Scottish Affairs, no.30, winter 2000

WHOSE LAW IS IT ANYWAY? INCLUSION, EXCLUSION AND THE CRIMINAL LAW

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We live, if we take contemporary political rhetoric seriously, in would-be inclusionary times: our present governments in both Westminster and Edinburgh are, supposedly, committed to combating 'social exclusion', and to fostering 'social inclusion'.[1] Now 'social inclusion' is one of those handy political slogans from which it is very hard for anyone to dissent: who could be in favour of 'exclusion' rather than 'inclusion'? Like all such slogans, however, it secures assent at the price, if not of complete vacuity, at least of a vagueness that makes it equally hard to know just what we are assenting to when we agree that 'social inclusion' is a good thing, and 'social exclusion' a bad thing. We need to know what 'social exclusion' is exclusion from, and what 'social inclusion' is inclusion into or in. We also need to know what it is to be either 'included' or 'excluded'.

Two other questions should also strike us. First, inclusion often also entails exclusion: to include some is to exclude others. So should we be worried about the possible exclusionary implications of inclusionary policies? Second, is the inclusion we seek to be voluntary or non-voluntary? Inclusion sounds friendly and welcoming when it wears a voluntary face: we are included in that to which we wish to belong. But it can sound more threatening if it is non-voluntary: we are forced to belong to that in which we might wish no part. I will not be able to pursue these questions in this article: but we must not lose sight of them.

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[1] *Hence the Westminster government's creation of the unhappily titled 'Social Exclusion Unit'; the name of the matching Scottish body – the 'Social Inclusion Network' – seems more appropriate to its inclusionary ambitions.*

I want to look at some of the kinds of inclusion and exclusion which fall within the political realm, in particular some which concern the criminal law. I'll ask what it is for a system of criminal law to be inclusionary rather than exclusionary – which is also to ask what can make it a law fit for citizens rather than mere subjects.

POLITICAL COMMUNITY

An obvious answer to the question 'What is inclusion inclusion into?', an answer implicit in recent political rhetoric, is 'community': we must include people both within an appropriate range of local communities, and within the larger political community.[1] I'll focus here on the idea of a political community.

We should no doubt treat the political rhetoric of 'community', like that of 'inclusion', with some suspicion. It is far from clear what it is supposed to mean; and while 'community' can sound warm and friendly, if we think of ourselves as drawing support and sustenance from a community to which we happily belong and in which we find our own good, it can also sound more threatening – just as 'inclusion' can. For communities all too often define themselves not just by what or whom they include, but also by what or whom they exclude: 'we' define ourselves as a community partly by separating 'us' from 'them' – the outsiders whom we treat as strangers. Furthermore, the embrace of 'community' can be suffocating rather than sustaining, especially when membership is non-voluntary: we can be oppressed by the bonds and demands of communities to which we do not wish to belong, but which insist that we do belong to them (families provide an obvious example here).

Nonetheless, it is worth taking the idea of 'community' seriously: not just because it can help us expose the hollowness of some of the political rhetoric of 'community', but because it can help us give plausible substance to the idea of 'inclusion' as a goal that we should strive for – and help us to understand the implications of the failure to include those who should be included.

(Of course, 'inclusion' doesn't have to be explained in terms of 'community'. Contractarian liberals, for instance, who understand political association on

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[1] *But, we must ask after devolution, which or what political community? The simple answer is 'All those political communities to which they formally belong and by whose laws they are supposedly bound': for contemporary Scots, these will include the local communities formally defined by their local governments, the Scottish political community, and the British political community.*

the model of a social contract, can talk of being included amongst the parties to this (imaginary) contract. I won't discuss this possibility here, save to note one basic difference between the liberal individualism which takes the social contract as its model, and the communitarianism which talks of 'community' rather than of contracts. The liberal picture is founded on the image of isolated, detached individuals who must choose whether and on what terms to associate with those around them – and find reasons to join in such association. The communitarian picture, by contrast, is founded not on the isolated individual 'I', but on a 'we' who find ourselves in association: it is not a matter of choosing to associate ourselves with others (though we may sometimes have to decide to dissociate ourselves), but of recognising our fellowship, our solidarity, with those others with whom we happen, contingently, to live.)

What could we mean by 'political community'? The idea of 'community' here is clearly not being used in a merely geographical sense: inclusion would be a simple, and uninteresting, matter if it just meant living within a certain geographical area – e.g. within the territorial boundaries of Britain or of Scotland. Nor is it used to refer simply to certain institutional structures: the existence of the institutional apparatus of a state does not suffice to create a political community, as that term is used in the rhetoric of 'community'. What then does it mean?

We are dealing here with a normative idea (or ideal) of community, as something to which we should aspire – and can fail to achieve. There are two related aspects to this idea (see e.g. Mason 1993; Reitan 1996). First, 'community' in this sense involves a shared commitment to certain defining values – a commitment in which most members in fact share, and in which all are expected to share. Second, it involves a mutual concern and respect for each other, as fellow members of the community – a concern and respect structured by the community's defining values.

Thus, for instance, as a member of an academic community I am (or should be) committed to the values which define that community's goods – the values of the pursuit of knowledge and understanding within the various intellectual disciplines. And I am, or should be, committed to an appropriate concern and respect for my fellow academics as being engaged with me in this common pursuit: a concern for their good in relation to those values, and a respect for them as being committed, as I am, to those values.

What of political community? Much depends, of course, on what values a political community is committed to: for communities can be committed to repulsive, corrupt and oppressive values as well as to admirable values. But,

given the anxieties often aroused in liberal hearts by talk of 'community' in the realm of politics, we should notice that a political community can be committed to liberal values: to fostering and respecting the central liberal goods of autonomy, freedom and pluralism; to ensuring equal respect, and genuinely equal opportunities, for all its members; to ensuring in particular that those who are most disadvantaged or vulnerable receive the support – and the respect – that they need.[1]

We should note three points about such an image or ideal of a liberal political community.

First, community in this sense is a matter of aspiration as much as, if not more than, a matter of fact. To see ourselves as members of such a community is to see ourselves as subject to the demands of its defining values – demands that we can all too often fail to satisfy.

Second, community does not entail intimacy. Some communities, like families, are indeed close and intimate: but communities can consist of members whose relationships, as members of the community, are limited and partial, and who may indeed have no direct contact with or knowledge of many of their fellows.[2] This is true of the community of philosophers, for instance: I do not even know many of those who are my fellow members in this intellectual community. It is also true of a liberal political community. For most of us, our most significant activities and relationships fall not within the political realm, but in the various other communities to which we also belong: we know relatively few of our fellow citizens, and often relate to those we do know less as fellow citizens than as friends, colleagues, local neighbours, and so on. But we can still recognise our fellowship with all members of the political community – a recognition manifest both in our participation, such as it is, in the community's political life, and in how we would behave towards others if we came into contact with them.

Third, membership of the community brings with it both benefits and burdens. We benefit from the support and respect we receive from our fellows and from the community as a whole: but we are also subject to the demands of community – the demand that we accept and respect the

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[1] *Hence the importance of recognising that a number of 'communitarian' critics of 'liberalism' can themselves be classed as 'liberal communitarians': see e.g. Taylor 1989, Walzer 1983; also Dworkin 1989; Lacey 1988, ch. 8.*

[2] *That is why it might be a mistake for communitarians to take the family as the paradigm or central example of community: see Simmons 1996, pp.251-2; contrast Marshall 1998.*

community's defining values, and exercise a proper regard for our fellow citizens. However, the demands are conditional on the benefits: if we are denied or excluded from the benefits of community, we cannot properly be held bound by its demands. The point here is not so much that we are not bound, though that is at least arguable. It is, rather, that those who deny us those benefits, those who thus fail to treat us as members of the community who should share in its goods, lack the moral standing to demand that we accept the burdens of community: compare the way in which, if I have consistently failed to treat you with the kind of respect and concern that are due to you, I am not well placed to demand that you treat me with such respect and concern, or to condemn you for failing to do so.

INCLUSION AND EXCLUSION

So what is involved in being included within, or in being excluded from, such a political community? I'll distinguish four modes or dimensions of inclusion and exclusion, and then focus in on the last two of them.

First, there is political inclusion or exclusion – the extent to which people can take part in the political process through which the community's governance is organised, its public policies decided, its laws made and administered. There is room for argument about how far such participation should be merely available, or should be required of citizens. But a liberal polity must be democratic; and whilst the question of just what 'democracy' requires is controversial, it must at least provide all citizens with a role in political decisions, and a way of making their voices heard in political deliberations – including deliberations and decisions about the laws which are to bind them. People are included within the political community insofar as they are given a genuine voice and role in the political process: they are excluded insofar as they are – whether deliberately or in fact – excluded from such participation.

Second, there is material inclusion or exclusion: the extent to which people can share in the various material resources and benefits available within the community, and in particular the extent to which they can acquire the resources necessary for an adequate human life, and for the pursuit of any of the variety of human goods available within a pluralist society – such resources as health care, housing, education, employment, and money. Here too there is room for argument about what resources should be seen as essential; and about how far what matters is that people have equal opportunities to try to acquire such benefits, or equal guarantees of being provided with them. But whatever views we take on these issues, we must recognise that people are excluded from full membership of the community

insofar as they are – whether deliberately or in fact – denied fair access to such material resources and benefits.

Third, there is what we can call normative inclusion or exclusion: the extent to which people are treated as sharing in the central and defining values of the community. Thus, for instance, a liberal polity will recognise individual autonomy and freedom as central values – as central human goods to be fostered, and as a source of central civic rights to be respected. To say that these are the community's values is to say that they are our values as members of that community: they are values which should govern our relations with each other as members – and the state's dealings with all its citizens. People are included within the normative community insofar as they are treated as sharing in these values: insofar, that is, as they are treated by their fellow citizens and by the state in ways consistent with those values – insofar as their autonomy and freedom are respected and fostered; but also insofar as they are treated as being themselves bound by the demands of these values – insofar as they are expected to respect those values in their treatment of others. They are excluded from the normative community insofar as they are treated – deliberately or in fact – as if these values did not apply to them: as if their autonomy or freedom was unimportant, and as if they did not share in the normative obligations flowing from these values. (Here again we see how inclusion brings burdens as well as benefits.)

Fourth, there is what we can call linguistic inclusion or exclusion: the extent to which people can take part in, can both understand and speak, the language in which the public or political life of the community is conducted. For a normative political community must be a linguistic community: its members may speak very different languages in their private or non-political lives; but they must share a language, a normative language embodying their shared values, in which they can discuss, decide and conduct their activities as a political community – and in which they can articulate and develop those values themselves. This requirement clearly underpins the possibility of both political and normative inclusion: for I can take part in the political process only if it is conducted in a language I can understand, and speak for myself; and I can be bound by a community's values only if I can understand and speak the language of those values for myself. People are thus included in a political community insofar as they can understand and speak its normative language, and are addressed in that language; they are excluded insofar as that language is alien to them – insofar as it is like a foreign language which they can neither understand nor speak for themselves, or insofar as they are not addressed in that language by their fellow citizens or by the state.

I want now to say a bit more about these last two dimensions of inclusion and exclusion, the normative and the linguistic, in relation to the criminal law – which should also make their meaning and their importance somewhat clearer.

THE CRIMINAL LAW AS A COMMON LAW

What role will the criminal law play in a liberal political community? It will play a number of different roles, but I'll focus on the role played by the central aspects of the substantive criminal law: those aspects of the law which define as criminal offences the central kinds of *mala in se* – kinds of conduct which are taken to be wrong independently of the law itself, such as murder, rape, serious physical assaults, theft, and so on.[1]

Now legal theorists often portray the criminal law as prohibiting or forbidding the kinds of conduct it defines as criminal: it forbids us to commit murder or rape, on pain of being punished if we disobey these prohibitions. This is how classical legal positivism portrays the law: the sovereign – be that a person, like a monarch, or a body, like a parliament – issues commands to her subjects, demanding that they obey them. One feature of this account is that the law is taken to offer those subject to it some new reason for obedience: some reason independent of the pre-legal wrongfulness of the conduct forbidden, having to do either with the law's authority (with our obligation to obey it), or with its power (with the sanctions it threatens against disobedience).

This is indeed how we should portray the law, insofar as it is a law imposed by a sovereign on a population of subjects: as far as the subjects are concerned, the law speaks to them as it were from outside their own lives, in the voice of a distinct and separate sovereign who claims authority, or exercises power, over them.[2] But it is not how we should understand the law of a liberal polity – a law which must be fit for citizens rather than mere subjects.

The law of such a political community must be structured and informed by the shared values of the community: it must define as criminal those kinds of conduct which attack or threaten the values to which the community is

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[1] *I cannot discuss the more complex character of 'mala prohibita' – offences which are wrong only because they are defined as offences by the law – here: but see Gordon 1978, 17-23; Duff 2000, ch. 2.4.*

[2] *And see Cotterrell 1995, ch. 11, on the 'imperium' model of law.*

committed, and on which its life and survival depend, or which attack or threaten the essential interests of members of the community – interests defined in terms of those central values. It must in that sense be a 'common' law.

Now the idea of the 'common' law is normally used to distinguish statute law, as passed by a legislature, from non-statutory law – the law declared, if not created, by the courts. But in its classical formulation, by theorists like Hale and Blackstone, the idea of the 'common' law transcended the distinction between statutory and non-statutory law. The 'common' law is the law of the community itself, embodying the shared values and shared understandings of the community: whether it exists in statutory or in non-statutory form, it should flow not from the will of a separate sovereign, but from the traditions and practices of the community itself.[1]

The common law is thus 'our' law as members of the political community: it is not an alien imposition on us, subjecting us to a sovereign's will; it rather gives formal expression to the shared values which structure our life as a community – values to which we are, or should be, already committed as members of that community.

This is, I think, a persuasive (although admittedly as yet somewhat vague) conception of the law of a liberal and democratic political community – as a law which belongs to the citizens as members of the community, rather than to a sovereign who imposes their authority or power on their subjects. However, we should note that such a law does not forbid or prohibit the conduct it defines as criminal: for such conduct is conduct which we, as citizens, should already recognise as wrongful, in terms of the values which the law embodies – values to which we already are, or should be, committed. The law should rather be understood as declaring that these kinds of conduct constitute not just wrongs, but public wrongs which properly concern the whole community – wrongs to which the community as a whole will respond,

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[1] *See generally Postema 1986, chs. 1-2; Farmer 1997; also Cotterrell 1995, ch. 11, on the 'community' as against the 'imperium' model of law, and Waldron 1999, pp. 56-60. Note that I do not suggest that our existing criminal law was or is a genuinely 'common' law in this sense; as Bentham ferociously argued in his critique of the common law (see Postema 1986), this ideology of the law's 'commonality' can all too easily be used as a cover for various kinds of oppression. My concern here, however, as throughout this paper, is with certain ideals of law and political community – with conceptions of what the law ought to be, and how it ought to function, in a liberal polity.*

by calling the wrongdoer to answer for them in the criminal courts (see Marshall and Duff 1998).

We should also note that this conception of the criminal law makes the notions of normative and linguistic inclusion central.

As to normative inclusion, the law as thus understood must address the citizens in terms of the values in which they supposedly share as members of the community – as members who are entitled to protection in the light of those values, and who are also bound by them in their conduct towards their fellows. It must address them, that is, as members of the normative community whose law it is.

As to linguistic inclusion, the law must address them in a normative language which they can understand, and which they could speak for themselves, as expressing those shared values. This requirement is most obvious in the case of defendants who appear before the criminal courts. They are called to answer a charge of wrongdoing – a charge that they have flouted the values to which they should, as citizens, be committed; and if they are convicted, their conviction condemns them for that wrongdoing. But I cannot properly be called to answer a charge which is expressed in a language I cannot understand, or to accept (as the convicted defendant is called to accept) a condemnation which I cannot make my own or speak for myself.[1]

The requirement for linguistic inclusion applies, however, to all those who are supposedly bound by and answerable to the law: for the law claims to declare obligations which are binding on them all; but those declarations must then be expressed in a language they can understand, and speak for themselves in the first person as a language which does express the values of the community to which they belong.

The law of a liberal polity, we could say, speaks not with the voice of a separate sovereign, but with the voice of the community itself. It is a voice in which the community speaks to itself, expressing its most central values: but it must therefore speak a language which all the members of the community can understand and speak.

To say that it must be a language which they can understand and speak is not just to say that, for instance, if English is the native language of the community, the law must be expressed, and the criminal process must be conducted, in English (or that, for those who do not speak English, adequate

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[1] *On the criminal trial and its significance, see Duff 1986, ch. 4.*

two-way translation must be provided). That is of course necessary – and the most obvious example of a failure of linguistic inclusion is that of a trial conducted in a language which is literally and utterly foreign and inaccessible to the defendant. But it is not enough that the law be expressed in a language which the citizens can in that minimal sense understand and speak. A defendant can feel like a foreigner at his own trial, can feel that the trial is conducted in what might as well be a foreign language, even if he speaks English and the trial is conducted in English: not just because the language used is full of technical legal terms which he cannot understand (though that is a depressingly familiar possibility), but because he does not recognise it – and cannot reasonably be expected to recognise it – as a language of values which is or could be the language of his own values. Citizens must be able to understand the language of the law as a normative language informed by values that are or could be their own; defendants must be able to understand and respond to the charges they face as charges of wrongdoing: which is to say that the law must address them in a normative language which is or could be their own.

PRECONDITIONS OF CRIMINAL LIABILITY

The argument of the previous section was, in effect, that the law of a liberal polity must be a common law which is both normatively and linguistically inclusive: it must address those whom it claims to bind in a normative language which they can understand and speak – a language of values which can be claimed to be their values (values in which they share and by which they are bound) as members of the political community.

This is, we can say, a precondition of criminal liability: if this condition is not satisfied, if the law in effect speaks to people in an alien voice which they could not make their own, it cannot claim to bind them, or call them to answer for their alleged wrongdoings.

But the other two kinds of inclusion, political and material, can also be plausibly seen as preconditions of criminal liability in a liberal democracy. For suppose that people have been effectively excluded from participation in the political process – the process through which the law itself is formed: how can we say to them that they are nonetheless bound by the law? Or suppose that they have been systematically excluded from anything resembling a fair share in the community's material resources: how can we say to them that they are nonetheless bound by its laws?

Once again, the question here is not so much whether they are bound by the law, or whether they act wrongly when they break the law. The question is, rather, whether the law, or the community whose law it claims to be, has the moral standing to call them to account for their criminal conduct, or to condemn them for it. To call them to account and to condemn them is to treat them, or to claim to treat them, as members of the political community: as citizens who are indeed bound by its laws, and answerable to the community for breaches of those laws. But if in other respects they are not treated as full members of the community; if they are politically or materially excluded: then in treating them as if they were members as far as criminal liability is concerned we are engaged in something like self-contradiction. Our actions in holding them criminally liable – the actions of the criminal justice system which claims to speak and act in the name of all members of the community – portray them as members of the political community: but our failure to include them politically or materially – the failure of the political institutions which claim to act on behalf of the whole community – portrays them as non-members. How then can we expect or demand that they see the law as their law, as binding on them as members of the community, when they are in other crucial respects not treated or respected as members?

I've talked here of the preconditions of criminal liability: but these points have a much wider importance, since they apply to any context in which demands are made of citizens by the state or the political community.

CONCLUDING QUESTIONS

I'll end with three questions which, if my sketch of an argument so far has been right, we need urgently to ask.

First, do we actually live in a genuine political community? Can we discern enough in the way of genuinely shared values, and authentic kinds of mutual concern and respect, to allow us to say that we do at least collectively aspire to be or become such a community? If we cannot, then we are certainly in serious trouble, not unlike that which MacIntyre diagnosed (MacIntyre 1985): we speak the language of political community and obligation, but have lost (if we ever had) the social structures of genuinely shared values and concerns on which that language depends for its sense. On my more optimistic days, I think – or hope – that the answer to this question is 'Yes', so long as we emphasise the point noted earlier, that community is a matter of aspiration as much as of fact. For instance, whatever the dangers (of chauvinistic nationalism, of self-deceiving rhetoric) in the cry of 'a nation once again', I

think we can properly talk of a Scottish political community – a community whose existence consists partly in a shared determination to create it.

Second, if there is such a political community, just who are the 'we' who constitute it or belong to it? In particular, how confident can we be that all those who are supposedly bound by its laws, for instance, are indeed treated as full members of the political community? If there are significant numbers or groups of people who are not merely disadvantaged, but effectively excluded from the community in the ways I noted earlier, then we (and they) are again in serious trouble: for whilst the law claims authority over them, and the courts claim the authority and the standing (acting in 'our' name and on 'our' behalf) to call them to account and to judge them for their alleged crimes, those claims are undermined by that exclusion; if we have systematically failed to treat such people as our fellow citizens, we cannot now honestly demand that they accept the burdens of citizenship. Even on my more optimistic days, I cannot confidently say that all those supposedly bound by the law have been adequately treated as members of the political community: it is clear that significant numbers and groups of people suffer significant kinds and degrees of unjust exclusion. We then need to ask what the implications of this are – in particular, in the context of the argument of this paper, whether and how far such people can be properly held to be bound by the demands and laws of the community which fails adequately to include them. Given the fact that inclusion and exclusion operate along different dimensions, and as matters of degree; given also the fact that a genuine recognition of exclusion, and a genuine aspiration to overcome it, can themselves constitute a kind of inclusion: any answer to this question will be complicated and messy. It is, however, a question that must be addressed.

Third, I have talked about the criminal law, and about the criminal process which calls accused wrongdoers to account: but I have said nothing about punishment. Now punishment, at least as administered and suffered in our existing penal systems, is clearly a potent weapon of exclusion: this is most obviously true of imprisonment, which both materially and symbolically excludes prisoners from participation in the ordinary life of the community (including its political life, since prisoners lose the right to vote), as well as from whatever other communities (family, friends, work) they may have; but it is depressingly true both of the nature of other kinds of punishment as they are in fact administered and received, and of their longer term effects – given how citizens generally tend to respond to offenders. My final question, however, is whether this must be so – or whether criminal punishment could inclusionary rather than exclusionary, treating those punished as full, albeit defaulting, members of the normative community.

My answer to this question is a very tentative 'Yes': that, ideally and in theory, a radically reformed system of criminal punishment could be an inclusionary system fit for citizens of a liberal polity. Such a system would not take either deterrence or incapacitation (the favoured goals of many penal theorists and politicians) as proper goals of punishment: for neither deterrence (the attempt to coerce obedience by threats) nor incapacitation (the attempt to exclude potential offenders from opportunities to offend) treat those punished or threatened with punishment as fellow members of a normative community; deterrence and incapacitation are, to put it crudely, things that 'we' – the law-abiding – do to 'them' – the dangerous criminal classes whom 'we' must treat as enemies. Instead, communication, repentance and reconciliation would be central to the aims of punishment: punishment would be a communicative enterprise, aiming to communicate to offenders the censure or condemnation that they deserve for their crimes; aiming to persuade them to recognise those crimes as wrongs, and thus to repent them; and aiming also to provide a way in which offenders can be reconciled – through penitential modes of punishment – with those they have wronged. As thus baldly and barely stated, this conception of criminal punishment will strike many as bizarre – and it is certainly not offered as a description of punishment as it is actually and typically practised in our existing penal institutions. I think, however, that it can be rendered plausible as an ideal of what criminal punishment should be in a liberal political community; and that punishment as thus conceived and practised, in a polity in which the preconditions of criminal liability (see above) were satisfied, would be genuinely inclusionary rather than exclusionary (see Duff 2000 for a detailed argument to this effect).

However, my main aim in this article has not been to argue for a particular account of criminal punishment – nor indeed, I fear, to argue to any very determinate or substantive conclusions. It has, rather, been to suggest that the ideas of inclusion and exclusion can play a useful and substantive role in political thinking, in the context of a 'liberal communitarian' conception of political community – that they need not be mere pieces of political rhetoric; to display something of their content, and of their implications for our understanding of the criminal law in particular; and to show that if we take these ideas seriously, they raise some important and challenging questions about the preconditions of criminal liability.

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November 1999