

# Dissident Ghosts of Queer Language in Hope Mirrlees and E. M. Forster

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The essay compares *Paris: A Poem* by Hope Mirrlees and *Howards End*, a novel by E. M. Forster. I start by arguing that death is portrayed as a mysterious spectacle resulting in the ghostly presence of the dead among the living in both works. The spectre of Ruth Wilcox in *Howards End* and the dead haunting Paris subvert institutions: they act against the capitalist market resisting commodification of life and death while also opposing the rigid heteronormative timelines mixing past present and future. Ultimately, the ghosts in Forster and Mirrlees's works emphasise the ephemerality of text and language, inventing new ways to talk about queer identity freed from oppressive 'othering'. Escaping through the fractures in the institutions, the ghosts signify the desire for a new language to speak in a non-normative, 'queer' way.

"Emily Dickinson said that 'Art is a house that tries to be haunted.'

Now it doesn't have to try."

-Susan Sontag<sup>1</sup>

A text does not have to be a ghost story to be haunted. For instance, Jean-Michel Rabaté highlights, 'modernism is systematically "haunted" by voices from the past'.<sup>2</sup> Or, as Melissa Boyde suggests, talking about Hope Mirrlees's *Paris* (1920), a text can be filled with the ghostly presence of the author's personally encoded references that require a biographical reading.<sup>3</sup> This paper, however, is concerned with less metaphorical spectres. I am using the framework developed by Simon

<sup>1</sup> Susan Sontag, *As Consciousness is Harnessed to Flesh* (Penguin, 2012 [1964-1980]), 429.

<sup>2</sup> Jean-Michel Rabaté, *The Ghosts of Modernity* (University Press of Florida, 1996), xvi.

<sup>3</sup> Melissa Boyde, 'The Poet and the Ghosts Are Walking the Streets: Hope Mirrlees—Life and Poetry', *Hecate* 35 (2009): 29–42.

Hay to talk about modernist ghosts. For Hay, ‘modernity is characterised by ghostliness, a ghostliness that consists not of the past’s persistence into the present but rather of the insubstantiality of the modern itself’:<sup>4</sup> it is the ‘illusory and displaced [...] nature of the precisely modern institutions of market, technology and home’.<sup>5</sup> I examine the spectral presence in two formally dissimilar works, neither of which is a conventional ghost story: Hope Mirrlees’s long experimental poem *Paris*<sup>6</sup> (1920) and a relatively less experimental yet by no means less radical *Howards End*<sup>7</sup> (1910) by Edward Morgan Foster. Towards the end of the essay, I also make a brief reference to another text by Mirrlees, namely her pioneering fantasy novel *Lud-in-the-Mist*<sup>8</sup> (1926). By reading *Paris* against this example of Mirrlees’s later work, one can see more clearly the development of her radical imagination, and how the metapoetic imagery she only touched upon in the poem became central preoccupation of her future writings. The variety of textual forms this paper covers— a poem, a novel, plus one of the first texts of the fantasy genre - elucidates rather than obscures ghostly themes the works have in common. In Mirrlees and Forster, ghosts fracture restrictive institutions and contribute to the modernist project of redeveloping the language itself. Destabilising the restrictive systems within both language and society, ghosts underline the texts’ queerness. I use ‘queer’ drawing on Kate Haffey’s definition where text’s queerness is not necessarily a reflection of authors’ and characters’ sexual identities, instead queerness is seen as ‘a peculiar relation to normativity’.<sup>9</sup> The ghosts in the texts are not monstrously othered; they are dissidents whom confining institutions of the capitalist market and patriarchal family cannot contain. By escaping through the gaps in times and places, ghosts embody the modernist desire for a new language to speak in a non-normative ‘queer’ way.

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<sup>4</sup> Simon Hay, *A History of the Modern British Ghost Story* (Palgrave Macmillan, 2011), 26.

<sup>5</sup> *Ibid.*, 189.

<sup>6</sup> Hope Mirrlees, *Collected Poems* (Carcanet Press, 2011).

<sup>7</sup> Edward Morgan Forster, *Howards End* (Hodder and Stoughton, 2004 [1910]).

<sup>8</sup> Hope Mirrlees, *Lud-in-the-Mist* (Gollancz, 2008 [1926]).

<sup>9</sup> Kate Haffey, *Literary Modernism, Queer Temporality: Eddies in Time* (Springer International Publishing, 2019), 22.

The dead come back to haunt both the narrative of *Howards End* and the lines of Mirrlees's *Paris* rebelling against the commodification of life. Advertisements and various references to urban consumerism are the nodes on Mirrlees's Parisian network-map. The same conspicuous capitalisation links metro stations, night taxis, the advertisements for seasonal spring goods 'PRINTANIERES' (98), 'CHARCUTERIE' (144), with the mournful 'DEUIL EN 24 HEURES' (147) and 'MORT AU CHAMP D'HONNEUR' (186), juxtaposing death and capitalism, suggesting that life can be seen as just one of the many urban commodities. The idea that gets criticised in the line: 'the silence of *la grève*' (263). '*La grève*' has a double meaning in French: a shore and a strike. While the first one generally adds to the poem's overarching imagery of the rising tide that makes Paris ghostly 'subaqueous' (227). The second can be read as a more pressing reflection of the poem's immediate historical context: the post-war workers' movement in Paris. As Tyler Stovall points out: 'in 1919 working-class politics assumed a spectacular quality, emphasising public contests over urban space'.<sup>10</sup> However, the dramatic 'public presentation geared to a mass audience',<sup>11</sup> which Stovall associates with the workers' protests of the time, is juxtaposed to the quiet strike captured in the line 'the silence of *la greve*' (263). Furthermore, the French pronunciation of the word '*grève*', when surrounded by English words, evokes associations with a 'grave', which are only enhanced with the mention of 'silence'. Thus, the strike against the working conditions and unemployment acquires ghostly connotations as if 'the famous dead of Paris' themselves, whom 'Paradise cannot hold for long' (365-366), are filling the streets protesting among the workers against the commodification of life and death.

The ghost in *Howards End* – Mrs Wilcox's haunting presence – similarly rebels against death being a cog in the capitalist system, namely its procedures surrounding inheritance. Following Mrs Wilcox's unexpected death, the question of her will, although initially straightforward – 'trusting her husband, she had left him everything without reserve' (87) – still fills the inner monologues of her son. 'There were no legacies, no annuities, none of the posthumous bustle with which some of the dead

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<sup>10</sup> Tyler Stovall, *Paris and the Spirit of 1919: Consumer Struggles, Transnationalism and Revolution* (Cambridge University Press, 2012), 143.

<sup>11</sup> *Ibid.*

prolong their activities. [...] She wanted not to vex people. That accomplished, the earth might freeze over her for ever' (87) or rather that was what Charles thought until the letter from the deceased Mrs Wilcox arrived, where she unexpectedly for the family alters her will, asking for Howards End to be left to Margaret Schlegel. The overtly foreshadowed plot twist of the 'vexation' the letter causes creates not a subtle humiliation of Charles, a son who cynically commodifies the death of his mother. For Charles, the duration of Mrs Wilcox's afterlife amounts solely to 'legacies' and 'annuities' while memory of the departed on its own is not enough to cause 'the posthumous bustle,' and the grief for Mrs Wilcox is not nearly as intense as material preoccupations about her will. The image of the letter itself that the Wilcoxes discover reinforces the critical tone that exposes the commodification of death by the deceased's very family. 'That note, scribbled in pencil, sent through the matron, was unbusinesslike as well as cruel, and decreased at once the value of the woman who had written it' (92). In the focalised thoughts of the Wilcoxes, the word choice of 'the value' further highlights the financial connotations that run through the scene. Yet Ruth Wilcox herself, or rather her ghostly presence in the form of the letter left behind, as if ridiculing the very need to attend to matters as commonplace and soulless as the proper legalities of her last wish, creates a "document" - 'No date, no signature' (90) - pencilled with the gravely ironic ephemerality comparable to that of life itself.

Furthermore, in her bequest of the house to Margaret, Mrs Wilcox dissents against the imposed gendered understanding of its space. Margaret was the one who 'discerned that Mrs. Wilcox, though a loving wife and mother, had only one passion in life—her house' (80). In the age when femininity was restrictively associated with the domestic sphere, Mrs. Wilcox's relationship to Howards End was a spiritual, not gendered, one. In contrast to Margaret, the Wilcoxes fail to grasp Ruth's kinship with the place: 'to them Howards End was a house: they could not know that to her it had been a spirit, for which she sought a spiritual heir' (92). In this context, Mrs Wilcox's pencilled note not only criticises the commodification of her death but also acts as a symbolic challenge to the notorious male-centric rules of primogeniture. By leaving Howards End to Margaret, Mrs Wilcox bypasses the restrictions of patriarchal hierarchy, creating alternative ways to define familial kinship, one

determined by the relationship between spirits, not genders. The house itself – a place traditionally associated either with the patriarchal lineage or female domestic realm – is depicted as a place that ‘transcended any similes of sex’, the house ‘was a comrade’ (192). ‘Ever a welcome ghost’ (154) of Mrs. Wilcox, her spiritual presence in *Howards End*, thus asks the readers to reconsider the role the space of a house had in the construction of gender. As Benjamin Kahan highlights, ‘the queerness of queer modernism has as much to do with gender and sex as sexuality’<sup>12</sup>. Redrawing the house as a spiritual, not gendered space, Mrs Wilcox’s ghostly presence within its walls can be read as modernistically queer.

The spectral presence in both works demands a queer reconsideration of the structures of time itself. Kate Haffey points out that ‘in the heart of much work on queer temporality is a desire to question, and perhaps even dismantle, notions of linear time.’<sup>13</sup> The presence of ghosts is often studied in conjunction with queer temporalities:<sup>14</sup> the spectres embody the interflowing past-present-future disrupting the straightforward time flow. Nina Enemark, in turn, writes that *Paris* creates an archaeological artefact, a ‘fly in amber’, of the 24 hours of the year 1919 where past and present intertwine.<sup>15</sup> Mirrlees owes her interest in antiquarianism to Jane Harrison (Mirrlees’s companion at the time she wrote the poem), who studied Ancient Greek rituals. For Harrison, the ritual was the ‘immediate’, ‘the lived, concrete process’ – it has to be performed, not merely recorded, and only during the performance itself can the essence of ritualistic practice be uncovered.<sup>16</sup> Thus, for Mirrlees, ‘the focus in ritual on the immediately palpable, on desire, and on doing [...] [makes] the past suddenly tangible and real [...] one is restoring the past, releasing its ghosts into the present’.<sup>17</sup> Mirrlees and Harrison’s ritual is not Apollonian in its essence – it does not reduce the moment to an ‘illusion’ of ‘a pleasing, coherent narrative’ – their ritual is the Dionysian

<sup>12</sup> Benjamin Kahan, “Queer Modernism,” in *A Handbook of Modernism Studies*, ed. J.-M. Rabaté (John Wiley & Sons, 2013), 355..

<sup>13</sup> Kate Haffey, *Literary Modernism, Queer Temporality: Eddies in Time*, 6.

<sup>14</sup> *Ibid.*, 8.

<sup>15</sup> Nina Enemark, “Antiquarian Magic: Jane Harrison’s Ritual Theory and Hope Mirrlees’s Antiquarianism in *Paris*,” in *Modernist Women Writers and Spirituality* ed. A. Radford, H. Walton and E. Anderson (Palgrave Macmillan, 2016) 115-116..

<sup>16</sup> *Ibid.*, 118

<sup>17</sup> *Ibid.*, 119

'mystical communion with the dead'.<sup>18</sup> Such spiritualistic interaction arguably disrupts heteronormative, 'coherent', timelines where future follows past and the dead do not walk among the living. One of the instances of such 'releasing [of] ghosts into the present' happens in the poem's concluding phrases. They take place during the liminal time of 'DAWN' (431): 'Verlaine's bed-time...' (432) as the ghost of the poet is returning to sleep with the sunrise. The allusion to the poet's nocturnal lifestyle can be read as a nod to Verlaine's transgressive sexualities, especially given the use of ellipsis '...' as if further details have to be self-censored. Opposite Verlaine's ghost is 'The President of the Republic' who 'lies in bed beside his/ wife, and it may be at this very moment...' (437-438). The transgressive occurs side by side with the exemplary, approved by the head of the state, heteronormative: may it be 'at this very moment...' the President's child is being conceived, the thought also censored. The poem continues with a more concrete reference to a heteronormative timeline of life as 'In the Abbaye of Port-Royal babies are being born' (439). Meanwhile, 'Perhaps someone who cannot sleep is reading *Le/Crime et le Châtiment*, (440-441). The image of the dissolved abbey, transformed into a hospital, points to the sacrament of birth linking it, in a darkly satirical fashion, to *Crime and Punishment* as a cure for insomnia (a novel where the main character kills a pregnant woman, Lizaveta) (440-441). Verlaine's past, presidential present and the future of the newly born generation – all are simultaneously merged in an in-between moment (emphasised by 'maybe' and 'perhaps') of sunrise. None of the stories is resolved, all end with uncertain '...' – this is how Mirrlees ritually preserves the moment. Enemark highlights such 'lack of closure, central to Harrison's definition of ritual as an expression of desire rather than satisfaction'.<sup>19</sup> Family life, birth and death stop their progression, locked in the eternal moment, echoing Jack Halberstam's argument that 'queer uses of time and space develop, at least in part, in opposition to the institutions of family, heterosexuality, and reproduction'.<sup>20</sup> The ritual temporalities of *Paris* subvert the heteronormative ones, which are progress-oriented and sequential, where birth-marriage-children prescriptively follow one another.<sup>21</sup>

<sup>18</sup> Ibid darkly satirical.

<sup>19</sup> Ibid., 124

<sup>20</sup> Jack. J. Halberstam. In a Queer Time and Place: Transgender Bodies, Subcultural Lives (New York University Press, 2005), 12. .

<sup>21</sup> Ibid., 14

E. M. Forster similarly allows for the past, present and future to mix and match in *Howards End*. Richard Russel examined the connection between Ruth Wilcox and her ancestors manifested in her attachment to the house, the wych elm tree and the surrounding land.<sup>22</sup> In the novel, beloved objects and places have the power to preserve the ‘true intimacy’ with the deceased<sup>23</sup>, in fact, they ‘display a spectral existence’.<sup>24</sup> This connection between times in *Howards End* is enhanced by the ‘ever a welcome ghost’ (154) of Ruth, whom Margaret frequently evokes. It becomes more explicit in the words of Mrs Avery, who amalgamates past and present in Margaret: ‘Oh! Well, I took you for Ruth Wilcox’ (188). The two women’s connection with the house and surrounding nature, discussed by Russel, may strike as quite essentialist, perpetuating the gendered stereotype of “the angel in the house”. It would have been the case had the novel ended with a happily ever after for every married couple. However, *Howards End* becomes a place that wraps the straightforward timelines of patriarchal family life. Marriage is not followed by children; children do not presuppose marriage, which, stripped of symbolism, becomes just a narrative tool. If Margaret and Helen keep the

home, it is the spectral one that traverses normative timelines.

Neither the experimental modes of depicting time nor the subversions of capitalist institutions are uncommon in modernism. So are the texts queer simply because they are modernist? And vice versa: ‘Is queer modernism simply another name for modernism?’<sup>25</sup> The ghostly destabilisation of institutions and temporalities may not be enough to give a definite “yes” answer. However, Mirrlees and Forster’s ghosts achieve more than that: they subvert the very authority of language and text. Both *Paris* and *Howards End* open in an arguably similar fashion: ‘One may as well begin with Helen’s letters to her sister’ and ‘I want a holophrase’. The dissident quality of Forster’s gambit, which at first glance may appear quite regular, has been pinpointed many times,

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<sup>22</sup> Richard R. Russell. “The Life of Things in the Place of *Howards End*”, *Journal of Narrative Theory* 46, no. 2 (2016): 204..

<sup>23</sup> Ibid.

<sup>24</sup> Ibid., 206

<sup>25</sup> Heather Love, “Introduction: Modernism at Night”, *PMLA* 124, no. 3 (2009): 744.

starting with Christopher Isherwood<sup>26</sup>. Why open the novel with such a metafictional emphasis that the novel is self-aware of its own constructedness, of the idea that its text 'may' (or equally may not) begin with the 'letters', if not to highlight that the language will inevitably lapse, leaving something unsaid not purposefully but because of its inadequacies? To start with the 'letters to her sister' is to place a text within a text, further complicating the metatextual layering. The image of a letter itself in Forster's work has been analysed by Peter Childs, who notes that 'the characteristics of letters, deferral and absence, are linked [...] with a truth that cannot be spoken in the present or to those present'<sup>27</sup>. To put it differently, the letters suggest that words are best for masking, not expressing a truth. Additionally, the pun on 'letters' can be read in the novel's opening line. Not only the correspondence between Schlegel's sisters, but also the thrown-together pieces of the alphabet themselves, can only point to what they cannot say. The failure of language and its various letters to communicate is a theme that is carried beyond the opening line through the whole novel. For instance, standing one evening outside Howards End, Margaret notices 'an unexpected love of the island awoke in her [...] It had certainly come through the house and old Miss Avery. Through them: the notion of "through" persisted; her mind trembled towards a conclusion which only the unwise have put into words' (191). Such an expression of frustration towards language dovetails with the pun on letters that can express only what is *not* present. These lines further point to Forster's desire for a new language affecting one 'through', transcending the superficiality of the alphabet. Forster's letters thus turn into the ghostly apparitions of the inexpressible words.

In tandem with Forster's wish comes Mirrlees's 'I want a holophrase' (3), the line that, according to Nina Enemark, signifies 'the desire for this holistic primitive word [...] a rejection of language cluttered with layers of arbitrary convention and a desire to start over - resonating with [...] "make it new"'.<sup>28</sup> The questioning of 'arbitrary convention' transpires through the poem's avant-garde materiality: dramatic capitalisation, use

<sup>26</sup> Peter Childs, "One may as well begin with Helen's letters...: Corresponding but not connecting in the writings of E.M. Forster", *Prose Studies* 19, no. 2 (1996): 209.

<sup>27</sup> *Ibid.*, 208

<sup>28</sup> Enemark, "Antiquarian Magic: Jane Harrison's Ritual Theory and Hope Mirrlees's Antiquarianism in Paris," 120.

of different fonts and white space of the page. The poem pushes the words to signify more than what their entries in the dictionary can suggest, the inexpressible. But to defy the existing convention is not enough. Paris argues for the existence of a language that would be entirely new. The ‘holophrase’, the word unlike all others, is out there, within one’s reach, but to write it down is to destroy its unencumbered newness. Mirrlees’s desire for the ‘holistic’ word, highlighted by Enemark, is evident in the numerous omissions ‘...’ that occur in lines 270, 233, 378, etc. Thus, the poem resorts to silences, the ghostly presence-absence of the language yet to come. The lines 174-178 further continue the theme of language’s ghostly elusiveness:

The ghost of Père Lachaise  
Is walking the streets,  
He is draped in a black curtain embroidered with the  
letter H,

In French, the letter H is almost always silent, a spectral letter, whose presence gestures to its absent sound.

The ghostliness of language as a way to express one’s desire for a new means of communication becomes more evident if one reads *Paris* against the Mirrlees’s later work, such as her novel *Lud-in-the-Mist*. James Gifford highlights that experimental modernism ‘seamlessly’ connects with the early 20th-century writings of the fantasy genre. The genre could even be seen as high modernism only ‘in another form’.<sup>29</sup> The invention of the secondary world appears as a credible extension of the modernist radical imagination, especially in Mirrlees’s case. *Lud-in-the-Mist*<sup>30</sup>, according to Jean Mills, ‘illustrates a queer social imaginary, a “what-if” world and subversive space of inclusion, embrace, and acceptance of self’.<sup>31</sup> Similarly to *Paris*, yet less metaphorically, the dead return from the fairyland to live in the town of Lud, restructuring its

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<sup>29</sup> James Gifford, “Goblin Modernism: Modernism, Anarchism, and the Radical Fantastic,”

Modernism/Modernity 27, no. 3 (2020): 552.

<sup>30</sup> Hope Mirrlees, *Lud-in-the-Mist* (Gollancz, 2008 [1926])

<sup>31</sup> Jean Mills, “Obscene, Grotesque, and Carnivalesque: Hope Mirrlees’s *Lud-in-the-Mist* as Menippean Satire,” in *The Female Fantastic*, ed. L. McCormick, J. Mitchell and R. Soares (Routledge, 2018), .

beliefs and institutions. The novel ends with an ekphrasis of a tombstone that was ‘but another proof that the Written Word is a Fairy, [...] speaking lying words to us in a feigned voice. So let all readers of books take warning!’ (264). Subverting its own authority, the text reiterates the desire for a new language, one that is free from the baggage of convention, better suited for expressing one’s identity.

Is queer modernism simply another name for modernism?<sup>32</sup> Yes, at least in the case of Forster and Mirrlees. By highlighting the spectrality of language, their writing expresses the desire to question the very foundations of interpersonal communications, in which the power of oppressive institutions resides. The texts propose to liberate words from the histories of institutionally established meanings: to make it new is to make it free. The disruptive ghosts in Mirrlees and Forster are not the terrifying “other”; they are fractures in the order of things. As Simon Hay suggested, modernist ghosts highlight the ephemerality of seemingly imposing structures;<sup>33</sup> what appears as an inescapable power—capitalism, patriarchy, gender essentialism—can be challenged. The dead in both texts protest against defining life by the profit made and death, a great unequaliser, by what material possessions one gets to leave behind. The spectral intervention into an otherwise linear and predictable sequence of life’s milestones subverts their heteronormative ordering. Ultimately, Mirrlees and Forster emphasise that their texts are themselves spectral. Things must be left unsaid; the purpose of letters sometimes is only to materialise what cannot be there. When words are written down, they are infused with the wish for a new, freer language. Thus, in the texts, the ghosts point to the fractures from where the new, queer meanings can emerge. The ghosts are apparitions not of the past but of the future experimental directions.

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<sup>32</sup> Love, “Introduction: Modernism at Night,” 744.

<sup>33</sup> Hay, *A History of the Modern British Ghost Story*, 189only to materialise.

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# 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.<sup>1</sup> Particularly promising is the ‘communicative’ theory of punishment, discussed in chapter six by Antony Duff.<sup>2</sup> 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.<sup>3</sup>

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

<sup>2</sup> Antony Duff, ‘Communicative Theory’ in The Oxford Handbook of the Philosophy of Punishment (Oxford: OUP, 2024). pp.90-105.

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> This article will present a solution to the prudential deterrence problem.

## I 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.<sup>67</sup> 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".<sup>8</sup> 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.<sup>9</sup> The primary objection to this theory arises out of the relationship between communicative and deterrent punishment respectively. It is therefore

<sup>4</sup> Ibid. p.92.

<sup>5</sup> Ibid. pp.104-05.

<sup>6</sup> Ibid. p.94.

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

<sup>8</sup> Duff, 'Communicative Theory', pp.91-93.

<sup>9</sup> 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.<sup>10</sup> Imprisonment in particular, as effective exclusion from the civic community, appears antithetical to the communicative theory's stated aims of apology and reconciliation.<sup>11</sup><sup>12</sup> There is, however, a

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<sup>10</sup> Ibid. pp.96-100.

<sup>11</sup> Ibid. p.92.

<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> Nonetheless, it seems as if at least some more traditional forms of punishment can be justified by a communicative theory.<sup>15</sup>

## **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.<sup>16</sup> These questions threaten to significantly undermine the communicative function assigned to punishment by Duff.

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<sup>13</sup> Ibid. p.103.

<sup>14</sup> Ibid. p.101.

<sup>15</sup> 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.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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".<sup>20</sup> 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

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<sup>17</sup> Ibid. pp.104-05.

<sup>18</sup> Ibid. p.105.

<sup>19</sup> Ibid. pp.103-04.

<sup>20</sup> Ibid. p.95.

section.<sup>21</sup> 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).<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

It seems that the punishment/penalty distinction as so defined may map onto the distinction between the criminal and the civil law.<sup>25</sup> 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.<sup>26</sup> According to this view, criminal trials are conducted differently from civil trials, with

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<sup>21</sup> Ibid. pp.95-96.

<sup>22</sup> Feinberg, 'Punishment', pp.397-98.

<sup>23</sup> Ibid. p.400, Duff, 'Communicative Theory', pp.95-98.

<sup>24</sup> Feinberg, 'Punishment', p.400.

<sup>25</sup> 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.

<sup>26</sup> 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.<sup>2728</sup> 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).<sup>29</sup> 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

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

<sup>27</sup> Singer, ‘The Resurgence of Mens Rea’, pp.404-05.

<sup>28</sup> Duff echoes this view in his discussion of criminal trials. See Duff, ‘Communicative Theory’, p.98.

<sup>29</sup> 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.<sup>30</sup> 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

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<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup> 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

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<sup>31</sup> Ibid. p.91.

<sup>32</sup> 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.<sup>33</sup> Gardner (2018) discusses the apologetic character of damages payments in civil courts at length, for example.<sup>34</sup> 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".<sup>35</sup> 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.<sup>36,37</sup>

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<sup>33</sup> My thanks to an anonymous reviewer for raising this objection and clarifying my thinking in doing so.

<sup>34</sup> 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.

<sup>35</sup> Duff, 'Communicative Theory', p.94, p.90, p.95.

<sup>36</sup> 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.

<sup>37</sup> 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.

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