stay following their release. We must ensure that those leaving our prisons have a place that they can call home.

Since 1999 the Scottish Greens have shown leadership on tackling crimes motivated by prejudice based on: race, religion, sexual orientation, gender identity or disability and this is something that we will continue to press on such crimes.

We must and increase support for victim support, including sustainable and long-term funding for violence against women support AND advice services.
Scottish Conservatives
Margaret Mitchell MSP,

The issue of support for vulnerable children and young people is not often explicitly mentioned as a criminal justice priority, despite the fact that it significantly impacts the criminal justice system.

If vulnerable children and young people aren’t supported, crimes considered ‘low-level,’ such as vandalism, can escalate to more serious offending behaviour.

Furthermore, the statistics on ‘looked after’ children provide sobering evidence of the need for care and support for these children. Fifty percent of the Scottish adult prison population and one third of young offenders are ‘care experienced.’

In addition to this young people who are ‘looked after’ are seven times more likely to be excluded from school than their peers and nearly half of 5-17 year olds in care were diagnosed with a mental health disorder.

If support is not available for these children then there is a temptation to self-medicate using alcohol or drugs which then can then become a gateway to the criminal justice system.

Fast evolving criminal justice issues include cyber-crime and internet bullying, which can be addressed if young people are made aware of what constitutes unacceptable behaviour. Education is also a tool to tackle issues such as knife crime. Here, organisations such as ‘No Knives Better Lives’ and ‘Ditch the Knife Cherish Life,’ hold effective and successful school campaigns which are credited with the reduction in knife crime in Scotland.

Finally, road crime affects families across Scotland when teenagers are tragically killed every year in car collisions or accidents. Again, similar school seminars making young people aware of the potentially horrendous consequences of speeding and driving recklessly is a powerful and non-legislative way to address this issue.

Clearly, a holistic approach is required to tackling the complex challenges and potential hazards children and young people may encounter, in order to facilitate a reduction in crime and reoffending.

Scottish Conservatives

Scottish Liberal Democrats
Alison M’Innes MSP,

Voters are right to expect that their government will use the powers it has at its disposal to keep communities safe, tackle inequality and promote social cohesion.

Scottish Liberal Democrats will do just that because we want everyone to achieve their potential. That means people need to feel safe in their communities, and victims must be supported, but it also means we need to help those who have offended get back on track.

Prison has proven to be hugely ineffective, even destructive for people given short-term sentences. It causes untold collateral damage to prisoners’ families. More children in Scotland each year experience a parent’s imprisonment that experience divorce. Yet Scotland continues to have one of the highest prison populations per capita in Western Europe, and reoffending rates remain stubbornly high.

We want to change that.

Too many people still find themselves in the criminal justice system because of poverty, addiction and mental health issues. We support intensive intervention with those at high risk of first-time offending and we will support the transfer of resources from ineffective short prison sentences to robust and effective community justice options to improve reoffending rates. A presumption against prison sentences of less than 12 months would be a catalyst for the sort of radical reform that is needed.

For those who require a custodial sentence, meaningful rehabilitation, education and support is essential so they are able to leave prison with the skills needed to be active and constructive members of society.

Taking that kind of concerted action will benefit everyone. Communities will be safer, victims protected from further criminality and those who have offended will have a chance to set out on a different path rather than be caught in the revolving door of the criminal justice system.

Scottish Liberal Democrats

Scottish Labour Party
Graeme Pearson MSP,

The next election will decide whether an SNP Government that has held power for almost a decade will continue in power. Though the Justice Secretary has maintained a consistent rhetoric alleging a fairer and safer community, the Scottish Government’s commitment to carry through effective reforms in this regard has been chaotic.

Scottish Labour will commit to ensuring victims will truly sit at the heart of the criminal justice system. We will deliver a system designed to support victims and witnesses from the time of reporting of crime until their reasonable needs have been provided for as they experience the system and beyond. We will also seek to ensure with the new Lord President, the culture of courts is modernised to enable those providing evidence to the courts are given every opportunity to provide it effectively by offering protection from threat and ensuring technology is used to allow evidence to be given via CCTV and other means.

It’s clear the link between their communities and our police officers has been lost, despite the hard work and dedication of frontline officers. That’s down to the SNP’s drive to centralise and the failure of ministers to put in place proper structures to hold the police service to account and the drive for a ‘one-size-fits-all’ policing model. Police Scotland needs a shake up so that power once again lies with local decision makers and we get back to the kind of community policing that made Scotland the envy of the world at one time, along with improving the relationship between the Scottish Police Authority (SPA) and local communities.

We will also remove the Offensive Behaviour at Football Grounds legislation that has unfairly criminalised Scottish football fans across the country. We believe there is a sufficiency of law to deal with offensive, threatening and violent behaviours. The promises made by the Cabinet Secretary that a new law would clarify the situation and be beyond challenge in the courts have proved unfulfilled.

The Scottish Labour Party

Scottish Justice Matters : March 2016
IN A recent edition of *Scottish Justice Matters*, McVie, Norris and Pillinger (2015) highlighted the decline in crime in Scotland over the last two decades as measured by both police recorded crime statistics and victim survey data. Since 2007, government data shows that there has also been a decline in the rate of conviction in Scotland, mainly as a result of a drop in convictions amongst young people (Matthews 2014). The timing of this decline is interesting as it matches the introduction of the Getting it Right for Every Child framework (GIRFEC) and, more recently, the changes to the system of youth justice in the form of the Whole Systems Approach (WSA).

According to the findings of the Edinburgh Study of Youth Transitions and Crime (McAra and McVie, 2010), such changes should have had the effect of reducing youth offending. Unfortunately, there is no national data that would allow us to test whether young people are less likely to offend now than they were in the past, and so we do not know if this decline in youth convictions really represents less youth crime. One possible issue confounding declines in convictions was the programme of summary justice reform started in 2007 which may merely have steered young people away from the courts and into different kinds of non-court disposals. The aim of this article, therefore, is to explore whether there is likely to have been a real drop in offending or whether people who offend in Scotland are merely being dealt with by a new set of non-court disposals, by comparing trends in convictions with the data we have on the use of non-court disposals. Given the importance of youth crime to declining convictions rates, particular focus will be given to data regarding those of 21 and under.

**Out of court but in the system?**

In 2007 the Scottish Government launched a programme of summary justice reform (Scottish Government, 2011). This process involved an increased emphasis on the use of out-of-court disposals by police and procurator fiscals. These ‘direct measures’ were intended to resolve cases without them being sent to court, in order to save the courts time and money on cases that were unlikely to have required a court disposal. We would expect, therefore, that these non-court disposals are likely to have had an impact on the number of convictions imposed by the courts.

The Scottish Government has published figures about the use of non-court disposals since 2009/10 (available online at http://www.gov.scot/Topics/Statistics/Browse/Crime-Justice/PubCriminalProceedings) and by comparing data on convictions with data about the number of non-court disposals served we can get a better understanding as to whether the drop in the number of convictions is offset by more cases ending in non-court disposals. Of course, this cannot definitely tell us whether offending by young people has declined, but it can help to provide some more clarity by ruling out one potential system effect which might have caused the recent decline in convictions in Scotland.

What do the data tell us? Figure One shows a breakdown of the total numbers of direct measures given to all men and women in each year between 2009/10 and 2013/14. The solid lines represent numbers of convictions and the dashed lines show total numbers of police and procurator direct measures (see note below). The figure is split between men and women, using different scales to highlight the trends in the data.

Overall, the picture is mostly one of decline in both convictions and non-court disposals. For men, the figures for the total number of convictions and non-court disposals show overall declines between 2009/10 and 2012/13, but then both rise sharply to 2013/14. For women, there are fewer convictions and non-court disposals, but they also show an overall decline between 2009/10 and 2012/13 with a sharp rise to 2013/14.

**Figure 1: Trends in Convictions and Non-Court Disposals in Scotland, 2009/2010 to 2013/2014**
At this stage it is difficult to know what to make of this jump in non-court disposals in 2013/14. The soon-to-be released 2014/15 figures for non-court disposals will help to show whether this increase in 2013/14 is a one-off, or whether it might be something more substantial.

Figure Two shows the same figures split into three age groups. By looking at the two sets of red lines we can see that numbers of non-court disposals and numbers of convictions for those under 21 both show overall declines between 2009/10 and 2013/14, and the rise in non-court disposals between 2012/13 and 2013/14 is much smaller for young people than it is for those aged 21-30 and over 30. There are not only fewer young people being disposed of in courts but also fewer disposals from police and procurator fiscals, and this drop is true for both young men and young women. This is a very different picture than for those of 21 and over. For example, for those over 30 there are increases in both non-court disposals and convictions between 2012/13 and 2013/14, which could suggest that increases in convictions for this group may have been even higher without the introduction of the new non-court disposals.

A real drop in youth crime?

Overall, based on this analysis of non-court disposals I think we can have more faith that declining convictions for young people do not just reflect young people being processed in a different part of the justice system. This is also in line with an interpretation that GIRFEC and WSA have had the desired effect of reducing youth offending. But we need to be very careful when drawing conclusions about offending from these data, as there may be other factors at play that are affecting whether cases come to the procurator fiscal or are reported to the police, or indeed affect whether and how young people become involved in offending.

However, this analysis helps to rule out one source of bias that could come from relying on convictions data alone when trying to understand changes in youth crime in Scotland. While the discussion here has focused on young people and the positive news of declining numbers of convictions and non-court disposals, we should not ignore the worrying increase in the numbers of disposals for those 21 and over, as shown in Figure Two. This divergence in the numbers of young people and older people involved with the justice system emphasises the complexity of the crime drop in Scotland, and highlights the benefit of making use of the multiple sources of data we have to look beyond the headline figures.

Note: These figures are for Anti-Social Behaviour Fixed Penalty Notices (ASBFPNs), Formal Adult Warnings (FAWs), Procurator Fines and Procurator Fixed Penalties. These are the only figures provided broken down by age. This excludes Fiscal combined fine and compensation orders, Fiscal compensation and some types of legacy fixed penalties. Figures for these other penalties are not provided by age and sex, and comprise a small number of overall COPFS disposals; between 3.8-10.1% (Scottish Government 2014).

Ben Matthews is a PhD researcher in criminology at the University of Edinburgh.

Matthews, B. ‘Where have all the young offenders gone?’, AQMeN Research Briefing 4, November 2014.


Offending and Desistance. The importance of social relations.

Reviewed by David Orr

Their parents struggled – some were violent and abusive, some were emotionally detached, some sought to numb the pain with alcohol. As they moved into adolescence the six (along with others whose stories are not elaborated in detail) became a naturally forming group known as “The Del”. As the young boys developed into young men patterns of persistent and at times serious co-offending behaviour duly emerged with attendant negative consequences. Weaver maps and analyses the six individuals’ pathways into co-offending and their subsequent efforts over many years (with varying degrees of success) to (co-)desist.

For those with a passion for critical realism and relational sociology (and specifically the works of Margaret Archer and Pierpaulo Donati whose ideas are developed to provide Weaver’s conceptual framework for theorising desistance) there is another layer to this book entirely. It is one that requires a significant degree of intellectual labour to grasp and a 600 word book review cannot do these meaty ideas justice. Fergus NcNeill’s observation on the sleeve-notes about the need “to read and re-read” the material is well made.

Essentially Weaver wades in to the structure-agency debate. She argues that “by relegating social relations to the domain of structures and by neglecting to analyse the dynamics or properties of social relations,” studies which do so, “lose sight of individuals-in-relation . . . the reflexive individual in his or her relationally and emotionally textured world”. For those individuals who find it easier to absorb complex concepts through images as well as words (unfortunately I am not one of them), a diagram outlining the investigate framework adopted by Weaver is repeated at numerous intervals throughout the book. Chapter 11 which deals with The dynamics of desistance is where the various theoretical strands threaded throughout the stories of the individual members of The Del in the preceding chapters are synthesised.

Based on a crude reading of the text, in answer to the question “What makes people stop offending and stay stopped?” one could legitimately respond, “Employment, intimate relations, God, football and friends”. Alas, it is a little more complicated than that. As Weaver repeats time and again through the text, the unique contribution of this book in terms of its contribution to desistance theory is that it takes “social relations as the central unit of analysis”. Fundamentally, what the work demonstrates is that:

“Identities are . . . tried, tested, performed and negotiated in different relational spheres which are more or less constraining or enabling to the extent that these (changing) identities (whether as a worker, father, provider, husband or a man) are realised and recognised by those participating in the relation”.

All we need now is for someone to do a study of a female co-offending group and to take note of the suggestion that there may be room for greater use of restorative approaches when responding to offending behaviour by individuals.

David Orr is a criminal justice social work and is currently senior practitioner, Edinburgh Young People’s Service.

See also: Weaver, B (2013) The Importance of Social Relations in Personal Change Scottish Justice Matters 1:2, 12

FILM REVIEW

16 Years Till Summer.
Directed by Lou McLoughlan

Reviewed by Nate Kunitskaya

16 Years Till Summer directed by Lou McLoughlan premiered at Visions du Réel and then in the UK at Sheffield International Documentary Festival. The film was nominated for BAFTA’s “Best Picture” and is represented by Taskovski Films. There were two screenings at the Glasgow Film Festival in February. At the time of writing no other screenings are planned in Scotland.

Filmed over four years, the film uses cinematic techniques - long takes of landscapes and close-ups - that deliberately blur the line between ‘dreams of the heart and rational judgement’. 16 Years Till Summer is a hybrid of heart and head; magic-realism and documented tragedy. The struggle of one man for redemption in a tale of forgiveness, self-discovery, of accepting the past and taking responsibility for one’s mistakes.

McLoughlan expertly weaves fable into documentary. A folkloric atmosphere carries you through the film, subtly evoked by the natural landscape and accompanying music. From the majestic, breath-taking Highlands with their snow-capped peaks and mirror-still lochs, to the quaint and romantic portraiture of rural life, each human being becomes both part of the landscape and a landscape in their own right. The fabric of the film is melancholy with nostalgia, every minute is meditative and reflective but offset by a mellow, traditional score that, even when absent, seems to linger in your mind.

16 Years Till Summer tells the story of Uisdean who is faced with the consequences of a life sentence. We witness, from the inside, the repercussions of such an event on his family and small community. Uisdean’s story is just as enchanting, tragic and cruel as any tale from fairy lore.

Uisdean wants to re-invent himself by becoming a full time carer to his elderly father. The quiet landscape, the isolated rural community, his father’s home and silent company underscore Uisdean’s social and mental isolation whilst his surprisingly romantic and pastoral attitude is continuously rebuffed by his father’s remarks. This becomes particularly poignant when he discusses his plans for the future - sharing his dreams of becoming a shepherd and setting up a small Bed and Breakfast.

Uisdean wants forgiveness and is distressed to find himself being described as an ‘assassin’ and ‘murderer’, acutely aware that society has withdrawn its trust from him. Even though the justice system has given him another chance he is unable to restore his ‘trust credit’ with the local community. Uisdean is bewildered even by the familiarity of his own home, as a captive creature would be upon being released into the wild. Enclosure has starved him not only of social contact but also of the ability to adapt himself : he is bewildered by his ‘freedom’ and grows uneasy as the idleness of his father’s home comes to feel like another form of confinement, and the hostility of the locals begins to wear down his spirits.

This brings to the fore the absence of a system to manage the assimilation of a recently released individuals into their local communities. Eventually circumstance brings Uisdean to make a mistake and he is returned to prison. When he is released for a second time, under stricter conditions, he moves in with his partner to her remarkably isolated home in the Highlands. He is dispossessed, his father has passed away and his remaining family have alienated him. In six months’ time Uisdean makes another mistake which sends him back to prison to complete his life sentence.

16 Years Till Summer is not partial to Uisdean’s perspective nor is it dispassionate. McLoughlan’s eyes do not judge. Instead, the camera is a patient observer of the unfolding events. The most evident message that transpires from the film is the fugitive nature of truth and justice, especially with the passage of time. Memories blur and our understanding of events change as we reconstruct them over and over in our mind. Entire narratives are left out, many voices are ignored. 16 Years Till Summer gently delivers this heart wrenching tale of one man’s experience with the nature of justice and truth as he begins, but never comes to accomplish, the hard graft of re-inventing himself.

One is bound to take heart to Uisdean’s story and find themselves dismayed at the conclusion.

Nate Kunitskaya is a MSc student at Napier University, Edinburgh, studying magazine publishing and is currently an associate with SJM.

Read more of Nate’s work at www.kinomanicfae.wordpress.com.
Essential reading

New insights, cross cutting themes and ideas covering crime and criminal justice in Scotland and elsewhere.

Coming in 2016

- March 2016
  Reimagining punishment and justice
- June 2016
  Reimagining community and justice
- November 2016
  Cybercrime

Available as quality print copy only £20 (inc. P&P) (£16 for students) from www.scottishjusticematters.com or email: scccj.info@ntlworld.com for other ways to subscribe.

www.magcloud.com    www.issuu.com

Catch up with recent SJM blogs all on sjm-blog/:
- Fiona Dyer on Needs not deeds; the failure of Scotland’s Youth Justice system
- Cyrus Tata on Sentencing and the Allure of Imprisonment
- Kath Murray on Policing, postcodes and poverty: stop and search and class
- Alec Spencer on Turning off the tap: policy and practice for women in criminal justice in Scotland

www.scottishjusticematters.com
editor@scottishjusticematters.com
@SJMJournal

Don’t forget that you can still buy paper copies of all previous issues from www.magcloud.com as well free downloads from www.scottishjusticematters.com, listen to our interviews on soundcloud.com/sjmjournal, explore our Pinterest boards on www.pinterest.com/SJMJournal/ and follow us on Twitter @SJMJournal and facebook.com/pages/Scottish-Justice-Matters/
Outstanding legislation

Abusive Behaviour and Sexual Harm (Scotland) Bill

A Scottish Government Bill introduced on 8th October to help improve the justice system response to abusive behaviour including domestic abuse and sexual harm. Most media attention related to the provisions on ‘revenge porn’ but there are also substantial practice and procedural reforms in effect implementing the 2015 Equally Safe: Reforming the criminal law to address domestic abuse and sexual offences consultation. Stage 1 was completed on 28th January 2016 and it is anticipated that Stage 2 will be completed by 11th March.

Alcohol (Licensing, Public Health and Criminal Justice) (Scotland) Bill

This is a member’s Bill introduced by Richard Simpson in April. It intended to "make provision for reducing and dealing with the abuse of alcohol; to amend the legislation in relation to applications for, and to vary, licences for the sale of alcohol; and for connected purposes". The Bill fell at Stage 1 in February.

Community Justice (Scotland) Bill

Introduced on 8th May, this important legislation intends to "to make provision about community justice, including establishing a new national body to oversee community justice and introducing requirements in relation to the achievement of particular nationally and locally determined outcomes; and for connected purposes" and in so doing abolish the Community Justice Authorities. The origins of the Bill can be traced to the recommendations about the reform of community justice provision contained in the Angiolini Commission on Women Offenders. The Bill as passed on 12th February 2016.

Criminal Verdicts (Scotland) Bill

This Member’s Bill was introduced by Michael McMahon MSP in November 2013 to "make provision for the removal of the not proven verdict as one of the available verdicts in criminal proceedings; and for a guilty verdict to require an increased majority of jurors". The Bill has now fallen.

Events

Glasgow SASO Day Conference: “Transforming Scottish Justice”

Thursday 12th May 2016
McCance Lecture Theatre, University of Strathclyde 10-4pm.
Chair: Derek Penman QPM
Speakers include: Hugh Campbell
Sessions on:
- Restorative Justice
- The age of criminal responsibility and prosecuting children
- Victims.
For your chance to win, please complete the following task in no more than 750 words:

There will be a new Scottish Parliamentary session beginning after the election in May 2016. Write an email or letter to the new Cabinet Secretary for Justice in which you give advice on what his/her priorities should be over the next four-year term.

Deadline: Friday 22nd April
Earlier submissions are welcome!

(1) fill in the competition front sheet file provided (2) add your text (3) send to: editor@scottishjusticematters.com

*Entrants must be in 6th year taking Advanced Higher Modern Studies at school or college in Scotland and be under 19 years of age at the date of submission.

Best of luck!

Find out more at: www.scottishjusticematters.com