

PUNISHMENT AND POLITICAL THEORY, M. Matravers, ed., (Portland, Oregon: Hart, 1999)

*Punishment and Political Theory*¹ is a collection of nine essays on penal philosophy. Most of the contributions to *PPT* were prepared for a conference on political theory and punishment held at the University of York (England) in September 1997. *PPT* displays a wide range of perspectives, from discussions of classical theorists like Kant, through modern thinkers like Antony Duff, to postmoderns like Michel Foucault. The contributors include some big names in the penal philosophy firmament — Duff himself, von Hirsch, and Lacey.

The papers in *PPT* fall into three main groups: (A) discussions of the classical liberal justification of punishment; (B) a “roundtable” on the “punishment as communication” theory of Duff; and (C) an invitation by Lacey to engage in dialogue with Foucauldian research.

A. CLASSICAL PHILOSOPHY OF PUNISHMENT

PPT begins at the right place — with Kant. Much recent penal philosophy can be understood as responding to problems set by Kant: the brand or brands of “liberalism” that turn on a commitment to the “autonomy” of persons and the relationship between that commitment and the legitimacy of the institution of punishment; the link between autonomy, social contract theory, and theories of punishment; the relationship between the commitment to autonomy and retributivism; and the moral possibility of capital punishment.

In “Punishment in a Kantian Framework,”² Tom Sorell wrestles with the justifiability of coercion generally and of punishment in particular — and even more particularly, of retributivist harsh punishment — given Kant’s commitment to autonomy. Sorell clarifies the nature of Kant’s commitment to autonomy. According to Sorell, Kant’s position should not be confused with liberalisms that emphasize “humaneness” or the “welfare” of others,³ or with “content-neutral” liberalisms that hold that one’s goals or projects are one’s own business, unless they pose a risk of harm to others.⁴ Kant’s approach to autonomy is more austere and rigid. He takes autonomy, self-rule, as the highest value. Autonomy is to be freedom, in the sense of liberation from impulse.⁵ True autonomy, true freedom, results not from doing what one happens to want, but in willing ends that are universalizable, so that those ends could be anyone’s ends or so that no one would be entitled to reasonably reject them as ends.⁶ Kant’s adherence to this high standard permits authoritative judgments of right and wrong. Each of us may, however, be mistaken about

¹ M. Matravers, ed., *Punishment and Political Theory* (Portland, Oregon: Hart, 1999) [hereinafter *PPT*].

² *PPT* at 10.

³ *Ibid.* at 24, 26.

⁴ *Ibid.* at 27.

⁵ *Ibid.*

⁶ *Ibid.* at 24.

whether what we wish to do is right.⁷ We may favour impulse over reason. We are fallible. In Sorell's view, fallibility is the foundation for legitimate coercion. Coercion of others may be justified so long as it tends to prevent them from acting in ways that do not promote their own autonomy — *i.e.*, when it corrects their mistakes and promotes their own good.⁸

Punishment is a particular type of coercion bearing on actions affecting or tending to affect civil society. Civil society is rationally preferable to the state of nature, in which each seeks his or her own happiness without regard for the happiness of others. Civil society, with its constraints on purely self-interested activities, makes possible the social institutions that protect life, liberty, property, and the pursuit of happiness.⁹ Given autonomy as a starting point, civil society should be regarded as a product of free rational choice by individuals. It is not founded on a real contract. It is the product of a hypothetical contract, a "social contract." Civil society is an arrangement to which each of us "could" have consented.¹⁰ Crimes — at least, for Kant, "public crimes" — threaten civil society to a greater or lesser degree by running contrary to the agreement to restrain one's own will. Crimes threaten to subvert civil society, to return individuals to the state of nature.¹¹ Crimes are founded on our fallibility, on our errors. Offenders err in their assessments of their own best interests. Offenders pursue contingent personal benefits, rather than rationally justifiable courses of action. To discourage persons from criminal behaviour, punishments are required. Each person should be understood to have agreed, in theory, to the imposition of penalties as guarantees that persons will not interfere with the freedoms of others.¹² The greater the degree of potential harm of conduct, the greater should be the degree of severity of the potential penalty. Punishment is a "prudential supplement" that addresses our fallible selves.

In "Punishment and Rights,"¹³ Dudley Knowles romps through a variety of penal theories in his quest for a response to what might be called the "paradox of punishment" — how can we recognize persons' rights and their claims to be free from interference with themselves and their property, yet interfere with them or their property in the name of punishment? The punisher seems to be no different than the offender: an offender's interference with another's person or property is wrong, why is not his or her punishment wrong too? En route to two different solutions to this paradox, Knowles touches on some issues raised by Sorell.

Knowles first considers the possibility of a consequentialist utilitarian rights theory, whereby rights (as a social institution) are justified through their contribution to the common good.¹⁴ Knowles quickly dismisses claims that consequentialist theories are

⁷ *Ibid.* at 16.

⁸ *Ibid.* at 15.

⁹ *Ibid.* at 16.

¹⁰ *Ibid.* at 24.

¹¹ *Ibid.* at 19.

¹² *Ibid.* at 25.

¹³ *PPT* at 28.

¹⁴ For an excellent defence of a consequentialist rights theory see L.W. Sumner, *The Moral Foundation of Rights* (New York: Oxford University Press, 1987).

incompatible with the recognition of rights. Critics of consequentialism assert that the consequentialist will always allow the promotion of social ends to trump the recognition of rights. In particular, it is frequently asserted that consequentialists countenance the punishment of the innocent, if that promotes a greater social good. The consequentialist can rightly respond that the recognition of rights, even if not promoting a social objective in a particular case, better promotes social good over the long run than sacrificing rights to short-term objectives.¹⁵ Furthermore, the consequentialist may challenge the critic to defend the position that rights are “absolute” in the sense that they can never be overborne (e.g., in times of emergency). Knowles goes on to point out that rights must be coupled with means to ensure the protection of rights. Consequences must be visited on rights violators. Consequences are effected through punishment.¹⁶ The institution of punishment is part of the set of rules that exists in relation to rights. The paradox is dissolved. Punishment does not violate rights; it is part of the apparatus of rules by which rights are recognized: “[t]he content of the right ... is given by the full specification of institutional dispensation which the argument from utility vindicates.”¹⁷

Knowles also considers non-consequentialist (“natural”) rights theories and the paradox of punishment. As seen in Sorell’s account of Kant, the basis for the justification of punishment lies in individuals’ autonomy.¹⁸ The legitimacy of punishment must be traceable to autonomy, (somehow) to the individual’s willing of punishment, choice of punishment, or consent to punishment.¹⁹ Knowles (rightly, it seems) rejects the view that offenders actually (whether expressly or tacitly) consent to punishment.²⁰ Knowles finds greater merit in the “hypothetical contract” solution. But unlike Sorell, Knowles admits that the social contract is no contract at all; it has no binding force. It is only a metaphor.²¹ Nonetheless, Knowles goes on to argue in the hypothetical contract mode (and his reasons for persisting with contract talk are somewhat obscure) that punishment is a practical requirement for abiding social interaction: “each party accepts a liability to suffer acts which would otherwise violate their rights as the cost of securing an agreement which will protect and promote their rights.”²² Again the paradox is dissolved: punishment is permitted because (on some level) the offender has agreed to this result.

B. THE DUFF ROUNDTABLE

The central piece in *PPT* is Antony Duff’s “Punishment, Communication, and Community.”²³ Duff proffers an account of punishment as “communication.” The status of Duff’s account is itself interesting. He does not purport to offer a justification of the institution of punishment as it is now, in whole or in part. His account, instead, is to be

¹⁵ *Supra* note 13 at 33.

¹⁶ *Ibid.* at 31.

¹⁷ *Ibid.* at 32.

¹⁸ *Ibid.* at 44.

¹⁹ *Ibid.* at 38.

²⁰ *Ibid.* at 39-42.

²¹ *Ibid.* at 42-43.

²² *Ibid.* at 46.

²³ *PPT* at 48. *PPT* also contains Duff’s response to von Hirsch, but since this adds nothing new, I will not comment on it further.

understood as an ideal, as representing what punishment should be, in a world of true community free from structures of oppression. In Duff's view, this does not make his account merely a "philosopher's dream."²⁴ His account maintains a normative value. It is relevant to current practice as a measure or standard by which the institutions of punishment may be judged.

Duff's starting point bears some similarity to Kant's. Persons should be regarded as rational, responsible agents, not as mere means to ends.²⁵ But while Duff recognizes individualist values, he opposes an individualistic metaphysics. Individuals are not primary. Individuals should not be regarded as essentially separate or distanced from one another.²⁶ Individuals are located in communities, in relationships of shared language and shared values.²⁷ With others, persons share a "form of life" (borrowing Wittgenstein's *secundum* term).²⁸ Individuals are not "strangers" to one another.²⁹ Duff's perspective, unlike Kant's, is "communitarian." The state, on this view, is (or should be) the institutional reflection and expression of political community.³⁰ As such, it is concerned not merely with persons' "external" conduct, with their bumping and jostling in the course of interconnected life, but with their internal moral condition.³¹

For Duff, a crime is an act that threatens to exclude an offender from his or her community.³² Punishment is the response to crime. Duff returns to the issue addressed by Sorell — persons should not be coerced or manipulated.³³ Unlike Sorell or Sorell's Kant, Duff does not seek to reconcile autonomy and coercion, with punishment as a prudential supplement to ensure legal compliance. We come to punishment as "communication." Punishment is a vehicle through which "we," the community (through the medium of the state), respond to offences with "censure." The purpose of censure is not to coerce, manipulate, or force offenders to change their attitudes.³⁴ Censure is to appeal to offenders as rational agents. Its aim is to bring offenders to understand their error, to accept that they have erred, to "repent" (Duff's term) the wrong they have done, to reform themselves, to reconcile themselves with their community, and (ultimately) to restore themselves to full membership in their community.³⁵

An important feature of Duff's account of punishment as communication is that it is retributivist, not consequentialist. Censure is internally or intrinsically related to the offender's offence; it is not contingently connected.³⁶ Censure is the message that is

²⁴ *Ibid.* at 67.

²⁵ *Ibid.* at 52; D. Ivison, "Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?" in *PPT*: 88 at 97.

²⁶ Duff, *ibid.* at 56, 57.

²⁷ *Ibid.* at 54.

²⁸ *Ibid.* at 57; see Ivison, *supra* note 25 at 90, 97, 99.

²⁹ *Ibid.* at 56; see Ivison, *ibid.* at 91.

³⁰ *Ibid.* at 54.

³¹ *Ibid.* at 54, 57.

³² *Ibid.* at 57; see Ivison, *supra* note 25 at 90.

³³ *Ibid.* at 58.

³⁴ *Ibid.* at 59.

³⁵ *Ibid.* at 51.

³⁶ *Ibid.* at 50, 52.

appropriate to that offence, and the message of punishment is directed primarily at the offender.³⁷ While most retributivist positions are solely oriented to the past (to the offender's act and the penal response appropriate to that act, as opposed to the future orientation of consequentialist deterrence theories), Duff's position contains elements oriented to the future (repentance, self-reform, reconciliation).

Duff confronts the relationship of "hard treatment" (harsh punishments) to penal communication. Imprisonment seems an extravagant means for making a communicative point; fines barely seem to communicate at all. Duff wishes to interpret even harsh punishment as communicative. It draws an offender's attention to the offence and leads the offender to understand that what he or she did was wrong. It persuades the offender to accept the censure of punishment and to "repent."³⁸ On the issue of selecting appropriate penal measures for offenders, Duff would reserve imprisonment for only the most serious offences.³⁹ The type of punishment that best exemplifies punishment as communication is community service.⁴⁰

Duff raises two "preconditions" that must be satisfied for punishment as communication to work properly. First, the state, the "we" who purport to punish, must have "standing" to do so. The state may lack standing because it lacks an appropriate relationship with the offender (lawyers might say that it has no "jurisdiction"); or because the state's own conduct has disqualified it from passing judgment (lawyers might request a stay of proceedings in such circumstances).⁴¹ Second, for punishment to communicate it must have the appropriate "accent," "tone," or "voice" in which it is delivered and received. Words may be clear, but their meaning is derived from their context. How things are said is as important as what is said. If the relationship between the punishing party and the offender prevents the appropriate tone of punishment from being understood (censure as a call to return to community), then the penal communication will fail.⁴² Duff's concern is that our present "unjust" political and economic structures may deny us the standing to punish at least some of those among us; and those structures may prevent penal communications from being understood. In our present circumstances, punishment cannot properly communicate, and to that extent, punishment is not justified.

The other "Duff roundtable" papers waded in on four main issues: Should punishment be understood solely as communication? If punishment does communicate, what link does it have with "repentance"? If punishment does communicate, what does it say? Who is the "we" that communicates?

Andrew von Hirsch, in "Punishment, Penance, and the State: A Reply to Duff,"⁴³ challenges Duff's view that punishment, including harsh punishment, should be solely understood as communication. Von Hirsch does consider punishment to have a

³⁷ *Ibid.* at 50.

³⁸ *Ibid.* at 51.

³⁹ *Ibid.* at 60.

⁴⁰ *Ibid.* at 53, 60; see Iverson, *supra* note 25 at 98.

⁴¹ *Ibid.* at 61, 63.

⁴² *Ibid.* at 65, 66.

⁴³ *PPT* at 69.

communicative function. Like Duff, he understands punishment to be, in part, a form of censure that conveys blame, recognizes the offender as an agent capable of moral deliberation, and invites the offender “to recognise the wrongfulness of the action; feel remorse; [and] make efforts to desist in the future.”⁴⁴ Von Hirsch, however, hard treatment is not to be understood as communicative, but as a prudential disincentive to predatory behaviour,⁴⁵ to appeal to those who may be tempted to commit offences but for whom a purely moral appeal is insufficient.⁴⁶ Von Hirsch reaches the same conclusion as Sorell’s Kant: punishments “address us neither as perfectly moral agents ... nor as beasts which only can be coerced through threats; but rather, as moral but fallible agents who need some prudential supplement to resist temptation.”⁴⁷ Duff opposes mixed-consequentialist views like that of von Hirsch, although his reasons are somewhat meagre. Duff asserts that the noise of the supplement would, in fact, replace or mask or drown out the voice of the law.⁴⁸

The link between punishment as communication and repentance is crucial for Duff. That link is Duff’s retributivist connection to the autonomy and decision-making of the offender. Thomas Baldwin, in “Punishment, Communication and Resentment,”⁴⁹ challenges Duff’s coupling of punishment and repentance. He argues that the correlation between the two is entirely contingent and variable. Moreover, the coupling of punishment and repentance provides no metric for judging the proportionality of punishment to an offence. Some offenders may require a long period of severe punishment to induce them to repent, and others may require only a short period of light punishment; but the time and severity of punishment required to induce repentance is not necessarily the same as the time and severity of punishment required to exact a just punishment, the punishment offenders deserve.⁵⁰ Like von Hirsch, Baldwin concedes that punishment does have a communicative aspect; and like von Hirsch, Baldwin would consider censure, or community disapprobation, to be communicated by punishment.⁵¹ Baldwin argues, though, that while explorations of the communicative aspects of punishment contribute to our understanding of the implementation of punishment, the communicative aspects of punishment form no part of the justification of punishment, as Duff would have it.⁵²

In “‘What to Say?’: The Communicative Element in Punishment and Moral Theory,”⁵³ Matt Matravers accepts the notion of punishment as communicative, but asks some probing questions about the message sent by a punishment that communicates. The punishment cannot say merely that the offender broke the law. What further claims does the punishment make? What reasons does it provide to an offender to attempt to convince

⁴⁴ *Ibid.* at 69, 78 at footnote 23.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* at 70.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.* at 55.

⁴⁹ *PPT* at 124.

⁵⁰ *Ibid.* at 126.

⁵¹ *Ibid.* at 130.

⁵² *Ibid.* at 130-32.

⁵³ *PPT* at 108.

him or her that he or she acted wrongly? To what moral position does punishment appeal?⁵⁴ (And how, one might ask, does punishment communicate? Through the words of the judge alone, or through implicit messages?)

Matravers' last question opens the deepest set of criticisms of Duff. Who is the "we" in whose name we punish? Who is the "we" that includes offenders, victims, judges, lawyers, prosecutors, police officers, and other members of the public? Duncan Ivison, in "Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?,"⁵⁵ writes within the Duffian-punishment-as-communication tradition but raises the problem of the "we" in colonialist contexts. How can talk of "we" make sense if one nation contains cultures with different languages, different values, different histories? As Ivison questions, "[w]hose norms? [w]hich values?"⁵⁶ Alan Norrie, in perhaps the most adventurous piece in *PPT* — "Albert Speer, Guilt, and 'The Space Between'"⁵⁷ — pulls the problem of the "we" into the heart of modernity. Norrie speaks to the breakdown or fragmentation of "normative communities in late modernity."⁵⁸ We move between communities; we "shift between narratives."⁵⁹ Our ability to shift between narratives does permit us to arrive at understandings of one another. At the same time, though, our ability to shift between narratives allows us to avoid guilt (and responsibility) through the reinterpretation of our actions and others' reactions.⁶⁰ To the extent that our relationships with others and ourselves are fissured and transient, and to the extent that we move with others and by ourselves through various normative commitments, the "we" that would speak through punishment and the "we" that would hear the voice of punishment is dispersed and subverted. Norrie might have said that Duff romantically assumes community in the face of the reality of fragmentation.

Von Hirsch too has concerns with Duff's "we." Von Hirsch writes that his "ultimate difficulty with Duff's view" is that he does not "grasp the conception of the state, and of 'community' on which [Duff's view] rests."⁶¹ Assume, *pace* Ivison and Norrie, that we can and should be able to identify a sufficient commonality among offenders and others so that all are able to communicate morally. With von Hirsch, we may wonder just how thick or deep the commonality would have to be to support the intrusive, subjectivity-obsessed state that Duff envisages. We may want a state to help keep us safe, to express our moral outrage, and even to educate us when we err, but do we want a state that is concerned with our souls, with our interiority? Duff's state may supply appropriate governance for a monastery, but would it supply appropriate governance for any modern, pluralistic, individualistic society — for any society in which we might want to live?⁶²

⁵⁴ *Ibid.* at 109-12.

⁵⁵ *Supra* note 25.

⁵⁶ *Ibid.* at 92.

⁵⁷ *PPT* at 133.

⁵⁸ *Ibid.* at 135.

⁵⁹ *Ibid.* at 138.

⁶⁰ *Ibid.* at 145.

⁶¹ *Ibid.* at 79.

⁶² *Ibid.* at 72.

C. INVITATION TO FOUCAULDIAN RESEARCH

PPT ends at the right place. The best piece in *PPT*, which should be read even if none of the other contributions seem appealing, is Nicola Lacey's "Penal Practices and Political Theory: An Agenda for Dialogue."⁶³ Essentially, this is a plea for the philosophy of punishment to engage in dialogue with the work of Foucault and with research inspired by Foucault. One might marvel at the fact that Lacey felt compelled to write her article. Our colleagues in many other disciplines — history, criminology, accounting, psychiatry, health studies, cultural studies, English, to name only a few — are entirely familiar with Foucault. What could be the state of the philosophy of punishment, if it must be reminded of Foucault's contribution to penal studies?

Lacey gives a brief description of Foucault's "analytic of power" and describes three types of apparatuses of power discussed by Foucault — the sovereign, the juridical, and the disciplinary.⁶⁴ Penal philosophy, by and large, focuses only on the sovereign and juridical species of power, and misses the intricate and delicate workings of disciplinary power that both support and operate through more visible or traditionally studied modes of power.⁶⁵ This abstracts penal philosophy from the actual workings of punishment, and from the normative problems posed by disciplinary mechanisms in the body politic.⁶⁶ This also inclines penal philosophy to naive assessments of the nature and effects of particular types of punishment. Duff, as we saw, is an advocate of community sentences. He did not advert to the risks of spreading and more subtle control exercised through increased reliance on community sanctions.⁶⁷

D. CONCLUSION

PPT could be a resource for a philosophy of sentencing and punishment seminar in a Faculty of Law or a Department of Philosophy or Political Science. It does not belong to the "law for laypersons" or even "jurisprudence for dummies" genre, and it is unlikely to find a wide readership outside academic circles (which is not, of course a criticism, but only an observation). Even for academics, *PPT*'s main significance is as a sort of "roundtable" on Duff's notion of punishment as communication. The key documents in penal philosophy are to be found elsewhere. No new paths are broken in *PPT*. The book

⁶³ *PPT* at 152.

⁶⁴ *Ibid.* at 155.

⁶⁵ *Ibid.* at 157.

⁶⁶ *Ibid.* at 159, 160. Alan Hunt, among others, has explored the relationships of law and discipline: see A. Hunt, "Foucault's Expulsion of Law: Toward a Retrieval" (1992) 17 *Law & Social Inquiry* 1.

⁶⁷ Lacey, *supra* note 63 at 161. See M. Mandel, "The Great Repression: Criminal Punishment in the Nineteen Eighties" in R.E. McCormick & L.A. Visano, eds., *Canadian Penology: Advanced Perspectives and Research* (Toronto: Canadian Scholars' Press, 1992) 189.

is a memorial of a conference and not a collection of research that had independently attracted an editor's interest. I do not predict that *PPT* will become a required text.

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