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REIMAGINING PUNISHMENT AND JUSTICE

scottish justice matters

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(RE)IMAGINING PUNISHMENT AND JUSTICE

Margaret Malloch and Bill Munro

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.

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BLIND JUSTICE

What does that mean?

Bill Munro

‘The blindfold over Justitia’s eyes does not only mean that there should be no assault upon justice, but that justice does not originate in freedom.’

(Adorno and Horkheimer, 1979:17)

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 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 Dürer wood block 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 Dürer and Bruegel created allegories of Justice that offered a very different reading from the earlier Renaissance representations. Technologically both Dürer 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 Dürer; 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 Justitia, 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 Dürer and Bruegel struggled for in their reimagining of Justice.

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