

# Defending a Communicative Theory of Punishment: The Relationship between Hard Treatment and Amends

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**Abstract** - According to communicative theories of punishment, legal punishment is pro tanto justified because it communicates the censure that offenders deserve for their crimes. The aim of this paper is to offer a modest defence for a particular version of communicative theories. This version builds on the one that has been advanced by Antony Duff. According to him, legal punishment should be understood as a kind of (secular) penitential burden that is placed upon offenders to censure them for their crimes, with the aims that they then come to repent, reform themselves and reconcile with those whom they have wronged. This paper departs from Duff's version, however, by arguing that the penitential burdens in question should be understood more specifically in terms of the amends that offenders ought to do to apologize for their criminal wrongdoings. The final section of this paper then attempts to address three potential objections to this revised version of the communicative theory.

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## 1. Introduction

According to communicative theories of punishment, as I understand them for the purposes of this paper,<sup>1</sup> legal punishment is *pro tanto* justified because it communicates the censure that offenders deserve for their crimes.<sup>2</sup> As a kind of retributive theory, communicative theories therefore seek to explain penal desert in terms of the censure that is deserved. This gives communicative theories a *prima facie* plausibility: whatever else offenders might very well deserve in virtue of their crimes, it seems the least problematic and controversial that they deserve to be censured for committing them.

Other kinds of retributive theories seek to explain the nature and the normative force of penal desert in other ways. Moore, for example, has a series of arguments based on intuitions showing that offenders deserve to suffer in virtue of their wrongdoings;<sup>3</sup> while Dagger has offered strong arguments against the typical criticisms that are launched against fair-play theory, which seeks to explain penal desert in terms of the unfair advantage that offenders gain in committing crimes.<sup>4</sup> However, *if* communicative theories can make good the task of explicating penal desert in terms of censure, then this makes them at least on

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<sup>1</sup> See eg Antony Duff, *Punishment, Communication, and Community* (OUP 2001); and John Tasioulas, 'Punishment and Repentance' (2006) 81 *Philosophy* 279. This definition also includes some (self-identified) expressivist theories, like Christopher Bennett's in his *The Apology Ritual* (CUP 2008).

<sup>2</sup> For the distinction between *pro tanto* (or 'tailored') and *all-things-considered* justification for punishment, see Mitchell Berman, 'Punishment and Justification' (2008) 118 *Ethics* 258, 262-266.

<sup>3</sup> Michael Moore, *Placing Blame* (OUP 1997) ch 3.

<sup>4</sup> Richard Dagger, 'Punishment as Fair Play' (2008) 14 *Res Publica* 259.

par with these other retributive theories, or even grants an extra edge over them.<sup>5</sup> A communicative theory that is successful in this task can then free positive retributivism from relying on the various defences of fair-play theory.<sup>6</sup> It can also complement and strengthen Moore's intuitive arguments, explain how and why offenders deserve to 'suffer' and the nature of this deserved 'suffering'. Furthermore, such a communicative theory can then also form the basis for showing what negative retributivism and other non-retributive theories (e.g. side-constrained consequentialism) have failed to recognize, when they do not accord the normative significance that retributive theories accord to penal desert in the justification of punishment.

Nevertheless, it is doubtful that communicative theories can make good the task of explicating penal desert in terms of censure. Insofar as legal punishment involves not just censure but also hard treatment, then even if legal punishment *qua censure* is justifiable because the offender deserves to be censured, it does not follow from this that legal punishment *qua hard treatment* is also justifiable just because of it. Call this 'the problem of hard treatment'.

The aim of this paper is to defend communicative theories in light of the problem of hard treatment. In particular, I shall defend a particular version of communicative theories, a version that builds on the one that has been advanced by Duff.<sup>7</sup> I shall begin by explaining in more detail the problem of hard treatment in the next section, before critically discussing and eventually rejecting two alternative responses to the problem of hard treatment. I shall

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<sup>5</sup> It also depends on whether there are good arguments for why offenders deserve to be censured. I shall put this latter task to one side for the purposes of this paper, but I am more optimistic that communicative theories can accomplish this task.

<sup>6</sup> See e.g. Antony Duff, 'The Incompleteness of 'Punishment as Fair Play': A Response to Dagger' (2008) 14 *Res Publica* 277.

<sup>7</sup> Most notably in his *Punishment, Communication, and Community* (n 1) ch 4.

then consider Duff's own communicative theory as a response, and argue for a revision to it. This takes us to the version of communicative theory that this paper seeks to defend, according to which the hard treatment in legal punishment should be more appropriately understood in terms of the amends that offenders ought to make to apologize for their criminal wrongdoings. It is only a modest defence, as I shall then briefly consider and address three potential objections to it at the end.

Finally, for the purposes of this paper, I shall assume that all crimes are wrongs; either they are (in the case of *mala in se*) wrongs that are prior to legal regulation, or they are (in the case of *mala prohibita*) wrongs as a result of legal regulation.<sup>8</sup> I shall therefore be using 'crimes', 'criminal wrongdoings' and 'wrongs' interchangeably in this paper.

## 2. *The Problem of Hard Treatment*

Legal punishment, as we normally understand it, involves more than mere censure. It also involves hard treatment, something that is painful and burdensome independently of the censure itself.<sup>9</sup> If censure is understood (for current purposes) as a kind of authoritative moral criticism or judgement about what an offender has done, then it seems obvious that many, if not all, of the legal punishments we typically have involve some form of hard treatment that goes beyond the pains and burdens inherent in censure.<sup>10</sup> A paradigmatic example of this is imprisonment, which significantly deprives offenders of many of their

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<sup>8</sup> Antony Duff, *Answering for Crime* (Hart Publishing 2007) 89-93.

<sup>9</sup> According to some (eg Nathan Hanna, 'Say What? A Critique of Expressive Retributivism' (2008) 27 *Law and Philosophy* 123, 124-128), legal punishment must also involve the *intention* or the *aim* to cause suffering, in order to distinguish punitive hard treatment from those that are non-punitive. I am unpersuaded by this, mainly for the reasons given by Bill Wringer, in his 'Must Punishment be Intended to Cause Suffering?' (2013) 16 *Ethical Theory and Moral Practice* 863.

<sup>10</sup> That is true without even considering the more controversial kinds of legal punishments, such as life imprisonment without parole, solitary confinement and capital punishment.

liberties. Similarly, non-custodial sentences like (temporary) bans from certain places, community payback orders and even fines etc., while they might not involve any liberty deprivations, still curtail or limit in varying degrees different rights and liberties of those who are subject to them. Accordingly, even if legal punishment *qua censure* is justified because the offender deserves to be censured, it does not follow from this that legal punishment *qua hard treatment* is also justified just because of it.

Of course, hard treatment is *a way* of communicating censure, but it does not seem to be the *only way* to do so. As Duff asks, "... censure can be expressed by a formal conviction, or by a purely symbolic punishment that burdens the offender only insofar as she takes its message of censure seriously. Why then should we express it through the kinds of hard treatment that our existing penal systems impose – punishments that are burdensome or painful independently from their communicative content?"<sup>11</sup> Indeed, it is normally wrong to inflict pains and burdens on others, unless there are good reasons to do so. If formal convictions or purely symbolic punishments can communicate the censure that offenders deserve for their crimes, there would be *no* good reasons to communicate it by way of hard treatment. Doing so would simply be wrong. Accordingly, unless communicative theories furnish us with good reasons that can justify hard treatment in the communication of deserved censure, it seems they have failed in their task of explicating penal desert in terms of deserved censure.

Of course, communicative theories might just very well be revisionary about our practice of legal punishment. This is not a problem in and of itself; but before we defend communicative theories as revisionary theories, notice how *deeply* revisionary they are in

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<sup>11</sup> Duff, *Punishment, Communication, and Community* (n 1) 82.

light of the problem of hard treatment. They do not just imply that our current practices of legal punishment are unjustifiable. They also imply, as suggested above, that legal punishment may consist of only formal convictions or purely symbolic punishments at the very most. Before we go down this revisionary route, it is worthwhile to investigate whether communicative theories need to be revisionary to *that* extent, or whether they can indeed furnish us with good reasons for some form of punitive hard treatment.<sup>12</sup>

There are many responses to the problem of hard treatment; and many of the more prominent ones have already been critically assessed by others.<sup>13</sup> Before considering Duff's communicative theory as a response, I shall therefore only look at two other prominent responses which have yet to be discussed critically by others in relation to the problem of hard treatment.

### *3. The Need to Distinguish the Culpable from the Non-culpable*

The first response focuses on censure understood as a kind of moral criticism. The problem here is that, according to Bennett, moral criticisms fail to distinguish between wrongdoers who are non-culpably ignorant and those who are culpable.<sup>14</sup> In merely censuring offenders for their wrongdoings, we therefore fail to address and treat them as culpable wrongdoers properly. Bennett then goes on to argue that in order to do so properly, we also ought to adopt retributive attitudes towards offenders, which in turn are expressed most

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<sup>12</sup> Not to mention that we can only adequately defend a revisionary theory, when we know *how* revisionary it is to start with.

<sup>13</sup> Hanna (n 9).

<sup>14</sup> Or in Bennett's words, those who are *qualified practitioners* of the practice governed by the norms in question and those who are merely *apprentices* of the said practice. See his *The Apology Ritual* (n 1) 99-100.

appropriately by a proportionate suspension of their rights and liberties, together with the imposition of a proportionate level of amends.<sup>15</sup>

Similar to Bennett's view, the version of communicative theory that this paper seeks to defend also aims to justify punishment in terms of the amends that offenders ought to undertake for their crimes. Unlike Bennett's view however, the primary reason for this is not the need to distinguish between those who are non-culpably ignorant and those who are culpable. This is because it is unclear why moral criticisms, even when they are only verbally conveyed, fail to distinguish between the two. If moral criticisms are understood to be something like "it was wrong for you (the offender) to have  $\emptyset$ -ed", then admittedly it is ambiguous between whether the offender culpably  $\emptyset$ -ed or merely  $\emptyset$ -ed out of non-culpable ignorance. Yet, there is no reason to think that moral criticisms must only take this simple and ambiguous form. Why can it not take the more complicated form of: "it was wrong for you to have  $\emptyset$ -ed, *and given you are a person with the necessary competent capacities, we expect that you could and should have known better*"? As long as we criticize offenders in this more spelled out form, it makes clear to offenders (and anyone else for that matter) that we are addressing them as culpable wrongdoers. Had they been addressed as non-culpably ignorant, the criticism would presumably be this instead: "it was wrong for you to have  $\emptyset$ -ed, *though we did not expect that you could or should have known better*".

Indeed, it seems we can criticize offenders as culpable wrongdoers by making the moral criticisms against an appropriate background institutional practice, even when they are not spelled out as above. An example of this is formal convictions. If criminal trials should be understood as a process of calling an alleged offender to answer for an alleged

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<sup>15</sup> *ibid* 118-121 & 144-149.

wrongdoing,<sup>16</sup> then the formal convictions resulting from them can properly be understood as the kind of moral criticisms that address offenders as culpable wrongdoers. This is because to call someone to answer for violating a norm X, is to presume that he is bound by X, as someone who is expected to be guided by X when acting. It is because he has allegedly violated X despite this expectation that he needs to answer. Had he not been so expected, there would be no need for him to answer for his actions, for what we then have is just the brute fact that he has allegedly violated X. In formally convicting an offender at the end of a criminal trial so understood, we are therefore criticizing him as a culpable wrongdoer; as someone who is expected to be guided by the norm he violated, but nevertheless failed to be guided by it without justification or excuse.

Bennett's argument therefore fails as a response to the problem of hard treatment. Merely censuring offenders for their wrongdoings can also properly address and treat them as culpable wrongdoers, and distinguish them from those who are only non-culpably ignorant, when the moral criticisms in question are spelled out as discussed above, or are made within an appropriate background institutional practice (e.g. our practice of formal convictions in criminal trials). As long as offenders are merely censured in these more specific ways, there is then no need also to inflict pains and burdens on offenders (in the form of a proportionate suspension of their rights and liberties and the imposition of a proportionate level of amends) just because of this requirement to address them as culpable wrongdoers. The problem of hard treatment therefore still remains despite Bennett's argument.

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<sup>16</sup> Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial*, vol 3 (Hart Publishing 2007) ch 5.



#### 4. *Hard Treatment and Preventive Deterrence*

Rather than to take issue with censure being understood merely as a kind of moral criticism, the second response focuses on the aim(s) that can give us good reasons for at least some form of punitive hard treatment. One such aim that has been widely appealed to is preventive deterrence, which has been prominently developed and defended by von Hirsch and Ashworth.<sup>17</sup>

This response basically admits that communicative theories, at least in the form I have presented so far, are incomplete justifications for legal punishment in light of the problem of hard treatment. Rather, the hard treatment in legal punishment, if it can be justified at all, is to be justified separately by appealing to the value of preventive deterrence, as a prudential supplement to the censure in question. It therefore seeks to justify legal punishment on two separate grounds: the communication of deserved censure on the one hand, and preventive deterrence on the other.

I do think that the appeal to preventive deterrence here answers the problem of hard treatment. What is unclear is that such a hybrid position is independently defensible to start with.

One worry here concerns proportionality. If the justification of hard treatment in legal punishment rests solely on the value of preventive deterrence, then this would justify widely disproportionate punishment. This is because the severity of the punishments (i.e. the level of hard treatment) would then not be tied to the severity of the crimes in question. Rather, it would be tied to whatever level that is necessary to achieve the desired level of

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<sup>17</sup> Andreas von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (OUP 2005) ch 2.

deterrence. There is no reason to think that this necessarily corresponds to the severity of the crimes in question.

This is not von Hirsch and Ashworth's hybrid position, for they argue that the value of preventive deterrence ought only to operate *within* the framework of communicating censure. That is to say, as a prudential supplement that is to be justified in terms of preventive deterrence, hard treatment is not separate and independent from the censorial message that it seeks to reinforce. Rather, it forms part of the censorial message in question. A more severe level of hard treatment therefore implies a more severe censorial message, and *vice versa* for a milder level of hard treatment.<sup>18</sup>

Von Hirsch and Ashworth's hybrid position would therefore not end up justifying widely disproportionate punishment. Given that the censure offenders deserve for their crimes ought to reflect the severity of the crimes in question, by arguing that the hard treatment forms part of the censorial message itself, their hybrid position therefore connects the severity of the hard treatment in legal punishments with the severity of the crimes in question. A more severe crime X would therefore merit, under their position, a more severe level of hard treatment than a less severe crime Y; and insofar as crime X is more severe than crime Y by a certain proportion, then the level of hard treatment for crime X should also be more severe than the one for crime Y by the same proportion.

However, even if their hybrid position respects ordinal proportionality (i.e. that punishments should be scaled according to the comparative seriousness of crimes), one might still worry that it does not necessarily respect cardinal proportionality.<sup>19</sup> If increasing the severity of the hard treatments does indeed better serve the value of preventive

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<sup>18</sup> *ibid* 22-24 & 134-137.

<sup>19</sup> Tasioulas, 'Punishment and Repentance' (n 1) 292.

deterrence, then there is no reason *against* doing so under this position, as long as this is done in a way that preserves ordinal proportionality. There is therefore no limit, for example, to the overall severity of a scale of hard treatments, as long as it is needed to achieve the desired level of deterrence, and the scale itself correctly corresponds to the comparative seriousness of crimes. Accordingly, while von Hirsch and Ashworth's hybrid position would not end up justifying widely disproportionate punishment with regards to ordinal proportionality, it could do so with regards to cardinal proportionality.

In response, it is unclear why it is not open for them to argue that certain kinds of hard treatments are just so severe that they are unjustifiable even when they better serve the value of preventive deterrence. It is arguable that extended solitary confinements, for example, are just so severe in nature that they 'drown out' the censure for any kind of criminal wrongdoing - in at least two senses: first, the prospects of being subjected to something this awful looms so large in one's mind that one refrains from committing crimes just because of those prospects, rather than because the crimes in question are wrongs; and second, the pains and sufferings that they cause to those who are subjected to them, are just so severe that they displace whatever censorial message such hard treatments were intended to convey in the first place.<sup>20</sup> Alternatively, one can also argue that the severity of extended solitary confinements constitutes a kind of 'cruel and unusual punishment', and for that reason is unjustifiable even if it better deters crimes. The same can also be said for

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<sup>20</sup> See von Hirsch & Ashworth (n 17) ch 2 fn n. I think this is the most plausible interpretation of the 'drowning out' metaphor.

lifelong imprisonment with no possibility of parole, if it does indeed violate the offenders' 'right to hope'.<sup>21</sup>

Of course, it is an open question whether any of the above kinds of arguments are sound. Yet, as long as von Hirsch and Ashworth can muster enough good arguments to rule out all instances of hard treatment that we intuitively regard with confidence as being too severe for even the most severe crime (e.g. extended solitary confinement etc.); and that moving down the scale to less severe crimes, respecting ordinal proportionality would not end up justifying something like imprisonment for a crime as minor as littering,<sup>22</sup> then one would be hard-pressed to come up with examples that can convincingly show how their hybrid position fails with regards to cardinal proportionality. I therefore contend that we should be hesitant in rejecting their hybrid position for failing to account for cardinal proportionality.

There is nevertheless a more intractable worry with their hybrid position; one that relates to their contention that hard treatment forms part of the censorial message in question. As explained earlier, it is this contention that allows their hybrid position to counter objections relating to proportionality; but this contention also leads to inconsistent claims about the severity of crimes under their position.

Let us imagine a crime of burglary that is committed with a certain level of culpability and causes a certain level of harms to others. If we assume that at t1, short term imprisonment is needed to deter such burglaries to a tolerable level within the society in

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<sup>21</sup> *Vinter and Others v UK* App nos 66069/09, 130/10 & 3896/10 (ECHR, 9 July 2013). Note that unlike the 'drowning out' argument, these two arguments appeal to independent considerations that are external to the consideration of censure that is inherent in von Hirsch and Ashworth's hybrid position.

<sup>22</sup> Whether this is so depends on (a) how severe is the level of hard treatment that may be justified for the most severe crime, (b) the number of crimes between the most severe crime and the crime of littering, and (c) the relative seriousness of each crime lying between them. All other things being equal, the less severe (a) is, the higher the number is in (b) and the greater the relative seriousness is in (c), then the more likely imprisonment would not be justified for littering.

question, then according to von Hirsch and Ashworth's hybrid position, it would be justifiable to punish such burglaries with short term imprisonments at t1. Imagine that later at t2, the economic climate of that society (for example) has improved so much that now only non-custodial sentences are needed to keep such burglaries to a tolerable level. Accordingly, it is then unjustifiable to punish them with short term imprisonments at t2. Rather, punishment should be reduced to non-custodial sentences.<sup>23</sup> The problem is that if hard treatment forms part of the censorial message in question, so that a more severe level of hard treatment implies a more severe censorial message (and *vice versa* for a milder level of hard treatment), and if the severity of the censorial message ought to reflect the severity of the crimes in question, then reducing the severity of the punishment for the burglaries at t2 would imply that the burglaries in t2 are less serious than the burglaries in t1. This seems absurd, for the burglaries in t1 and t2 are *ex hypothesi* exactly the same kind of criminal wrongs. They are committed with the same level of culpability and cause the same level of harms to others. As such, they are therefore of the same level of seriousness. It is just that they are committed at different times.

More generally, there is therefore a tension between the following two claims within von Hirsch and Ashworth's hybrid position: (a) hard treatment forms part of the censorial message in question, so that a more severe hard treatment implies a more serious crime and *vice versa* for a milder hard treatment; and (b) hard treatment is to be justified in terms of preventive deterrence. Insofar as they hold (b), then the level of hard treatment for a given crime can fluctuate depending what is needed to serve the value of preventive deterrence best. If they also hold (a), then this fluctuation would translate into claims about

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<sup>23</sup> For this to satisfy ordinal proportionality, most probably the whole scale of punishments would have to be reduced correspondingly. This would be warranted if the kind of effect that we are imagining here about the improved economic climate extends to other crimes as well.

the severity of crimes, leading to the kind of inconsistent claims that I have illustrated in the above. To avoid this result, von Hirsch and Ashworth must therefore reject either (a) or (b). However, if they forgo (a), then their position would be susceptible to objections relating to proportionality; and if they forgo (b), then they would have no response to the problem of hard treatment. Either way, their hybrid position would become untenable. For these reasons, we should therefore reject it and seek an alternative response to the problem of hard treatment.

### *5. Hard Treatment and Penance*

This then takes us to Duff's communicative theory. Just like the above second response to the problem of hard treatment, this one also focuses on identifying certain aims that can give us good reasons for at least some form of punitive hard treatment. Yet unlike that one, it denies (b) and insists that the communicative theory of punishment is indeed a complete justification of legal punishment. Rather than seeing hard treatment as separate from the communication of deserved censure, and therefore requiring a separate justification in its own right, we should see it as part of the communicative process suitably understood.

More specifically, according to Duff, we should understand legal punishment as a form of secular penance which aims at 'three R's' – repentance, reform and reconciliation, and that these aims are to be pursued by a communicative process of censure involving the imposition of hard treatment. The hope is that through such a communicative process, offenders can then be persuaded and come to repent for their crimes, try to reform themselves, and reconcile themselves with those they have wronged, precisely by

undergoing the burden of the hard treatment in question.<sup>24</sup> Hard treatment therefore has two roles to play in relation to these 'three R's'. First, it serves to *induce* offenders to come to repent, reform themselves and reconcile with those whom they have wronged; and second, it serves *as a vehicle* through which offenders come to do so. Accordingly, once we understand the communicative theory of punishment in terms of secular penance with the 'three R's' as its aims, then hard treatment is also within the reach of its justificatory power.

In what follows, I shall focus more on the aim of repentance than on the other two aims. This is because, as it will become clear later on, self-reform is part of repentance broadly construed, and the aim of reconciliation is to be pursued through the aim of repentance.

We also need to be clear at the outset just exactly what kind of hard treatment is being justified under Duff's communicative theory. Given the stated aim of repentance, one might be tempted to identify the hard treatment that is being justified here in terms of the pains and burdens that come along with repentance; the emotional toils of guilt, for example, that result from recognizing that one has done a wrong. This is a mistake, for hard treatment is here understood as a kind of burden that is (among its other roles) placed on an offender to induce him to repent for his crimes. Insofar as this constitutes a kind of suffering, it is an external one that is different from whatever internal suffering might result from his recognition that he has done a wrong. It is therefore a straw man to criticize Duff's communicative theory on the basis that under his view, hard treatment is just the suffering that comes along with repentance.<sup>25</sup>

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<sup>24</sup> Duff, *Punishment, Communication, and Community* (n 1) 106-112.

<sup>25</sup> cf Hanna (n 9) 142-148.

One prominent objection to Duff's communicative theory is that it just seems improper for the state to try to induce and elicit repentance from offenders. This objection is based on the idea that in doing so, the state seems to be doing something that an abbot would be doing in a monastery, when he imposes penance on sinners so that they come to repent and expiate their sins, and thereby achieve absolution and salvation. Thus despite Duff's claim that it is a *secular* form of penance, it is unclear that this is something a *secular* liberal democratic state like ours should be doing when responding to crimes.<sup>26</sup>

There are in fact two issues raised in this objection; and it would be best to distinguish them from each other. The first one concerns whether the *aim* of inducing and eliciting repentance from offenders is itself a proper one for a liberal democratic state; and the second one is about the proposed *means* that are to be used in the pursuit of that aim: whether it is proper for a liberal democratic state to burden offenders with hard treatment (just as the penance imposed by the abbot burdens the sinner) to induce offenders to repent for their crimes. Ultimately, it is the second issue that poses the most significant challenge to Duff's communicative theory; but let us look at the first issue to start with.

If we understand the aim of inducing repentance from offenders in religious terms, as when the aim is to induce them to repent for their *sins* so that they could achieve *salvation and absolution from God*, then it seems flatly inconsistent with the liberal commitments to state neutrality; but it is not clear why it can only be understood in religious terms.<sup>27</sup> To start with, when it comes to the state, the kind of repentance that we are aiming to induce from offenders is not repentance for their sins (whatever that might be), but *for their crimes*. Let us therefore assume, for the purposes of this argument, that a

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<sup>26</sup> von Hirsch & Ashworth (n 17) 93-97.

<sup>27</sup> See also John Tasioulas, 'Repentance and the Liberal State' (2007) 4 *Ohio State Journal of Criminal Law* 487, 506-507 & 513-518.



liberal state is justified in enacting the crimes in question, to declare the types of conduct under consideration as wrongful and therefore as something that all members of the state should not do.<sup>28</sup> We can then understand the kind of repentance that the state is aiming to induce from offenders here as precisely the recognition and judgement that what they have done is an instance of such wrongful conducts, and is therefore something that they should not have done. If the state is justified in marking out and declaring an offender's conduct as a wrong, it is unclear why the state may not also aim for the offender to come to recognize and judge that his conduct is wrong. Furthermore, there is no further requirement here that offenders come to this recognition and judgement for the right reasons (whatever they might be). As Tasioulas points out, "a repentant murderer... need not be able to offer a correct account, or indeed any half-way plausible account, of *why* murder is wrong. When he does have such an account, it suffices if it falls within certain broad limits of intelligibility – a divine command explanation would count as such, even for an atheist".<sup>29</sup> The state therefore is not here aiming for offenders to come to recognize and judge that their conduct is wrong for the same reasons as the state (or anyone else's reasons for that matter). Rather, it is merely aiming for them to come to do so for whatever intelligible reasons they so happen to hold.

Of course, repentance is a complex moral response involving a number of different elements; and the recognition and judgement that what one has done is a wrong is only one of them.<sup>30</sup> Yet, this recognition and judgement is the more foundational element in the sense that it is the element from which we can come to see the relevance of the other elements in repentance. It is by coming to recognize and judge that one has done a wrong,

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<sup>28</sup> The conditions under which this is the case will depend on our normative theory of criminalization.

<sup>29</sup> *ibid* 488.

<sup>30</sup> *Ibid* 488-489.

that one sees the need to apologize and make reparations (if there are any) for the wrong that one has done. It is also in light of this recognition and judgement that one comes to see the need to reform oneself, to resolve not to commit such a wrong again and overcome (if there were any) moral defects that led to one's original wrongdoing. It is also in virtue of such a recognition and judgement that one is disposed to experience the emotions of guilt and shame that are typical of repentance. Nevertheless, what exactly is being aimed at here by the state, when it aims to induce offenders to repent for their crimes, is precisely this more foundational element of their coming to recognize and judge that what they have done is a wrong; and not, for example, the emotions of guilt and shame that supervene on such judgements. It is through aiming at this more foundational element that the state aims to bring an offender to repent for their crimes in the fuller sense described above. Provided that a liberal democratic state was justified in enacting the crimes in question, then as long as what the state is aiming to induce from offenders for their crimes is repentance in this more specific sense, there is no reason to think that this aim itself is an improper one for a liberal democratic state. If there is an impropriety here, it is about the means and the extent to which the state may induce repentance from offenders for their crimes. This takes us to the second issue raised by the original objection.

The worry here is that, as it currently stands, it is just not clear what exactly is the hard treatment that is justifiable to burden offenders with under Duff's communicative theory. It certainly cannot be whatever best induces offenders to repent for their crimes. If this was the case, then it could end up justifying widely disproportionate punishment; for the severity of punishment would then be tied to how 'thick-skinned' an offender is, and not to the severity of the crimes in question.

There are two aspects to the above worry that need to be addressed. The first concerns the duration of hard treatment; i.e. just how long is it justifiable to burden an offender with a particular kind of hard treatment in order to induce his repentance? The second concerns the kind of hard treatment in question; i.e. just what exactly is the appropriate kind of hard treatment that is justifiable to burden an offender with for his particular crime?

Duff addresses both questions. With regard to the second one, he argues that we should focus on the meanings of particular kinds of punishment; and ask, what kinds are, in light of their meanings, appropriate for the crimes in question.<sup>31</sup> Thus to take imprisonment as an example, Duff argues that '[t]he message of imprisonment is that the offender has not just damaged or threatened, but has *broken*, the normative bonds of the community'.<sup>32</sup> It is therefore only appropriate for crimes whose nature involves breaking the normative bonds of the community in question.

One worry about this response is that this would then make 'the appropriate kind of hard treatment' depend on the kind of account that we hold for the nature of crimes. If all crimes are, according to some social contract theories,<sup>33</sup> wrongs that violate the terms of the social contract of the political community in question, then arguably all crimes involve breaking 'the normative bonds' of the community in question. This would then lead to the rather implausible conclusion that imprisonment is appropriate for all crimes, regardless of their severity as wrongs.

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<sup>31</sup> Duff, *Punishment, Communication, and Community* (n 1) 145.

<sup>32</sup> *ibid* 150.

<sup>33</sup> eg Susan Dimock, 'Contractarian Criminal Law Theory and Mala Prohibita Offences' in Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo and Victor Tadros (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 165.

Of course, one can respond to this by rejecting the above social contract account of crimes,<sup>34</sup> or by arguing that there is a difference between 'violating the terms of the social contract' and 'breaking the normative bonds' of the community in question. Even if that is the case, the first question about the duration of hard treatment still remains; and it is even more unclear that Duff's response is adequate here.

Duff argues that we should only do so much when it comes to inducing offenders to repent for their crimes. This is because to properly respect them as responsible autonomous agents, we should leave them room in the end to not accept, and therefore not come to judge and recognize that they have done wrongs, despite our best efforts to persuade them otherwise.<sup>35</sup> This rings true to me; but it is unclear, according to this argument, just when we are doing more than we should.

As the above brief discussion shows, Duff needs to say more to address properly the second issue raised by the original objection. Instead of elaborating and defending Duff's responses, I shall explore another response in the following; one that I believe is more adequate in defending Duff's communicative theory from the above worries.

## *6. Hard Treatment and Amends*

According to this response, when thinking about what is the appropriate hard treatment that is justifiable to burden offenders with in order to induce their repentance, we should focus more specifically on what offenders ought to do in light of their crimes; or in other words, the secondary responsibilities that they have in virtue of violating their primary

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<sup>34</sup> See eg Duff, *Punishment, Communication, and Community* (n 1) 36-39.

<sup>35</sup> *ibid* 122.

responsibilities.<sup>36</sup> Given the limited space here, I am unable to offer a complete theory about what offenders ought to do in light of their crimes. I contend, however, that a plausible theory would have to account for the intuition that offenders should at least apologize for their wrongdoing, and that this apology should not merely be verbal, but should take a certain material form. In other words, it should involve reparations for one's wrongdoing, where this involves not just material reparations for the harms that result from one's wrongdoing; but also moral reparations for the fact that one committed a wrong, as opposed to merely having non-culpably caused harms. I shall refer to all these collectively as the 'amends' that offenders ought to make to apologize for their wrongdoing.

It is precisely in terms of such amends that we should understand the 'hard treatment' in Duff's communicative theory. That is to say, the kind of 'hard treatment' that we should burden offenders with to induce them to repent for their crimes is precisely the *amends that they ought to make to apologize for their wrongdoing*. According to this view, we should therefore start with an account of the amends that offenders ought to make to apologize for their crimes. Once that account is in place, the kind of hard treatment that we should burden offenders with to induce their repentance is then precisely the amends that are identified by such an account.

Under this view, the hard treatment that we should burden an offender with for his particular crime therefore depends on what exactly are the amends that he ought to make to apologize for his particular wrongdoing. Answering this requires a complete theory of amends. Although I am unable to offer one here due to limited space, I see reconciliation as the aim of apologies, and that the amends a wrongdoer ought to make to apologize for his

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<sup>36</sup> cf Victor Tadros, *The Ends of Harm* (OUP 2011) 275-279.

wrongdoing are to be determined by what he reasonably ought to do to merit reconciliation with those whom he has wronged, and the wider community whose norm he has violated.<sup>37</sup> In the context of criminal wrongdoings, the latter then refers to the political community whose crime the offender has committed. Even in the absence of a complete theory of amends, there are already good reasons in favour of the view I have been arguing for.

First, there is a clear story under this view for why the hard treatment in question is appropriate, and it is therefore justifiable to burden an offender with it to induce his repentance. This is because the hard treatment in question, as a means for inducing an offender's repentance, is now not merely something that is external to and different from what an offender ought to do in light of his wrongdoing. Rather, it is constituted precisely by the amends that he ought to make in light of his wrongdoing. In other words, we are here burdening him with what he ought to do (i.e. the amends in question) to induce him to do what he ought to do (i.e. repent for his crimes). Insofar as such amends are also part of repentance broadly understood, then the means used to pursue the aim of repentance under this view can also be said to be internal to the aim in question.

Understanding hard treatment in this way also supports the second role that Duff's communicative theory accords to hard treatment, i.e. it serves as a vehicle through which offenders come to repent and reconcile with those whom they have wronged. This is because it is through such amends, when they are undertaken with the right spirit (i.e. with the recognition and judgement that one has done a wrong),<sup>38</sup> that offenders come to repent (in the broader sense) for their crimes and reconcile with those whom they have wronged.<sup>39</sup>

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<sup>37</sup> See Linda Radzick, *Making Amends* (OUP 2009) ch 4.

<sup>38</sup> I shall talk about the stubbornly unrepentant offender in the next section.

<sup>39</sup> See text at n 30.

Proportionality is also built into the justification of punishment under this view. This is because it is plausible to think that the amends an offender ought to make to apologize for his crime should be proportionate to the nature and severity of his crime. A more burdensome and extensive set of amends is therefore required to apologize for a more serious crime, and *vice versa* for a less serious crime. Since the hard treatment in legal punishment is precisely, according to this view, the amends that an offender ought to make to apologize for his criminal wrongdoing, this requirement of proportionality is therefore transferred over to the justification of punishment.

Finally, and more importantly for the purposes of this paper, understanding hard treatment in this way also allows us to respond more adequately to the above challenges to Duff's communicative theory. To start with, a particular kind of hard treatment is now appropriate not simply because its meaning somehow corresponds to, reflects or captures the nature of the crime in question; but because they are precisely the amends that one should make to apologize for one's criminal wrongdoing. Even if all crimes are wrongs that violate the terms of the social contract of the political community in question, it does not follow necessarily that severing one's 'normative bonds' with the community in question is the most appropriate amends that one should make to apologize for them. More importantly, this view has a clear answer to the question 'just when we are doing more than we should?'. If, according to our best account, the amends that an offender ought to make to apologize for his particular crime are X, then according to this view, X is precisely the most we can burden an offender with to induce his repentance. Even if the offender remains unrepentant after he has undergone or undertaken X, we are not allowed to burden him more with X+1.

## 7. Three Potential Objections

In the following, I shall consider three immediate objections to the above view. Given the limited space here, my aim is not to refute all of them decisively; but to show that there are at least plausible responses to each of them.

The first objection alleges that it is senseless to burden unrepentant offenders with the amends they ought to make to apologize for their crimes.<sup>40</sup> This is because apologies have a certain voluntary aspect to them; and they need to come from within the agents who are doing the apologizing. If unrepentant offenders make the amends in question merely because they are burdened by it, this would then undermine what they do as apologies for their wrongdoing.

The first thing to note in response to this objection is that burdening offenders with the amends in question does not necessarily preclude the possibility of their coming to recognize and judge for themselves that they have indeed done a wrong, and thus perform the amends in a way that would constitute genuine apologies. Indeed, the aim behind burdening offenders in this way is precisely to induce such a recognition and judgement. More importantly, the above objection only holds for those who argue that *simply in virtue of making* the amends in question, offenders have therefore apologized for their criminal wrongdoings and reconciled themselves with those whom they have wronged.<sup>41</sup> The view that has been defended here is, however, not committed to this. It is open to the possibility that a (persistent) offender might very well remain unrepentant despite being burdened by the amends in question; and that in virtue of this, the amends that he has made therefore

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<sup>40</sup> Matt Matravers, 'Duff on Hard Treatment' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment and Responsibility* (OUP 2011) 75-80.

<sup>41</sup> See eg Christopher Bennett, 'Taking the Sincerity Out of Saying Sorry' (2006) 23 *Journal of Applied Philosophy* 127.



do not constitute an apology for his wrongdoing. It is just that we are now not allowed to impose on him additional burdens to induce his repentance further. Under this view, it is only in the specific sense that he should not be subjected to further punishment, that an offender can be said to have 'reconciled' himself with others simply in virtue of performing the amends that he has been burdened with.<sup>42</sup>

There might be another objection relating to recalcitrant offenders in the vicinity here. *If* it turns out as a matter of fact that burdening them with the hard treatment in question actually undermines their prospects of coming to repent for their crimes, so that we would have done better in relation to this aim had we not burdened them with it, then this seems to undercut our justification for the hard treatment in question. This is because in such a case, the justifying aim in question is precisely undermined by the hard treatment that it is intended to justify in the first place.

There are certainly reasons to think that hard treatment can, as it turns out, undermine the aim of inducing repentance in offenders. As Narayan points out, insofar as the hard treatment in question involves material and liberty deprivations, these will 'often have the effect of focusing one's attention on one's own suffering'; and thus 'shift the agent's attention from the nature of her previous wrongdoing to the nature of her current hardship'. Furthermore, insofar as they are imposed on offenders as opposed to being undertaken voluntarily by them, this will likely 'result in anger and a hardening of the heart'.<sup>43</sup>

Nevertheless, there are also reasons to think otherwise; for it also depends on what exactly is the kind of hard treatment that is under consideration here. If it is conceived as

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<sup>42</sup> I am therefore open to the possibility that it may be justifiable to subject 'dangerous' offenders to further preventive detention.

<sup>43</sup> Uma Narayan, 'Appropriate Responses and Preventive Benefits' (1993) 12 *OJLS* 166, 177.

something that is rather harsh and severe in kind, and inflicted on an offender simply as a way to induce him to repent, then it does seem likely that the hard treatment will turn out to have the effects envisioned above. However, if they are conceived in the way that I have been arguing for, in terms of the amends that offenders ought to make to apologize for their wrongdoing, then this might make it less likely. This is because there is a rational connection between the hard treatment in question and the offender's previous wrongdoing, i.e. that it is precisely the amends that he ought to make to apologize for the wrong that he has committed. The hope is that through such a connection, an offender who is initially focused on his current hardship (of being subjected to the hard treatment in question) can then upon reflection come to focus on the wrong that he has committed; for his current hardship is, according to this connection, the upshot of the amends that he ought to make to apologize for his wrongdoing. Similarly, insofar as an offender resents the fact that the hard treatment in question is imposed on him, the hope is also that through this connection, he can come to see that what is now imposed on him is precisely what he in any case ought to be doing to apologize for his wrongdoing;<sup>44</sup> that we are imposing on him precisely the burdens that morality already imposes on and requires of him.

Whether or not the hard treatment that I have been arguing for will turn out to undermine the aim of repentance is of course an empirical question. Insofar as there is (as yet) no clear answer to this, what I have been trying to show here is that while there are general reasons to think that hard treatment might turn out to undermine the aim of

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<sup>44</sup> While this can account for legal punishments where offenders are required to do something (e.g. community payback orders, fines and penalties), one might wonder whether it can also account for imprisonments for example, which is all too often something that is simply done to an offender. I shall discuss this later on when addressing the third objection.

repentance, there are also reasons to think otherwise, especially when we conceive of hard treatment in the way that I have been arguing for.

There is also another reason that is worth mentioning here. Subjecting a recalcitrant offender to the hard treatment which aims at inducing his repentance also expresses the recognition that he is not beyond hope; that despite his current recalcitrance, he is still seen as capable of seeing and judging that what he has done was wrong (and may eventually come to see and to judge that for himself). It therefore expresses a certain kind of recognition respect,<sup>45</sup> one that involves seeing the recalcitrant offender as someone who is nevertheless responsive to reasons; and that while he is now recalcitrant, he will eventually come to recognize that he has done a wrong by being required to make the amends that he ought to make to apologize for his wrongdoing.<sup>46</sup> Unless we know in advance that a particular recalcitrant offender's prospect of repentance is necessarily undermined by the hard treatment in question, this therefore constitutes another reason in favour of subjecting him to it with the aim of inducing his repentance.

Of course, much more needs to be said about this recognition respect.<sup>47</sup> However, as explained before, what I want to do here (and all that I can hope to do) is to show that while there is force to this objection concerning recalcitrant offenders, it is not necessarily

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<sup>45</sup> See also Avishai Margalit, *The Decent Society* (Harvard UP 1996) 75.

<sup>46</sup> One objection here is that besides the hard treatment in question, there might also be other things that we can do to/for offenders in order to induce their repentance. We might for example burden them with other kinds of hard treatments or entice them with benefits. Doing these would then also be expressing the respect discussed above. In response, we need to ask whether these other things are indeed appropriate to do to/for offenders in order to induce their repentance. Enticing them with benefits in order to get them to do what they ought to do arguably fail to respect them appropriately (Ambrose Lee, 'Legal Coercion, Respect and Reason-responsive Agency' (2014) 27 *Ethical Theory and Moral Practice* 847, 854); and while the hard treatment I am arguing for here is appropriate in being the amends that offenders ought to make to apologize for their wrongdoing, the appropriateness of other kinds of hard treatment remains to be shown.

<sup>47</sup> See also *ibid.*

decisive against the communicative theory I am defending here; for there are, as I have tried to illustrate, some plausible responses to it.

The second objection alleges that if the aim of burdening offenders with the amends in question is to induce them to repent for their crimes, then this seems unnecessary for the offender who is already repentant at the point of conviction.<sup>48</sup>

We need to be clear about what we mean by an 'already-repentant' offender here. If by this, we are merely referring to an offender who only comes to recognize and judge that he has done a wrong, I see no objection here. What we are requiring of and burdening him with is precisely the amends that he ought to make to apologize for his wrongdoing. It is therefore something that he presumably should recognize as what he ought to do in coming to recognize and judge that he has done a wrong.<sup>49</sup> Since the amends in question are also supposedly part of repentance (in the fuller sense discussed before), hard treatment so understood therefore still plays its second role here, for it provides a vehicle through which such an 'already-repentant' offender can come to repent fully for their crimes. It is just that, as opposed to the unrepentant offender, it is now not needed to serve its first role of inducing an offender to recognize and judge that he has done a wrong.

The same can also be said for an 'already-repentant' offender who has done something to apologize for his crime prior to conviction, but not exactly the amends he ought to make to apologize for his crime. If there is a worry here, it is about who has the *right* to determine exactly what an offender ought to do to apologize for his crimes. However, *if* an argument can be made for the state's authority to determine what exactly counts as a criminal wrong, it is not clear why the same argument cannot also be made for

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<sup>48</sup> Matravers (n 40) 75-80.

<sup>49</sup> Indeed, to the extent he does not, it throws doubt on whether he has really come to such a recognition and judgement to start with.

what an offender ought to do to apologize for committing such criminal wrongs. Insofar as there is an objection here, it is therefore not one that is distinctive to the communicative view that is being defended here. Rather, it is more generally about the state's right to determine what members of the political community in question owe towards each other.

What about the kind of 'already-repentant' offender who, unlike the above two kinds, has already made precisely the amends he ought to make to apologize for his crimes? I think this also does not pose a problem to my view. As I explained in the beginning, communicative theories (as I understand them, of which my view is one kind) seek to explain, in terms of the censure that offenders deserve in virtue of their crimes, just why it is justified in the *pro tanto* sense to punish them. I therefore maintain that *in virtue of their crimes*, such 'already-repentant' offenders do deserve to be punished in the way I have been arguing for, and that this punishment is thus justified in the *pro tanto* sense. Nevertheless, it might still be unjustified *all-things-considered* because such offenders have already made precisely the amends they ought to make to apologize for their crimes. Whether that is the case depends on whether we should take into account offenders' post-offence behavior in deciding what is the *all-things-considered* justified punishment. I think we should, though properly defending this is beyond the scope of this paper.<sup>50</sup> The point here is just that given it is only concerned with *pro tanto* justification, my communicative view is therefore not necessarily committed to punishing an offender even when he has already made precisely the amends he ought to make to apologize for his crime.

The third and final objection questions whether my communicative view can account for legal punishments that involve liberty deprivations. To the extent that the kind of

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<sup>50</sup> See eg John Tasioulas, 'Where is Love? The Topography of Mercy' in Rowan Cruft, Matthew Kramer and Mark Reiff (eds), *Crime, Punishment and Responsibility* (OUP 2011).

amends we typically think of, which wrongdoers ought to make to apologize for their wrongdoings, involve certain kinds of positive duties (e.g. compensation and certain reparative work), my communicative view can account for those legal punishments that also involve the imposition of certain positive duties (e.g. community payback orders, fines and penalties). Such punishments are and should be, according to my view, the kinds of compensatory or reparative duties that constitute (at least partly) the kind of amends that an offender ought to make to apologize for his wrongdoing. However, what about those legal punishments that involve liberty deprivations (e.g. restriction orders, house arrests and imprisonments)?

I think my communicative view can also account for those punishments. There are reasons to think that alongside certain positive duties, liberty deprivations can also sometimes be an appropriate part of the amends in question (or more accurately restricting one's own liberties, since we are talking in terms of the amends that wrongdoers ought to make here). Through restricting one's liberties, or more specifically refraining, distancing or removing oneself from the kind of activities that one normally does or takes for granted in everyday life, one shows that one has taken the time, effort, energy, attention and space to reflect, think through and face up to the wrong that one has culpably done, as one is diverted away and removed from the ordinary routines of everyday life. When the activities in question are part of the context of one's culpable wrongdoing, doing so also expresses the recognition that one has culpably violated a norm that makes such activities possible for everyone (including oneself). This is especially the case when the wrong is serious and the stakes in violations are particularly high, for it involves seeing oneself as being in some sense temporarily "disqualified" from the activity in question, at least during and at most until one has undertaken the reparations that constitute the apology that one should undertake in

light of one's culpable wrongdoing. A deep and remorseful apologetic response should involve such kinds of recognitions.

Of course, when and under what conditions liberty deprivations are part of the amends in question, and what kinds are proportionate to what crimes, can only be answered with a complete theory of amends. The point is just that insofar as liberty deprivations can also sometimes be a proper part of the amends that wrongdoers ought to make to apologize for their wrongdoings, there is room within my communicative view to account for legal punishments that involve liberty deprivations.

Even if all this is true, however, it is still an open question whether imprisonment as it is currently practiced (for example) in the UK can be justifiable under my communicative view. This is because convicted offenders are simply taken from courts to prisons. Insofar as this is something that is simply done to offenders, it is hard to see how it can be understood as something that an offender ought to do in light of his wrongdoing, as part of the amends that he ought to make to apologize for it. For this reason, my communicative view would find more justifiable kinds of imprisonment where it is more plausible to see the liberty deprivations as something that an offender does as part of what he ought to do to apologize for his wrongdoing. Examples of such imprisonments include sentences that require an offender to report on a certain date to a certain prison to serve his term, or sentences of intermittent imprisonment (e.g. weekend imprisonments) which also require an offender to report for his imprisonment.<sup>51</sup>

Admittedly, much more needs to be said about the plausibility and feasibility of such 'open' prisons. For example, whether they would create a perverse incentive for offenders

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<sup>51</sup> My thanks to Antony Duff for pointing this out, and to an anonymous reviewer for pressing me to further elaborate my position on this in the following.

to abscond just because other offenders do so, and how that should be best mitigated.<sup>52</sup> Furthermore, none of what I have discussed necessarily implies that imprisonment as it is currently practiced in the UK can never be justifiable. It all depends on whether there are good enough reasons to justify departing from the kinds of imprisonment that are endorsed by my communicative view. What I merely want to do in this section is simply (a) to show that the kind of communicative theory defended here does not necessarily rule out all kinds of imprisonment as unjustifiable, just because they involve liberty deprivation; and (b) to briefly describe the kinds of imprisonment that best exemplifies the commitments of this communicative theory.

## 8. *Conclusion*

This paper seeks to defend a particular version of the communicative theory in light of the problem of hard treatment. This particular version follows Duff in arguing that the hard treatment in legal punishment can be justified in relation to the aim of repentance, more specifically by inducing offenders to repent for their crimes and by providing a vehicle in which they come to do so. Yet, it also argues that the hard treatment in question should be more appropriately understood in terms of the amends that offenders ought to make to apologize for their criminal wrongdoings. This paper then considers three potential objections to this particular version of communicative theory, the first two of which were originally advanced against Duff's version of it. It argues that the version of communicative theory defended in this paper has plausible responses to each of them.

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<sup>52</sup> I think this can be best mitigated by enforcing the orders to report in the event that an offender absconds from them. My thanks to an anonymous reviewer for highlighting this problem of perverse incentive.