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## Prison on Appeal: The Idea of Communicative Incarceration

A huge amount of literature in legal and political philosophy is focused on the aims and justifications of punishment.<sup>1</sup> There is also a considerable body of work devoted to what constitutes a proportionate sentence.<sup>2</sup> But ethical examinations of the permissible forms of punishment are much rarer.<sup>3</sup> That research which does exist on this issue tends to focus on the death penalty, torture and corporal punishment.<sup>4</sup> Almost nothing exists, on the other hand, on the permissibility of the paradigm form of punishment in contemporary societies: imprisonment. A handful of philosophers have produced important work outlining the rights of prisoners and evaluating just which crimes are deserving of imprisonment, but the question of whether the very practice of imprisonment can be justified has been little discussed.<sup>5</sup> This omission is both surprising and problematic given that the harms that imprisonment produces are so enormous and easy to identify. After all, the practice of imprisonment seems to involve the state routinely infringing individual rights to liberty, privacy, freedom of association, and in most prisons systems, many more rights besides.<sup>6</sup> This is deeply problematic if one assumes that one of the primary functions of the state is to uphold the rights of its citizens. And when other costs of imprisonment are included in the analysis – such as the harms it causes to the friends and family of prisoners, its failure to reduce reoffending, and its enormous cost

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<sup>1</sup> For an excellent overview of the philosophical literature on punishment *per se*, see, R.A. Duff and David Garland (eds.), *A Reader on Punishment* (Oxford: Oxford University Press, 1994).

<sup>2</sup> For an excellent summary of the philosophical work on proportionate sentencing, see Andrew von Hirsch and Andrew Ashworth (eds.), *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005).

<sup>3</sup> Antony Duff makes the same point about a lack of philosophical attention to forms of punishment in R.A. Duff, 'Penal Communications: Recent Work in the Philosophy of Punishment', *Crime and Justice* 20 (1996): pp. 1-97, at p. 57.

<sup>4</sup> On the death penalty, see Matthew H. Kramer, *The Ethics of Capital Punishment: A Philosophical Investigation of Evil and its Consequences* (Oxford: Oxford University Press, 2011); on torture, see Stanford Levinson (ed.), *Torture: A Collection* (Oxford: Oxford University Press, 2004); and on corporal punishment, see Kevin Murtagh, 'Is Corporally Punishing Criminals Degrading?', *Journal of Political Philosophy* 20 (2012): pp. 481-498.

<sup>5</sup> Richard L. Lippke, *Rethinking Imprisonment* (Oxford: Oxford University Press, 2007); William Bülow, 'The Harms Beyond Imprisonment: Do We Have Special Moral Obligations Towards the Families and Children of Prisoners?', *Ethical Theory and Moral Practice* 17 (2014): pp. 775-789; and William Bülow, 'Treating Inmates as Moral Agents: A Defense for the Right to Privacy in Prison', *Criminal Justice Ethics* 33 (2014): pp. 1-20.

<sup>6</sup> Imprisonment 'seems' to do this – but may not if one adopts the view that criminals forfeit their rights upon commission of a criminal act. See Christopher Heath Wellman, 'The Rights Forfeiture Theory of Punishment', *Ethics* 122 (2012): pp. 371-393.

to taxpayers - the need for an ethical evaluation of the practice of imprisonment becomes even more urgent.

The most obvious way for such an evaluation to proceed is to identify the aims and principles that we want a system of criminal punishment to fulfil, and then to assess whether imprisonment can meet them. Indeed, this very method was that employed by sociologist Thomas Mathieson in his classic abolitionist text, *Prison on Trial*. In that book, Mathieson forcefully argues that imprisonment cannot be justified by appeal to any standard punitive aim.<sup>7</sup> First, he argues that it cannot be justified in terms of rehabilitation, because the evidence shows that prison does not rehabilitate offenders, and its condition as a large authoritarian bureaucracy suggests that it cannot rehabilitate.<sup>8</sup> Second, Mathieson argues that it cannot be justified in terms of general prevention, because while some studies purport to show a link between deterrence and probability of sanction, none shows a link to mode of sanction.<sup>9</sup> Third, Mathieson argues that prison cannot be justified in terms of incapacitation, on the basis that incapacitation violates core legal and ethical principles by punishing people for something they have not done, and may never do.<sup>10</sup> And finally, Mathieson argues that prison cannot be justified on the grounds of desert, because determining the precise degree of pain any offender merits is impossible, and it is futile to hope that some specific period of time locked up in jail can effectively deliver it.<sup>11</sup>

The aim of this paper is not to evaluate Mathieson's claims on each of these points; for present purposes it will assume that they are valid. Instead, the aim of this paper is to give prison an 'appeal hearing': to examine whether imprisonment can be justified by a set of punitive aims not considered by Mathieson. In particular, it asks whether imprisonment might be justified by the 'communicative theory' of punishment proposed by Antony Duff. The implications of Duff's theory for imprisonment are particularly important to explore for at least two reasons. First of all, his communicative theory is now one of the most sophisticated, established and influential theories of punishment, offering something quite distinctive to the familiar consequentialist and retributivist

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<sup>7</sup> Thomas Mathieson, *Prison on Trial* (Winchester: 3<sup>rd</sup> ed. Waterside Press, 2006).

<sup>8</sup> *Ibid.* pp. 27-54.

<sup>9</sup> *Ibid.* pp. 55-84.

<sup>10</sup> *Ibid.* pp. 85-107.

<sup>11</sup> *Ibid.* pp. 108-140.

alternatives.<sup>12</sup> Furthermore, not only has Duff defended and outlined a powerful and imaginative justification of punishment per se, he has also – unlike so many other theorists of punishment – given serious attention to the particular forms of punishment that would be justified under his theory. Crucially, Duff sees imprisonment as having a role within his account of punishment. While Duff is absolutely clear that the use of imprisonment should be reduced dramatically in a society with a properly communicative criminal justice system, he is also explicit that imprisonment ought to hold a prominent place within it.<sup>13</sup> Three separate rationales for the use of imprisonment can be found within Duff’s writing. First, he argues that imprisonment is required as the ultimate sanction for those that wilfully fail to comply with all other forms of punishment.<sup>14</sup> Second, he claims that prison can form an appropriate shock or stimulus to an offender’s repentance.<sup>15</sup> And Duff’s third and most prominent argument is that imprisonment serves as a ‘symbolically appropriate’ form of punishment for those who have committed crimes which seriously undermine the ‘social and moral bonds’ which hold a community together.<sup>16</sup>

The purpose of this paper, then, is to ask whether these communicative rationales offer a convincing basis with which to justify imprisonment. This will not be done by evaluating the merits of the communicative theory itself – for much has been written on that topic elsewhere in the literature.<sup>17</sup> Instead, it will assume that the overall tenets of Duff’s theory are sound, and ask whether

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<sup>12</sup> For instance, standard texts on the philosophy of punishment now include accounts of the communicative theory alongside more traditional retributivist and consequentialist theories. For example, see Thom Brooks, *Punishment* (Abingdon: Routledge, 2012).

<sup>13</sup> R.A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), pp. 149-151; R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986), pp. 282-3; R.A. Duff, ‘Punishment, Communication and Community’, in Matt Matravers (ed.), *Punishment and Political Theory* (Oxford: Hart, 1999), pp. 48-68, at p. 60; Duff, ‘Penal Communications’, p. 66; R.A. Duff, ‘Alternatives to Punishment – or Alternative Punishments?’, in Wesley Cragg (ed.), *Retributivism and Its Critics* (Stuttgart: Steiner, 1992), pp. 43-68, at p. 60; and R.A. Duff, ‘Punishment, Expression and Penance’, in H. Jung, H. Müller-Dietz and U. Neumann (eds.), *Recht und Moral* (Baden-Baden: Nomos Verlagsgesellschaft, 1991), pp. 235-248, at pp. 243-4.

<sup>14</sup> Duff, *Punishment, Communication and Community*, p. 152.

<sup>15</sup> Duff, *Trials and Punishments*, p. 283.

<sup>16</sup> Duff, *Punishment, Communication and Community*, p. 149; Duff, ‘Alternatives to Punishment – or Alternative Punishments?’, p. 60; Duff, ‘Punishment, Communication and Community’, p. 60; Duff, *Trials and Punishments*, p. 282; Duff, ‘Penal Communications’, p. 66; and Duff, ‘Punishment, Expression and Penance’, p. 243.

<sup>17</sup> For just a few notable examples see Michael Davis, ‘Punishment as Language: A Misleading Analogy for Desert Theorists’, *Law and Philosophy* 10 (1991): pp. 311-322; Andrew Von Hirsch, ‘Punishment, Penance and the State: A Reply to Duff’, in Matt Matravers (ed.), *Punishment and Political Theory* (Oxford: Hart, 1999), pp. 69-82; and Matt Matravers, ‘Duff on Hard Treatment’, in R. Cruft, M. Kramer and M. Reiff (eds.), *Crime*,

prison can plausibly be said to have a role within it. As such, the argument proceeds in four stages. The first section offers a brief sketch of Duff's communicative theory and its main elements. This includes a summary of the different modes of punishment Duff regards as appropriate within a communicative system of criminal justice, and his reasoning. The next three sections then explore each of Duff's rationales for giving imprisonment a role within such a system: that it is the ultimate sanction; that it can act as a shock to repentance; and that it is symbolically appropriate. The paper argues that none of these rationales succeeds in justifying imprisonment, and that a communicative penal system truly in line with Duff's theory would not include imprisonment. The ultimate conclusion of the paper is thus that imprisonment cannot be justified by appeal to the communicative aims outlined by Duff; in other words, this particular 'appeal' fails. Whether imprisonment can be justified by any alternative penal or other goals is beyond the scope of this paper and left to future research.

## 1. The Communicative Purpose of Punishment

Duff's communicative theory of punishment is in part inspired by older 'expressivist' accounts of punishment, where the fundamental aim of punishment is to convey to the offender feelings of disapproval.<sup>18</sup> However, it seeks to improve upon such theories by not regarding the offender as a passive recipient of such messages, but instead as an integral participant in a two-way dialogue:

Criminal punishment, I argue, should communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they have wronged.<sup>19</sup>

In this way, Duff's communicative theory improves upon expressivist accounts by treating offenders as responsible moral agents who are asked to understand the wrong they have done and to repent it.

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*Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford: Oxford University Press 2011), pp. 68-84.

<sup>18</sup> Joel Feinberg, 'The Expressive Function of Punishment', *The Monist* 49 (1965): pp. 397-423.

<sup>19</sup> Duff, *Punishment, Communication and Community*, p. xvii.

Furthermore, it also explains the rationale for inflicting hard treatment upon the offender. After all, many have pointed out that if the sole aim of punishment were to express censure to the criminal, this could be done without the need for hard treatment: a trial, conviction and public condemnation seem like perfectly effective ways of conveying the message of censure. And Duff himself sees these non-punitive aspects of the criminal justice process as absolutely crucial to the communicative dialogue.<sup>20</sup> However, in Duff's theory, the hard treatment of punishment is not a supplement to the communicative process, but an integral part of it. For it is important to note that the communicative theory is fundamentally retributive, and seeks an appropriate response from the offender for the wrong that they have done. As such, the hard treatment of punishment is absolutely essential to the communicative process: it serves as a penance that the offender is required to undergo in order to focus her mind on her wrongdoing and to repair the broken relationship with those she has wronged, which includes the wider community.

In Duff's theory, then, punishment is an appropriate method of communication for criminal behaviour. To reiterate, punishment is not the only part of the communicative enterprise – the trial and conviction play important roles too – but without doubt the hard treatment of punishment is an integral part of the communicative dialogue between state and offender. As such, it makes perfect sense for Duff to endorse those particular forms of punishment that can reasonably serve in communicating that moral message. As Duff writes: 'On the account I have developed and defended elsewhere, the communicative purpose of criminal punishment runs all the way down, even to the justification ... of particular kinds of hard treatment punishment.'<sup>21</sup>

Of course, it is important to note that Duff does not mean that punishment and particular forms of punishment can only be justified if they do in actual fact end up realising their communicative aims. As has been pointed out by critics, and acknowledged by Duff himself, it is undoubtedly true that for some offenders – like psychopaths and the like – effective moral

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<sup>20</sup> R.A. Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial Volume 3* (Oxford: Hart Publishing, 2007).

<sup>21</sup> Duff, 'Punishment, Communication and Community', p. 51.

communication will prove to be impossible.<sup>22</sup> And such communication will also be ineffective for offenders who have already acknowledged the wrongfulness of their actions and the need for reform in advance of receiving punishment.<sup>23</sup> For Duff, it is not the actual success of communication that justifies hard treatment, but the attempt to communicate censure that is deserved for a moral wrongdoing:

The moral possibility of trials and punishments does not, of course, depend upon their actual success in bringing wrongdoers to engage in the communicative enterprise, or to answer for, to repent, or to make amends for their crimes: we must address the wrongdoer as someone who could respond appropriately...<sup>24</sup>

So what forms of punishment does Duff see as appropriate methods within a wider system of communicative criminal justice? Duff identifies and endorses four examples of effective communicative punishments. Importantly, these four modes of punishment are not mutually exclusive and are often combined in particular punitive bundles. The first form of punishment endorsed by Duff is properly constructed victim-offender mediation programmes.<sup>25</sup> Obviously the explicit aim of such schemes is communicative in Duff's terms: '...to bring the offender to recognise the nature and implications of what she has done, and thus to make material or symbolic reparation for it.'<sup>26</sup> The second mode of punishment Duff endorses is probation. After all, the offender's supervision by a probation officer itself communicates both a condemnatory judgement and that his standing and trust in the community has diminished. Furthermore, the specific restrictions and conditions imposed by the probation order could also help the offender confront the wrongfulness of his behaviour.<sup>27</sup> Third, Duff also cites approvingly certain education programmes and forms of training, such as those imposed upon violent offenders, which confront offenders with the impact of their behaviour, and

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<sup>22</sup> Duff, 'Penal Communications', p. 54.

<sup>23</sup> Ibid.

<sup>24</sup> R.A. Duff, 'Can we Punish the Perpetrators of Atrocities?', in T. Brudholm and T. Cushman (eds.), *The Religious in Response to Mass Atrocity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press 2009), pp. 79-104, at p. 91.

<sup>25</sup> Duff, *Punishment, Communication and Community*, p. 92.

<sup>26</sup> Duff, 'Punishment, Communication and Community', p. 53.

<sup>27</sup> Duff, 'Alternatives to Punishment – or Alternative Punishments?', pp. 56-8.

which help them to develop strategies to better deal with the triggers of their criminal activity.<sup>28</sup> Finally, Duff claims that community service orders can also serve communicative processes well. After all, the service embodies a public apology and a means by which a repentant offender can make up to the community.<sup>29</sup> Furthermore, specific types of community service – such as vandals cleaning up a neighbourhood, or drunken drivers working as cleaners or porters in a hospital accident unit - may help non-repentant offenders face up to the implications of their actions.<sup>30</sup>

Once again, Duff is not making the implausible claim that these modes of punishment will always be effective in establishing communicative dialogue; instead he is making the much more modest claim that each of these forms of sanction, when appropriately employed, are rationally connected to the communicative enterprise of punishment. And Duff's reasoning here seems perfectly plausible. For one, each of these forms of sanction imposes a significant burden on the offender, notably through some significant restriction on liberty, thus ensuring that the retributive condition of imposing a penance for moral wrongdoing is satisfied. Secondly, while the hard treatment entailed by each of these forms of sanction is retributive, it also serves wider communicative purposes: it is directly linked to helping offenders understand the nature and implications of their crimes. Each of these modes of punishment confronts the offender with the wrongfulness of what they have done, thus facilitating (but not coercing) repentance and reform. Thirdly, while each of these sanctions does impose a significant burden, none is so painful and severe that the moral message being communicated is likely to be 'drowned out'. Finally, each of these means of punishment also aims to facilitate the goal of reconciliation through keeping the penance within and related to the community, thus aiming to reintegrate the offenders to society once the penance has been paid.<sup>31</sup>

Duff is justifiably less persuaded that fines are appropriately communicative: '...they lack the more richly communicative, reparative, and rehabilitative character of the kinds of punishment which

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<sup>28</sup> Ibid. p. 54.

<sup>29</sup> Duff, *Punishment, Communication and Community*, p. 106.

<sup>30</sup> Duff, 'Alternatives to Punishment – or Alternative Punishments?', pp. 55-6.

<sup>31</sup> Duff, *Punishment, Communication and Community*, p. 98.



I have discussed here. This suggests we should limit rather than extend their use.<sup>32</sup> However, Duff does envisage some situations in which fines may be of use in relation to certain crimes concerned with material greed.<sup>33</sup> But more persuasive is his claim - which seems to contradict the aforementioned limited endorsement of fines - that fining offenders may have the problematic consequence of misleading them into believing that their crimes can be 'paid for' in purely monetary terms.<sup>34</sup> Reparations, of course, are a different matter. And given that communicative punishments ought to impose a penance through which the offender might achieve reconciliation, one can certainly see how the payment of reparations to victims or society might play a role in a communicative penal system. In any case, a full analysis of the proper role of fines and reparations in a communicative system of criminal justice is beyond the scope of this paper. The important point to take is that Duff sees some forms of punishment, such as victim-offender mediation programmes and community service, as rationally connected to the enterprise of communicative punishment, and others, such as fines, as poorly connected to that enterprise. What we must evaluate next is his analysis of imprisonment.

Given that imprisonment is 'exclusionary' - that is, a sanction which takes the offender out of the community which he has wronged and to which he must be reintegrated - Duff admits that imprisonment does not look promising as a means of communicative punishment.<sup>35</sup> After all, it conflicts directly with the communicative ambition of reconciliation. Because of this, and as stated above, Duff is explicit that a penal system pursuing communicative goals would make far less use of imprisonment compared to current practice in contemporary societies; mediation, probation, education programmes and community service would be the preferred alternatives. Nonetheless, as also stated above, Duff does believe that imprisonment has an important role in a communicative criminal justice system: to serve as the ultimate sanction; to shock certain offenders to repentant

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<sup>32</sup> Duff, 'Alternatives to Punishment - or Alternative Punishments?', p. 60.

<sup>33</sup> Duff, 'Punishment, Expression and Penance', p. 244; and Duff, *Punishment, Communication and Community*, p. 147.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid. p. 149.

understanding; and to act as a symbolically appropriate sanction. The remainder of the paper will critically evaluate each of these rationales in turn; and it will also argue that each fails.

## 2. Imprisonment as the Ultimate Sanction

The first basis on which Duff finds a place for imprisonment within his theory of communicative punishment is to serve as the ‘ultimate sanction’ for those that wilfully fail to comply with all other forms of punishment.<sup>36</sup> It is perhaps no surprise that Duff makes this argument. After all, it certainly seems likely that some offenders will resist or refuse to participate in mediation, probation, education programmes or community service. Surely it is thus necessary to have some ultimate threat such as imprisonment operating ‘above’ these sanctions to either ensure that offenders comply, or to secure that all offenders do serve some kind of penance.

The problem with this justification is twofold. In the first place, it is entirely unclear why imprisonment should play the role of the ultimate sanction. After all, there are plenty of other types of coercive sanction that could be used to ensure compliance or to guarantee that a penance is paid. Indeed, if the main point of this ultimate sanction is to persuade offenders to comply with the ‘standard’ punishments imposed upon them, it is only reasonable to surmise that threats of corporal punishment or even death could work more effectively than that of imprisonment. The selection of imprisonment for this role thus seems somewhat arbitrary.

Secondly, and perhaps more importantly, the very idea of an ultimate sanction or threat conflicts with Duff’s wider theory. To explain, Duff is quite clear that hard treatment punishment must respect offenders as responsible moral agents. The coercive hard treatment must persuade them of their moral wrong and the need for repentance; proper respect must not manipulate offenders into repentance:

If I am to respect another as a rational moral agent, I need not refrain from trying to persuade her to modify her conduct: respect does not preclude attempted persuasion. Respect does,

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<sup>36</sup> Ibid. p. 152.

however, preclude manipulation or coercion...; that is, I should attempt modify her conduct only by giving her relevant reasons to modify it herself.<sup>37</sup>

Importantly, these 'relevant reasons' must be rational and moral. If instead they are prudential, '...by threatening to inflict harm on her if she remains unpersuaded, I cease to treat her or respect her as a rational moral agent...'<sup>38</sup>

This concern for treating individuals as rational moral agents and his wariness of manipulation makes Duff critical of two alternative theories of punishment. First of all, he claims that consequentialist theories of punishment which justify hard treatment solely on the basis that they serve some goal such as rehabilitation or deterrence fail to show respect to moral agents and instead, to paraphrase Hegel, treat men like dogs.<sup>39</sup> In other words, consequentialist theories treat offenders as mere instruments to the achievement of some broader social goal. But Duff is also critical of rival communicative theories – like that offered by Andrew Von Hirsch – which include not only a message of condemnation in moral terms, but also a 'prudential supplement' of hard treatment.<sup>40</sup> To explain, Von Hirsch argues that the only way hard treatment can be justified is not as a moral message, but as a 'prudential supplement' to that message. The hard treatment is an addition to the communication of moral censure – which can be provided simply by conviction and condemnation – providing an incentive for morally imperfect beings to obey the law. But Duff is critical of providing self-interested incentives in this way, on the basis that these prudential reasons, '...will replace, rather than merely supplement, the law's moral voice.'<sup>41</sup> In other words, the threat of some form of hard treatment to deter offenders from future crime will end up 'drowning out' the moral message of punishment, impeding the possibility of moral persuasion and reform.<sup>42</sup>

However, by using imprisonment as 'the ultimate sanction' for those who wilfully resist other forms of sanction, Duff's theory too is manipulating rather than persuading. He is also offering

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<sup>37</sup> Duff, 'Penal Communications', p. 14.

<sup>38</sup> Ibid.

<sup>39</sup> See the discussion of Hegel's theory of punishment in Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right* (Edinburgh: 2<sup>nd</sup> ed., Edinburgh University Press, 2013), p. 44.

<sup>40</sup> Von Hirsch, 'Punishment, Penance and the State: A Reply to Duff'.

<sup>41</sup> Duff, 'Penal Communications', p. 45.

<sup>42</sup> Duff, 'Punishment, Communication and Community', p. 55.

prudential incentives for compliance with the non-custodial sentence. After all, the threat of imprisonment ‘hangs over’ offenders who are tempted not to comply with non-custodial punishments, manipulating them into compliance. This threat thus seems likely to ‘drown out’ the proper moral message of properly communicative sanctions, and thus to impede the process of moral persuasion. Of course, Duff might respond that imprisonment is not intended as a threat, nor as a manipulation tool to garner compliance. Instead, it is merely in place to ensure that some appropriate penance for the wrongdoing takes place, and thus also to communicate to offenders that the community takes their infractions seriously. But while imprisonment might not be intended as a threat, it still performs the function of a threat: it states explicitly that offenders must comply with the sanctions, for if they do not, they will receive a prison term. This kind of message is in conflict with the aims and purpose of the communicative theory of punishment.

In response, it might be argued that all forms of punishment are coercive and manipulative. After all, offenders do not volunteer for or choose hard treatment, it is imposed upon them against – or rather irrespective of - their will. As such, criticising Duff’s endorsement of imprisonment for being coercive and manipulative is surely unfair: all punishment has these features, so perhaps Duff is entitled to justify particular forms of it that coerce and manipulate. But while it is of course true that punishment is coercive in the sense that it is forced upon offenders, this is not the type of coercion that Duff is concerned with when he criticises consequentialist and communicative theories that entail a prudential supplement. Duff is quite happy to accept that punishment is imposed upon offenders against their will: this is what they deserve for their moral wrongdoing. The problem arises when the proposed imposed punishment seeks to manipulate offenders – say with threats or prudential incentives – into desired forms of behaviour. Out of respect for moral agents, the aim of punishment for Duff must be to persuade rather than manipulate. However, by threatening to inflict a harmful prison sentence on an offender who refuses the communicative non-custodial sentence, Duff is straightforwardly manipulating offenders into desired forms of behaviour. The choice facing the offender is clear: enter the communicative dialogue, or go to jail.

### 3. Imprisonment as a Shock to Repentance

Of course, this choice may not be quite so problematic if imprisonment itself were communicative. If a jail term could also be communicative, then it would not act as a manipulative threat to induce appropriate behaviour, but would actually serve as a proper part of a communicative penance. It is clear that Duff does believe that imprisonment can be appropriately communicative in two distinct ways. The next section looks at how Duff believes that imprisonment can serve to usefully communicate to offenders the break they have made with the community and its values. This section examines the claim that imprisonment can be appropriately communicative insofar as it can provide a shock to repentance. Duff writes:

And even a short prison term, if administered and received in the right spirit, can provide a stimulus to and expression for a criminal's repentant understanding: the 'short sharp shock' of a brief imprisonment, or even the 'clang of the prison gate' itself, could ideally serve, not as a prudential deterrent, but as an adequately communicative and penitential punishment.<sup>43</sup>

The idea is that imprisonment is a sanction of such severity that it can be useful in focusing the offender's attention onto the wrongful nature of the crime, '...and thus to induce in him the painful recognition of his wrongdoing.'<sup>44</sup> As such, Duff believes that imprisonment can indeed serve as a useful tool in a properly communicative penal system by effectively delivering the moral message of wrongdoing.

However, there are at least two important problems with this view. The first is that it can end up proving too much. For it is once again unclear why imprisonment – and not other severe forms of punishment – should serve as the appropriate stimulus to repentant understanding. Indeed, the idea that a harsh sanction can shock individuals into a more rational and moral frame of mind is remarkably similar to standard justifications of corporal punishment. For example, the Islamic scholar Ustadh Mahmoud justifies the penalty of 100 lashes for fornication by an unmarried male in the following way:

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<sup>43</sup> Duff, *Trials and Punishments*, p. 283.

<sup>44</sup> Duff, 'Penal Communications', p. 53.

The fornicator sought easy pleasure without regard for the *Shari'a* so he is made to suffer pain in order to recover his senses. By pulling the self to pain, when it succumbs to prohibited pleasure, he re-establishes a certain equilibrium and avoids recklessness and folly.<sup>45</sup>

Other cruel punishments have also received similar justifications. For example, the so-called 'separate system' used in certain Victorian prisons imposed extremely harsh conditions on inmates: prisoners were kept in solitary confinement for the majority of their stay; there was a general rule of complete silence; and when inmates were permitted outside of their cells, they were required to wear peaked caps that covered their faces, to prevent any kind of communication with others. Crucially for our purposes, such a regime was instigated precisely for the same reasons Duff gives for imprisonment: to provide a context and stimulus for prisoners to fully reflect on their moral wrongdoing, to repent their crimes, and to reform themselves.<sup>46</sup>

So Duff's reasoning that imprisonment can be justified on the basis that it can act as a shock to repentant understanding proves too much: it can end up justifying corporal punishments and other similarly cruel sanctions. Duff would respond that his theory explicitly condemns grossly oppressive punishments such as corporal punishment. This is because a properly communicative penal system must address the offender as a rational agent. Corporal punishments, on the other hand, address offenders like animals: as creatures to be trained and manipulated into appropriate behaviour by the delivery of a physically painful stimulus.<sup>47</sup> But this response misunderstands the nature of corporal punishment and neglects the fact that corporal punishments can also address offenders as rational agents. Indeed, the justifications of both the lashes and of the separate system outlined above assume that a moral message is being provided to a rational agent. These punishments inflict pain for a communicative purpose: for stimulating the offender into moral clarity. This is precisely the rationale that Duff gives for imprisonment. Now we might say – quite rightly in my view - that corporal

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<sup>45</sup> Quoted in Abdullahi An-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Syracuse, NY: Syracuse University Press, 1990), p. 114.

<sup>46</sup> Michael Ignatieff, 'State, Civil Society and Total Institutions: A Critique of Recent Social Histories of Punishment', *Crime and Justice* 3 (1981): pp. 153-192.

<sup>47</sup> Duff, 'Punishment, Communication and Community', p. 52.

punishments are extremely unlikely to provide that appropriate stimulus: the pains they cause are bound to reduce rather than enhance the rational faculty, thus hindering repentance. But of course the same can be said for imprisonment. In fact, there may even be reason to believe that imprisonment will have a more deleterious effect on proper reasoning compared to corporal punishments. After all, corporal punishments are genuinely ‘short and sharp’, while the ‘pains of imprisonment’ tend to last over a much longer term.<sup>48</sup>

And this leads us to the second problem with Duff’s claim that imprisonment can be justified in terms of it providing an appropriate shock to repentance: as we will see, the empirical evidence suggests that imprisonment is a particularly poor vehicle for inducing rational reflection, moral clarity and repentance. As such, it seems extremely odd to include it as part of a properly communicative penal system. For to reiterate, while Duff is clear that forms of punishment should not be evaluated by their actual success in achieving communicative goals, he is understandably adamant that the communicative purpose of punishment ‘runs all the way down’ to the justification of particular forms of sanction. In other words, we might say that a specific mode of punishment must be ‘rationally connected’ to the communicative enterprise of punishment in order for it to be justified. There are three sets of empirical reasons to believe that imprisonment is not rationally connected to stimulating moral reflection and repentance.

First of all, there are good reasons to believe that the ‘pains of imprisonment’ will drown out messages of wrongfulness, and the need for penance. That is to say, it is extremely likely that a prison term will not focus offenders’ minds upon their moral wrongdoing, but will instead focus them on the pains that their incarceration entails. The pains of imprisonment are well-documented in the criminological literature. Gresham Sykes in *The Society of Captives* famously claimed that the end of corporal punishment in many societies did not mean the end of painful punishments. He pointed out that imprisonment imposes a number of significant and painful deprivations: of liberty, security,

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<sup>48</sup> Murtagh, ‘Is Corporally Punishing Criminals Degrading?’, p. 16.

goods and services, autonomy and heterosexual relationships.<sup>49</sup> It is only reasonable to surmise that such painful experiences are likely to overwhelm messages of moral censure.

Of course, Duff will no doubt respond that his support of prisons only extends to less restrictive and more rehabilitative forms of the institution. These types of incarceration, it might be argued, are far less likely to drown out moral messages. But once again, the empirical evidence gives us good reason to doubt this. For example, Ben Crewe has shown that while many contemporary prison regimes may not impose such severe deprivations on inmates as they did in the past - and may even in some contexts offer real opportunities for prisoners - they are nevertheless experienced painfully by inmates. Following his extensive empirical research on prison life, Crewe argues that the 'new' pains of imprisonment are experienced as a form of 'psychological tightness' by inmates. For example, complex sentencing conditions leave inmates uncertain and confused about their futures; psychological assessments and cognitive-behavioural courses are highly intrusive and emotionally demanding; and risk assessments leave prisoners anxious to avoid saying and doing the wrong things to jeopardise release.<sup>50</sup> It is only reasonable to assume that an institution which delivers such routine pains on offenders serves not as a useful vehicle for moral and rational repentant understanding, but as a serious impediment to it.

Secondly, not only is there good reason to believe that the pains of imprisonment will drown out any moral message that hopes to be conveyed through punishment, but it may also completely undermine it. After all, being deliberately inflicted with pain by others is not something that is usually received in a calm and dispassionate manner. The pains of imprisonment, much like other pains, are usually received with resentment, hostility or even despair. A.J. Skillen sums this point up extremely well:

As far as the person punished is concerned, the 'hard treatment' rapidly becomes itself the focus of attention, an object of resentment and hostility. Remorse, which is pain at the wrong

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<sup>49</sup> Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, NJ: Princeton University Press, 1958).

<sup>50</sup> Ben Sykes, 'Depth, Weight, Tightness: Revisiting the Pains of Imprisonment', *Punishment and Society* 13 (2011): pp. 509-529.



done, is overridden by pain at the treatment being received. What ‘gets across’, then, is a demoralizing sense of isolation...<sup>51</sup>

Furthermore, empirical studies have demonstrated that imprisonment can seriously reduce inmates’ feelings of personal control.<sup>52</sup> And most tellingly, a recent empirical study on the effects of imprisonment on inmates’ moral reflection found that a common strategy amongst them was to simply ‘get their heads down’, and thus to actively silence normative questions around wrongdoing.<sup>53</sup> It is clear that these kinds of feelings and actions - resentment, hostility, lack of control and retreat - are a significant barrier to the kinds of moral reflection and effective dialogue that a communicative criminal justice system is meant to embody.

Finally, even if it is possible that imprisonment is able to produce some kind of moral transformation, the empirical evidence strongly suggests that it will not be of the type that Duff desires. After all, the phenomenon of ‘prisonisation’ in which the, ‘...folkways, mores, customs, and general culture...’ of the prison are adopted by inmates has long been observed by criminologists.<sup>54</sup> It was once thought that such changes in values stayed with offenders over the long-term, serving as a serious obstacle to offenders’ rehabilitation and thus making it harder for offenders to adopt the changes in lifestyle necessary for desistance and successful reintegration into the wider community.<sup>55</sup> However, recent empirical studies suggest that the process is not linear, with some inmates deliberately turning away from these prison norms as they approach release.<sup>56</sup> But whether prisonisation is experienced over the short or the long term, the fundamental point remains: imprisonment may sometimes facilitate a moral transformation, but it is one in which the norms and values of the prison are adopted, as opposed to a repentant understanding of moral wrongdoing.

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<sup>51</sup> A.J. Skillen, ‘How to Say Things with Walls’, *Philosophy* 55 (1980): pp. 509-523, at p. 523.

<sup>52</sup> Lynne Goodstein, Doris Layton and R. Lance Shotland, ‘Personal Control and Inmate Adjustment to Prison’, *Criminology* 22 (1984): pp. 343-369.

<sup>53</sup> Marguerite Schinkel, ‘Punishment as Moral Communication: The Experience of Long-Term Prisoners’, *Punishment and Society* 16 (2014): pp. 578-597, at p. 590.

<sup>54</sup> Donald Clemmer, *The Prison Community* (New York: Holt, Rinehart and Winston, 1958).

<sup>55</sup> For example see Samuel L. Myers, Jr, ‘The Rehabilitation Effect of Punishment’, *Economic Inquiry* 18 (1980): pp. 353-366.

<sup>56</sup> Alison Liebling and Ben Crewe, ‘Prison Life, Penal Power and Prison Effects’, in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology* (Oxford: 5<sup>th</sup> ed., Oxford University Press, 2012), pp. 895-927, at pp. 913-914.

Imprisonment is extremely unlikely to ‘shock’ prisoners into moral clarity and repentance. The empirical evidence in fact suggests that it is much more likely to have opposite effects: to ‘drown out’ moral reflection; to be met with resentment, despair, loss of control and withdrawal; and even to result in offenders adopting the values of the prison and other prisoners, rather than those of the wider community. Given this, it is very difficult to see any ‘rational connection’ between the practice of imprisonment and the communicative enterprise of punishment.

#### 4. Imprisonment as a Symbolically Appropriate Sanction

However, there is another way in which Duff believes imprisonment can be appropriately communicative. In fact, the most prominent and repeated reason that Duff gives for imprisonment having a role in a communicative system of punishment is that it can serve as a ‘symbolically appropriate’ sanction. To explain, Duff argues that:

[S]entencers should look for (or try to create) that particular sentence that will express most appositely the censure merited by this offender’s crime and which will be appropriate to this particular offender.<sup>57</sup>

Duff is essentially updating the old adage that ‘the punishment must fit the crime’ to argue that the mode of punishment should appositely reflect and communicate the wrongful nature of the crime to the offender.<sup>58</sup>

Duff’s key claim is that because imprisonment excludes the offender from the community, it can sometimes be a symbolically appropriate sanction:

The central message which imprisonment communicates is exclusion: it removes or excludes the offender from the community and his normal social relationships; and it must be justified as being necessary to give material and symbolic form to the judgment that his offence was so destructive of those moral and social bonds on which the community depends as to cast in doubt his membership of the community.<sup>59</sup>

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<sup>57</sup> Duff, ‘Penal Communications’, p. 62.

<sup>58</sup> Duff, ‘Punishment, Expression and Penance’, p. 242.

<sup>59</sup> Duff, ‘Alternatives to Punishment – or Alternative Punishments?’, p. 60.

The idea is that imprisonment gives expression to the fact that some crimes are so destructive of the values that keep the community together, that they make it impossible to live with an individual who commits them.<sup>60</sup> For Duff, these are crimes entailing serious violence, including murder.<sup>61</sup>

There is certainly something powerful about this particular line of argument. After all, the physical exclusion of, for example, rapists and murderers from their community seems to send a message about the seriousness of their wrongdoing that is far more apposite than that which can be sent via education programmes, victim-offender mediation programmes or community sentences. Rapists and murderers have excluded themselves from society by violating its core values, so perhaps literally excluding them via incarceration in jail is the appropriate communicative response.<sup>62</sup> In spite of this intuitive appeal, however, there are two important problems with this line of argument for justifying imprisonment.

The first problem is that Duff's reasoning may once again prove much more than he wants it to. That is to say, it may end up justifying imprisonment for a huge number of crimes – perhaps even all crimes - and not just those involving serious violence. To explain, Duff presumably focuses on crimes of serious violence and murder because they constitute violations of moral and social bonds that all societies, as he states, 'depend on'. In other words, a society simply cannot function properly without norms of respect for life and for bodily integrity. But societies also depend on several other norms to function properly. For example, a norm of respect for property is an absolutely essential part of a community's 'moral and social bonds'; once again, without some set of rules governing property relations, it is impossible for a society to function properly. So if imprisonment is justified for those crimes that break the moral and social bonds that society depends on, it must surely also be justified for all property crimes.

In fact, there is good reason to believe that in Duff's ideal communicative system of criminal justice all crimes constitute violations of basic moral and social bonds, and thus that imprisonment is justified for all crimes. To explain, Duff is sensitive to the critique of his theory from some liberals

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<sup>60</sup> Duff, *Punishment, Communication and Community*, p. 150; and Duff, 'Punishment, Expression and Penance', p. 243.

<sup>61</sup> *Ibid.*; and Duff, 'Penal Communications', p. 66.

<sup>62</sup> Duff, *Punishment, Communication and Community*, p. 149.

that it is too intrusive: it deliberately intrudes into individuals' moral conscience and sensibilities, demanding that offenders confront their moral wrongdoing, and asking them to reflect, repent and reform.<sup>63</sup> In response, Duff argues that in a community which values autonomy, the criminal law must be strictly constrained: only the most serious moral transgressions will be criminalised.<sup>64</sup> As such, the scope for any penal sanction to result in the kinds of intrusions outlined above will be extremely limited. But of course, if imprisonment is justified only for the most serious transgressions of social and moral bonds, and if all crimes simply by being crimes constitute such transgressions, imprisonment is justified for all criminal activity, all else being equal. Quite obviously, this conclusion runs directly contrary to Duff's aim to radically reduce the use of imprisonment as a punitive sanction; in fact, it would seem to demand its extension in all societies.

In response to such a critique, Duff might well propose that there are two thresholds of seriousness when it comes to criminal activity. First, he might argue that only serious transgressions of social and moral bonds ought to be criminalised. And then he might further claim that only a subset of those transgressions – the 'most serious of the serious' - merit the particular sanction of imprisonment. This could be argued to communicate to offenders that all criminal activity breaks important bonds that societies depend upon, but there are some actions which constitute bigger breaks than others. This response is certainly plausible. Nonetheless, it is worth pointing out that what constitutes the 'most serious of serious' transgressions under this theory will not include, as Duff seems to suppose, all and only violent acts. For under this communicative theory, the seriousness of a crime is a function of the extent to which it breaks social bonds. But it is worth noting that many violent crimes are rather isolated crimes of passion that pose minimal threat to the social bonds holding a community together. Instead, the most serious of serious crimes will seem to include such things as acts of terror and the promotion of insurgent ideas. After all, such radical actions strike explicitly and directly at the moral and social bonds of a political community. But it seems odd to regard these sorts of crime as those which most urgently require the communication of exclusion to their perpetrators. After all, those who commit such acts are exactly the type of people who have

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<sup>63</sup> Christopher Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge: Cambridge University Press, 2008), p. 190.

<sup>64</sup> Duff, 'Punishment, Communication and Community', p. 58.

already reflected on the deepest values of their society – and have come to reject them fundamentally. It is hard then to see the useful purpose in communicating to such individuals the fact that their actions constitute a fundamental break with society; for this is something that is already abundantly clear to them.

Duff will no doubt respond to such a claim in the same way that he responds to criticisms of his theory which argue that communication with psychopaths is near impossible. For recall that Duff argues that it is the attempt to communicate deserved censure that is vital under his theory, rather than the success of any particular communicative enterprise.<sup>65</sup> But even if we accept this line of argument, a more fundamental problem remains with the idea of communicating exclusion through imprisonment. For the simple fact is that communication and exclusion are in tension with one another, and it is hard to see how they can be reconciled in a satisfactory way. For as we will see in what follows, if emphasis is given to exclusion, as embodied by the physical separation of offenders through imprisonment, then the possibility of meaningful communication fades; and if emphasis is given to improving that communication, say by utilising less restrictive and more rehabilitative forms of imprisonment, then the message of exclusion is radically undermined. Given this tension, the very possibility of ‘communicating exclusion’ is hard to make much sense of.

Let us start then by looking at how excluding offenders through imprisonment undermines the communicative enterprise of punishment. Recall that the communicative theory of punishment is designed to improve upon expressivist theories by arguing that the state must move beyond sending simple messages of censure to offenders, but must instead facilitate a moral dialogue between the state and responsible moral agents. A genuine two-way dialogue over criminal wrongdoing entails the expression of censure from state to offender, but it also possesses two other crucial elements: it must express censure in such a way that is likely to facilitate understanding of the message; and it must do so in way which is rationally connected to eliciting an appropriate response.<sup>66</sup> Now clearly such forms of dialogue are going to be extremely difficult for any mode of punishment to realise.

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<sup>65</sup> Duff, ‘Penal Communications’, p. 54.

<sup>66</sup> For a very useful discussion of the necessary conditions of genuine dialogue and the difficulties it poses for Duff’s theory, see Kimberley Brownlee, ‘The Offender’s Part in The Dialogue’, in R. Cruft, M. Kramer and M. Reiff (eds.), *Crime, Punishment and Responsibility: The Jurisprudence of Antony Duff* (Oxford: Oxford University Press, 2011), pp. 54-67.

Indeed, Kimberley Brownlee has argued that the inherent inequality in status between the state and offender undermines the very possibility of reciprocal punitive dialogue.<sup>67</sup> But this seems too strong. After all, it does seem possible for genuine dialogue to take place between parties of unequal status, such as between parents and their young children, or between schoolteachers and their pupils. Moreover, it is also possible to imagine suitably tailored bundles of sanctions which could meet the basic conditions of a genuine punitive communicative dialogue outlined above. For example, one can at least imagine a bundle of sanctions that included say, victim-offender mediation programmes and education programmes, that if packaged and delivered properly could facilitate an appropriate understanding and response from an offender. What is much more difficult to imagine, on the other hand, is how a period of incarceration in jail could by itself constitute such a communicative dialogue.

For while imprisonment undoubtedly expresses censure, it does not seem rationally connected to the other two features of a genuine communicative dialogue: helping the offender achieve understanding; and eliciting an appropriate response. We have already seen in the previous section how certain features of prison life and the way it is experienced impede the possibility that moral messages will be received and understood by offenders. But even if messages of exclusion can somehow get across and be understood, there are powerful reasons to doubt that prisoners will be able to respond appropriately to them. For it is crucial to remember that exclusion contradicts one of the key responses that communicative punishment is meant to facilitate: reintegration. Communicative punishment is designed to persuade offenders to repent, reform and achieve reconciliation; and together such responses are hoped to reintegrate the offender into the community. The idea is that the understanding which offenders achieve and the penance they serve will enable them to repair the rift they have caused with society, and live successfully by its values. But such reintegration is surely best achieved by wrongdoers paying their penance within and to their community. This is quite simply because the empirical evidence strongly suggests that confinement and exclusion disrupts offenders' ability to make something of their lives and find a role in the conventional channels

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<sup>67</sup> Ibid.

afforded to them by society.<sup>68</sup> Put directly, the evidence shows that prison impedes rather than enables reintegration. Indeed, Duff himself acknowledges this, citing the exclusionary nature of imprisonment as the reason why our employment of imprisonment should be radically reduced.<sup>69</sup> But given that properly communicative sanctions must not merely express a message of moral wrongdoing to offenders, but must also do so in a way that is likely to elicit understanding of that message and facilitate an appropriate response, it is unclear why Duff advocates even its limited use.

Duff might concede that proper communicative dialogue is impossible within most existing and established forms of imprisonment. However, he will justifiably respond that his is a theory of punishment as it ought to be, and thus it must also be a theory of imprisonment as it ought to be. What we should ask, then, is not whether existing forms of imprisonment can appropriately communicate the message of exclusion, but whether the most suitable prisons we can imagine can achieve such effective communication. Recall then that the problem with imprisonment is that it impedes understanding of the moral message being communicated, and also fails to elicit the appropriate response from offenders. How might such problems be overcome? While Duff does not provide detailed answers to these questions, he does in one place advocate less exclusionary forms of imprisonment, such as curfews and intermittent sentences.<sup>70</sup> On the same basis, we can expand on this point to surmise that it is also possible that the appropriate use of open prisons might alleviate some of the problems with eliciting a meaningful dialogue described above. Indeed, curfews, intermittent sentences and open prisons all seem to have communicative potential on three levels. First of all, it is certainly possible that such forms of incarceration are less likely to ‘drown out’ the moral message of censure. Given the greater range of freedoms that such forms of imprisonment take, it is likely that they will reduce the pains of imprisonment, the levels of resentment, hostility and loss of control, and the phenomenon of prisonisation amongst inmates. In turn, this may make offenders more receptive to the moral messages that the punitive sanction is attempting to communicate. Secondly, these forms of imprisonment may be more useful in enabling offenders to understand that message, since they can

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<sup>68</sup> On this point, see the essays in S. Maruna and R. Imarigeon (eds.), *After Crime and Punishment: Pathways to Offender Reintegration* (Cullompton: Willan, 2004).

<sup>69</sup> Duff, *Punishment, Communication and Community*, p. 149.

<sup>70</sup> *Ibid.* p. 151.

more easily incorporate other sanctions such as victim-offender mediation, education programmes and community service orders that are tailored to the specific nature of the offenders' criminal activity. Finally, curfews, intermittent sentences and open prisons allow for much more engagement with the wider community, thus reducing the problem of exclusion and facilitating the possibility of successful reintegration. For example, these forms of confinement are usually coupled with job placements, community service, and forms of training which all provide a clear connection to the core communicative goal of reintegration. In this way, it may be possible to develop forms of imprisonment that can realise a genuine punitive communicative dialogue.

The problem, of course, is that by shifting the emphasis of the penal system in this way to ameliorate communication, the message of exclusion gets lost in the process. To reiterate, Duff believes that it is important for imprisonment to communicate exclusion; it is the exclusion that prison entails which makes it a symbolically appropriate sanction. Crucially, however, all of these attempts to make prison processes better at fostering communicative dialogue – intermittent sentences, curfews, open prisons – radically water down the exclusionary nature of imprisonment. So while the move to less exclusionary forms of incarceration might make prison more effective at communicating, it also radically undermines what is meant to be its core message. And indeed, there is some empirical evidence which suggests that these less exclusionary forms of confinement do send confusing messages. For example, one of the most famous open prisons is Bastøy in Norway – sometimes referred to as 'Prison Island'. Bastøy is large, open, with minimum security and provides offenders with lots of contact with the wider community. However, recent research suggests that inmates there can become confused about their different roles within and outside of the prison environment, as well as the different rules that apply. Offenders get a taste of freedom and of life after release, but this can be bittersweet: they grow anxious about the prospect of returning to the community, and still have to suffer the frustration of ultimately remaining in rule-governed custody.<sup>71</sup> The point here is not that even these forms of imprisonment cause suffering and hardship to the offenders, for obviously all forms of punishment do that. Rather the point is that they send confusing messages to inmates. For a

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<sup>71</sup> Victor Lund Shammass, 'The Pains of Freedom: Accessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway's Prison Island', *Punishment and Society* 16 (2014): pp. 104-123.



theory which justifies forms of sanction by their communicative potential, such confusion is deeply problematic.

In summary, we can see that there is a real problem in using prison as a vehicle to communicate the message of exclusion. If imprisonment is clearly exclusionary, then its moral message is unlikely to be heard or responded to in the appropriate manner. But if we try and make prison more effective at communicating, it thereby becomes less exclusionary, undermining the key moral message that Duff wants to be communicated.

## 5. Conclusion

The conclusion of this paper must be that this particular appeal hearing for prison has failed: imprisonment cannot be justified by appeal to Duff's communicative theory of punishment. It cannot be justified as an ultimate sanction for those that fail to comply or resist other forms of punishment. This is because other sanctions could also serve that role, and also because the very use of threats manipulates offenders rather than treats them respectfully as responsible moral agents. Nor can prison be justified as a shock to repentant understanding. This is because the idea that harsh punishments can serve this goal may end up justifying corporal and other cruel punishments. Moreover, there is good reason to believe that imprisonment (and corporal punishment) is a poor vehicle for the delivery of moral messages. Finally, imprisonment cannot be justified as a symbolically appropriate response to the most serious crimes. This is because all crimes undermine important social and moral bonds, which would seem to make prison a proper response to all crimes. Furthermore, while imprisonment may be able to express the message of exclusion to criminals, it fails to engage them in a meaningful dialogue in which the offender is likely to hear the message and respond to it appropriately. Crucially, attempts to overcome this problem and improve the communicative potential of imprisonment – through forms of curfews, intermittent sentencing and open prisons – only end up confusing the message of exclusion.

If imprisonment is to be justified, then, we will have to look again at the punitive aims discussed and dismissed by Mathieson. Or we might seek to justify it via other punitive aims that he did not consider. Alternatively, there is also the possibility that imprisonment might be justified on the grounds that it serves social goals that are not strictly punitive.<sup>72</sup> The final possibility, of course, is that Mathieson was right that prison simply cannot be justified, and that all societies must work towards its abolition. Whatever the case, because of the serious harms that imprisonment imposes, and its widespread use, it is vital that these possibilities are pursued and that the institution receives far more ethical attention from philosophers than it has to date.

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<sup>72</sup> Bennett, *The Apology Ritual*, p. 196.