Peculiarly Criminal: Resolving the Prudential Deterrence Problem

James Farrow

This article contributes to the debate in the philosophy of law over the justification of punishment. It focusses on the 'communicative' theory of punishment as articulated by Antony Duff in his chapter of the recently published *Oxford Handbook of the Philosophy of Punishment* (2024). In the chapter, Duff explicates his theory and suggests that the 'prudential deterrence' problem is the most serious objection to it. This article proposes a novel solution to the problem. It argues that the problem arises from Duff's failure to properly outline the role of his theory in relation to the different kinds of law (principally criminal and non-criminal). Accordingly, this relation is clarified by the suggestion that the communicative theory ought to be designated as what justifies the criminal law in particular, while the considerations raised by the prudential deterrence problem are what defines the law apart from particular criminal or non-criminal considerations.

Introduction

One of the central questions within the philosophy of law concerns the justification of punishment. Whether and why the legal system has the right to mete out punishment to those who break its commands is an issue of obvious importance, so it is no wonder that the debate is ongoing and has been for centuries. Perhaps the very latest contribution to the debate is the *Oxford Handbook of the Philosophy of Punishment* (2024), in which the most prominent current theories of punishment are outlined by their major proponents.[1] Particularly promising is the 'communicative' theory of punishment, discussed in chapter six by Antony Duff.[2] Duff is arguably the pioneer of this view, and in the chapter he provides a concise overview of it and also discusses a major objection, known as the "prudential deterrence" problem.[3]

[1] The Oxford Handbook of the Philosophy of Punishment, ed. J. Ryberg (Oxford: OUP, 2024). https://doi.org/10.1093/oxfordhb/9780197750506.013.6

[2] Antony Duff, 'Communicative Theory' in The Oxford Handbook of the Philosophy of Punishment (Oxford: OUP, 2024). pp.90-105.

[3] Ibid. p.90.

The communicative theory holds that the justification of punishment under the criminal law lies in a dialogue involving a message of disapprobation from the state to the offender, and then in the offender's responding with a ritual apology.[4] This process encourages reconciliation and allows the sociopolitical community to feel that its values are being upheld. While this might seem intuitive, Duff admits that a plausible further purpose of the justice system is that it deters wrongdoing, and that it is on this basis that punishment is justified. Indeed, it is strange to imagine a justice system which lacked any deterrent element. According to the communicative theory, however, such a system would completely satisfy the demands of justice – indeed, any further punishment would be unjustifiable. This presents a problem for Duff, and is referred to as the 'prudential deterrence problem'. Duff himself does not offer a solution to the problem, except to say that the communicative theory must accommodate its concerns in some way.[5] This article will present a solution to the prudential deterrence problem.

The Communicative Theory of Punishment

Unlike the expressive account of punishment (best articulated by Joel Feinberg) in which punishment is merely condemnation of the offender by the state, the communicative theory holds that the offender must be an active participant in the process.[6][7] It is not enough for the law to simply 'tell them off'; we expect the offender to communicate their remorse (or at least give the impression of remorse) by performing some apologetic act, lest they be seen to have suffered no penalty for their wrongdoing and "get away with it".[8] The aim of this process is to bring about a reconciliation between the offender and the public whose norms have been violated, and it is in this that justice consists.[9] The primary objection to this theory arises out of the relationship between communicative and deterrent punishment respectively. It is therefore

[4] Ibid. p.92.

[5] Ibid. pp.104-05.

[6] Ibid. p.94.

[7] Joel Feinberg, 'The Expressive Function of Punishment' in The Monist, 49, 3 (Oxford: OUP, 1965). pp.397-423. https://doi.org/10.5840/monist196549326

[8] Duff, 'Communicative Theory', pp.91-93.

[9] Ibid. pp.98-99.

necessary first of all to properly understand these terms and what each form of punishment might look like.

Punishment is here defined as any kind of sanction imposed upon an individual by the state as a result of their having violated the law. The distinction between communicative and deterrent punishment is more theoretical than practical and thus does not take a consistent concrete form. However, given that on the communicative view the kind of reconciliatory public apology described above exhausts the demands of justice (at least in principle), the theory often fails to provide much justification for harsh punishments, e.g., imprisonment. In any case, the distinction in question arises out of the debate as to what the purpose or justification of punishment is. If the state imposes a punishment on an individual on the grounds that the said punishment is necessary for the individual to communicate their remorse to the wider community, and thereby bring about a reconciliation, then that punishment is considered to be communicative. Similarly, if the state imposes a punishment because it is considered necessary to deter wrongdoing, then it is an instance of deterrent punishment. Importantly, this distinction does not preclude the possibility of a punishment being justified for both communicative and deterrent reasons. Indeed, such a possibility is just what this article will consider.

It is not difficult to see how incongruous the recommendations of Duff's communicative theory might be with the criminal justice system as it currently exists. If all that is necessary for justice to be done is that the state and the offender engage in a symbolically reparative dialogue, the need for more traditional legal sanctions (e.g., imprisonment, fines, community service, etc) is at best questionable. Duff admits that many of these approaches may indeed be unjustified from a communicative standpoint.[10] Imprisonment in particular, as effective exclusion from the civic community, appears antithetical to the communicative theory's stated aims of apology and reconciliation.[11][12] There is, however, a

[10] Ibid. pp.96-100.

[11] Ibid. p.92.

[12] I leave the question of whether exclusion from the community could serve the aims of reconciliation to one side. My point here is that the practice of imprisonment as it currently exists would certainly be hard to justify by communicative lights. This is a point Duff himself raises, see Duff, 'Communicative Theory', p.92, pp.94-95. My thanks to an anonymous reviewer for encouraging me to make this clarification.

communicative argument for these forms of punishment. Arguing that "mere words" may not always be sufficient to communicate condemnation to or apology from the offender, Duff contends that it may be necessary to use material sanctions to more effectively convey the intended approbation and/or apology.[13] He acknowledges that determining exactly how much material sanction ought to be meted out in any particular case will be a difficult enterprise, as the appropriate forms and severity of punishment is often a matter of convention.[14] Nonetheless, it seems as if at least some more traditional forms of punishment can be justified by a communicative theory.[15]

The Prudential Deterrence Problem

The communicative theory may well accord with some of our basic intuitions about the function of the criminal law: that the criminal law is a mechanism by which wrongdoing is condemned and apologised for, and by that process the values of the community are upheld, has a great deal of intuitive force. However, it remains an open question whether the communicative theory can account for all of our intuitions about the function of the justice system. Duff admits that a plausible further purpose of the justice system is that it deters wrongdoing, and that it is on this basis that punishment is justified. Moreover, he accepts that the communicative theory, even if it can account for some material sanctions, may not itself be able to justify these sanctions to the extent necessary to deter potential offenders. It is doubtful that a justice system which was adequate by communicative standards but failed to reduce crime to a reasonably low level would be tolerated. Even if purely communicative punishment could deter crime to a sufficient degree, the fact that it might be expected to satisfy this condition testifies to the importance of deterrent considerations.[16] These questions threaten to significantly undermine the communicative function assigned to punishment by Duff.

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[13] Ibid. p.103.

[14] Ibid. p.101.

[15] For lack of space I leave it to others to determine which methods of traditional punishment would be most appropriate for communicative justice, although I suggest that community service might be a good candidate.

[16] Ibid. pp.102-03.

Duff himself accepts the force of this argument. He concedes that a system of justice premised on purely communicative considerations is not likely to be viable, given our understanding of punishment as a deterrent and the need to dissuade from wrongdoing those who may be unmoved by the threat of moral censure alone.[17] A deterrent aspect is therefore necessary in addition to the communicative function of the criminal law. Duff admits this reluctantly, however, and it is clear that the law's dual aspect is outlined in view of practical realities, rather than on any solid theoretical foundation. The role of deterrence is designated as being a "constraint" on the pursuit of communicative aims, a mere "secondary feature" of criminal justice generally.[18] Duff fails to outline the formal relation of deterrence to the law which might justify these claims, stating only that deterrence must be included in legal calculation as a result of regrettable facts about human nature.[19] It is because of this lack of a formal demarcation of the respective roles of communication and deterrence in the law that the prudential deterrence problem persists, predicated as it is on contrasting assertions about the function of the law.

The Limits of Communication

Unfortunately, Duff himself does not consider a substantive solution to the prudential deterrence problem in his paper. This is by no means indicative of whether such a solution is possible. This paper will articulate a solution that takes account of the role of deterrence in the law. To begin with, it will be helpful to clarify exactly what it is in Duff's argument that exposes him to the prudential deterrence problem. Early in the chapter, Duff mentions and rejects the argument that what defines the criminal law in particular (as opposed to other kinds of law) is that it is justified by its aim of punishing people. Rather, for Duff, the criminal law has a special "normative significance".[20] He goes on to develop this notion of the criminal law's distinguishing 'normative significance' into the communicative justification of it which was elaborated in the first

[17] Ibid. pp.104-05.

[18] Ibid. p.105.

[19] Ibid. pp.103-04.

[20] Ibid. p.95.

section.[21] A keen observer will recognise two things: that communicative punishment has been offered as the justification of the *criminal* law (whether it justifies or is characteristic of other kinds of law is left unclear) and that the question of other motivations for punishment has been left unresolved, only to return as the prudential consideration which poses so much danger for the communicative theory. Any solution to the prudential deterrence problem will therefore define the aims of the different kinds of punishment more rigorously. This may be done with the aid of a distinct but related theory of punishment.

Bearing some similarity to the communicative theory, Joel Feinberg's expressive theory of punishment may be able to provide a framework by which the prudential deterrence problem can be avoided. In his 1965 paper 'The Expressive Function of Punishment', Feinberg draws a distinction between two kinds of legal sanction: "punishments" (e.g., imprisonment) and "penalties" (e.g., parking tickets).[22] He argues that what is distinct about punishments as opposed to penalties is that they carry a kind of reprobative "symbolic significance", not dissimilar from Duff's argument testifying to the "normative significance" of the criminal law.[23] He further argues that such reprobation is in principle separable from any material sanction (although in practice is often tied to such sanctions) and constitutes its own kind of punishment, similarly to communicative punishment.[24]

It seems that the punishment/penalty distinction as so defined may map onto the distinction between the criminal and the civil law.[25] Feinberg's argument about what makes 'punishments' unique is similar to the argument in the philosophy of law that what defines the criminal law is that it confers or expresses a special kind of approbation.[26] According to this view, criminal trials are conducted differently from civil trials, with

[21] Ibid. pp.95-96.

[22] Feinberg, 'Punishment', pp.397-98.

[23] Ibid. p.400, Duff, 'Communicative Theory', pp.95-98.

[24] Feinberg, 'Punishment', p.400.

[25] The fact that there are some kinds of punishment containing a symbolic/apologetic element which are issued under both the criminal and the non-criminal law (e.g., fines, damages payments) is addressed at the end of the following section.

[26] Found for instance in Richard G. Singer, 'The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability' in Boston College Law Review, 30 (2,2) (Newton:

greater standards of proof and confidence in guilt required for a conviction, because criminal convictions bear a unique stigma, which is its own kind of punishment.[2728] Drawing on these theories, communicative punishment may be circumscribed as what specifies the *criminal* law only, and distinguishes it from the non-criminal law. Furthermore, given that deterrent considerations are not picked out by this distinction, but (following the prudential deterrence objection) the role for deterrent sanctions in the law is admitted, then deterrent punishment seems not to be characteristic of any kind of law in particular but rather of the law in general (what the distinguishing characteristics of non-criminal kinds of law may be is not investigated here).[29] On this view, deterrent punishment is an aspect of both 'punishments' (analogous to criminal sanctions) and 'penalties' (analogous to non-criminal sanctions), whereas communicative punishment is only an aspect of 'punishments' – the operation of the criminal law then involves both communicative and deterrent punishment. Whether an agent's action demands deterrent punishment (subject to the law in general), and whether the same action demands communicative punishment (subject to the criminal law in particular) are two conceptually independent, if often practically linked, questions. If an offence falls inside the purview of the criminal law, and its specifically communicative function is then performed, the proponent of the communicative view can then be quite happy to leave any other necessary punishment up to the purely deterrent considerations of the law in general. Thus, by formalising the relations between kinds of punishment and kinds of law in this way, prudential considerations can be accommodated in a communicative account of punishment, without undermining the communicative theory.

Potential objections

The first and most pressing objection may be one which Antony Duff himself has articulated. In the same paper already discussed, Duff

Boston College Law School, 1989). pp.337-408. https://bclawreview.bc.edu/articles/1476. In particular pp.404-05.

[27] Singer, 'The Resurgence of Mens Rea', pp.404-05.

[28] Duff echoes this view in his discussion of criminal trials. See Duff, 'Communicative Theory', p.98.

[29] I offer a suggestion of what this might be at the end of the following section.

argues that to draw too clear a distinction between communicative punishment and deterrent punishment is arbitrary, as each aspect has dissuasive power, and any person is likely to be influenced by the dissuasive effect of both. Separating them is not only to discretely classify human beings and their motives, which is problematic enough, but also has the troubling implication that a particular class of people require deterrent punishment because they cannot be trusted to heed the moral message communicated by the law.[30] Duff argues that this is an altogether too cynical view of the law's subjects. However, this objection, while powerful, is ill-suited to the view proposed here. The distinction between communication and deterrence in this paper is not made in order to identify two kinds of dissuasion working in parallel, each designed to target different people and different motives. Instead, the distinction is unique to the criminal law as opposed to the law in general and exists because their purposes (and not their targets) are distinct. It is true that the application of either kind of law does involve deterrent punishment, but that is what justifies merely the law in general, and that is why deterrent sanctions are common to both criminal and civil law. If we are to distinguish criminal law from the law in general, and are also sympathetic to a communicative understanding of justice, we *can* make a clear distinction between communicative and deterrent punishment, if we use it to specify the criminal law. This distinction does not threaten to give legal form to an arbitrary division of human motivations – on the contrary, it betters our understanding of precisely what it is we are doing when we use the tools the law gives us, and so reduces the arbitrariness of our judgements.

Discussion of this objection gets us closer to the heart of the matter, and to why communication is better suited to the circumscribed role presented here. The objection rests on the assumption that communicative punishment acts as a method of dissuasion, with the same end as deterrent punishment. It is only by accepting this premise that one can arrive at the conclusion that both methods appeal to inseparable motives in potential offenders. However, the view presented in this paper supports the idea that what is unique about communicative punishment and justifies it (and is therefore unique to and justification for the criminal aspect of the law) is not to do with dissuasion. This is not

[30] Duff, 'Communicative Theory', p.104.

to say that moral sanction does not have a dissuasive effect – indeed it often does – but rather that dissuasion is not the *purpose* of this punishment. Duff himself maintains that dissuasion is not the justification for communicative punishment when, in the first part of the chapter under discussion, it is explained how the central idea of the communicative theory is developed out of retributivist intuition. Specifically, criminals must be sanctioned "as an intrinsically appropriate response to [their] past crime."[31] On this basis, the moral sanction of the law is an attempt to communicate to the offender their responsibility for wrongdoing, which it is hoped will motivate them to publicly apologise, and as such to satisfy the community that their values are being upheld.[32] These are the ends for which communication is the means – the theory is not ultimately justified by instrumental concerns about future wrongdoing, as deterrent punishment is.

A second objection worth discussing is that the argument presented here simply concedes to the first articulation of the prudential deterrence problem in Duff's paper. This claimed that the admission of the role of deterrent punishment, even if communicative punishment is wholly adequate for that task, is at the same time to make the further admission that punishment is *primarily* justified by deterrence. It is then argued that this would be fatal to the communicative theory. This objection draws attention to the need for a clarification of the roles of communicative and deterrent punishment in the law respectively (something which this article hopefully provides) but goes wrong by holding that to admit the need for deterrence in the law is to render the communicative theory redundant. Rather, it can be safely conceded (as it is in this paper) that the justification of the law in general *is* primarily a deterrent one, as long as it is also specified that the communicative element between polity and offender is the special feature of the criminal law which distinguishes it from the law in general. The problem arises not from admitting of a role for deterrent punishment in this way, but rather from adopting the communicative theory without first clarifying the role of deterrent intuitions in the law and criminal punishment. For Duff, proceeding without such a clarification, it appears as if deterrent and communicative considerations cut across one

[31] Ibid. p.91.

[32] Ibid. pp.91-92.

another: on the view presented in this article, no such problem arises. The communicative theory of punishment is wholly adequate to explain the kind of punishment that is unique to the criminal law, which is often accompanied by other punishment for deterrent purposes.

Finally, it might be objected that there are punishments meted out under the civil or otherwise non-criminal law which contain a communicative or apologetic element, and that this threatens the special disapprobative character that I have argued belongs exclusively to the criminal law.[33] Gardner (2018) discusses the apologetic character of damages payments in civil courts at length, for example.[34] I agree that these kinds of civil punishments contain an apologetic element. The difference, however, between these punishments and criminal punishments is toward whom the offender's apology is directed. In his paper, Duff states that criminal wrongdoing is "wrongdoing which concerns the whole polity", and that the purpose of punishment in the communicative theory is to "achieve a two-way communication between polity and offender" that nonetheless treats offenders as "fellow members of the polity".[35] Duff maintains the centrality to communicative justice of reconciling the offender to their political community throughout the article alongside the implication that the criminal law and criminal courts are the ones which are addressed to and act on behalf of this community. On this basis, I think it is reasonable to argue that the communicative theory of justice refers specifically to the reconciliation of the offender with their political community, and it is this kind of dialogic communication which is unique to the criminal law.[36,37]

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[33] My thanks to an anonymous reviewer for raising this objection and clarifying my thinking in doing so.

[34] John Gardner, From Personal Life to Private Law (Oxford: OUP, 2018). https://global.oup.com/academic/product/from-personal-life-to-private-law 9780198818755?cc=gb&lang=en&. See especially Chapter 4.

[35] Duff, 'Communicative Theory', p.94, p.90, p.95.

[36] I suggest that the role of apology in the civil law might be to ameliorate relations between individuals rather than between the offender and the polity, but I do not have space to develop this thought here.

[37] To the further objection that this is simply to make the public/private distinction the basis for the criminal/civil distinction, I think there is something to be said for the idea that the former reduces to a distinction between the kind of dialogic communication between state and offender discussed here and a one-way expression between offender and plaintiff. What it is for law to be public (i.e., criminal) is that it is justified by

Conclusion

In conclusion, a communicative account of punishment can overcome the prudential deterrence problem. The problem emerged in Duff (2024) because of a failure to clarify the precise relationship between communicative and deterrent punishment, as well as their respective relationships with the criminal law and the law in general. This article has provided a solution to this problem by arguing that the former distinction maps onto the latter. Specifically, deterrent punishment is the basic feature of the law in general, and is therefore present in all types of law, whereas communicative punishment is the distinguishing feature of the criminal law. That punishment under the criminal law contains both of these elements is thereby explained in a manner which can satisfy the communicative theorist, thus eliminating the prudential deterrence problem.

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the communicative theory. More work would need to be done to flesh out this view, however.

Bibliography

https://www.youtube.com/watch?v=4hOK7bU0S1Y

Arrowsmith, W. 1958. “Introduction to Orestes, by Euripides.” Euripides IV.

Banham, M. 1998. The Cambridge Guide to Theatre. Cambridge: Cambridge University Press.

Conacher, D. 1967. Euripidean Drama: Myth, Theme, and Structure. University of Toronto Press.

Downing, T. 1995. Music and the Origins of Language: Theories from the French Enlightenment. Cambridge University Press.

Eisner, R. 1979. "Euripides' Use of Myth" Arethusa 12 (2): 153-174

Feaver, D. 1960. "The Musical Setting of Euripides' Orestes" The American Journal of Philology 81 (1): 1-15

Grout, D. 1947. A Short History of Opera. New York and London: Columbia University Press.

Grove, G. 1954. “Listing of 'Important Operas'.” In Grove's Dictionary of Music and Musicians, 233. London and New York.

Hall, E. 1989. In Inventing the Barbarian, 56-100. Oxford.

Hall, E. 1997. “Introduction.” In Eirpides: Medea: Hippolytus: Electra: Helen tr. E Hall, ix-xxxv. Oxford: Oxford University Press.

Holden, A Kenyon, N Walsh, S et al. 1993. The Viking Opera Guide.

Hoxby, B. 2005. “The Doleful Airs of Euripides: The Origins of Opera and the Spirit of Tragedy.” Cambridge Opera Journal 17 (3): 253-269.

Migliaccio, C, and A Goodrich Heck. 2000. “Philosophy of Music in the 20th Century.” Rivista Italiana di Musicologia 35 (1/2): 187-210.

Mitsis, P. 2023. “Euripides' Alcestis and the Artifices of Eternity.” In Paideia on Stage, by Phillip Mitsis, Victoria Pichugina and Heather Reid. Parnassos Press.

Russo, P. 1994. “Visions of Medea: Musico-Dramatic Transformations of a Myth tr. M A Smart.” Cambridge Opera Journal 124.

Said, S. 2002. “Greeks and Barbarians in Euripides' Tragedies: The End of Differences?” In Greeks and Barbarians, edited by Thomas Harrison, 62-100. Edinburgh: Routledge.

Schultz-Gerhard, E. 1924. “The Differences between Classical Tragedy and Romantic Tragedy.” The Classical Weekly 18 (3): 18-22.

Sheppard, W A. 1996. “Bitter Rituals for a Lost Nation: Partch's "Revelation in the Courthouse Park" and Bernstein's "Mass".” The Muscial Quarterly 461-499.

Storey, I. 2006. “Comedy, Euripides, and the War(s).” Bulletin of the Institute of Classical Studies 87: 171-86.

Ward, P. 2002. “Egon Wellesz: An Opera Composer in 1920s Vienna.” Tempo 219: 22-28.

Winnington-Ingram, R P. 1997. Euripides and Dionysus, an Interpretation of the Bacchae. Bristol: Bristol Classical Press.