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## BOOK REVIEW

### Punishment, Liberalism, and Communitarianism

PUNISHMENT, COMMUNICATION, AND COMMUNITY.  
By R.A. Duff. Oxford, Oxford University Press, 2001. Pp.  
xx, 245. \$47.50 (cloth).

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In his most recent book, R.A. Duff, who is without a doubt one of the pre-eminent criminal law theorists today, presents an extraordinarily ambitious theory of punishment. This book fits well within Duff's long-term project of laying bare the relationships between the criminal law and different specialized fields within philosophy. Duff's philosophical treatment of the criminal law began with his *Intention, Agency, and Criminal Liability*,<sup>1</sup> in which he thoroughly analyzed the relationship between the criminal law and contemporary philosophy of mind and action.<sup>2</sup> Now Duff is squarely concerned with the connections between the criminal law and contemporary political philosophy.

Duff claims that the comprehensive theory of punishment he advances "does justice to the central retributivist concern that punishment must focus on and be justified by its relationship to the crime for which it is imposed," that it also "does justice to the consequentialist concern that punishment must be justified by some good that it aims to achieve," and, furthermore, that his account does justice "to the abolitionist concern that we should aim

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1. R.A. Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (1990).

2. Aside from numerous articles on these subjects, Duff also edited *Philosophy and the Criminal Law: Principle and Critique* (Antony Duff ed., 1998).

not to 'deliver pain' to offenders" (129). Duff's theory of punishment would go a great way toward actually evaporating thorny, recalcitrant problems in the philosophy of punishment. For retributivists and consequentialists fiercely oppose each other as to the justification of punishment, and together, they oppose abolitionists (who believe punishment is never justified). If one were to accept Duff's main theses in this book, however, retributivists, consequentialists, and abolitionists would see eye to eye. If this were not already enough, as a bonus, Duff's book also purports to allay major points of disagreement regarding the central debate of contemporary political philosophy: the debate between liberals and communitarians.

It takes no great skepticism to suspect that this sounds too good to be true, and to thereby suspect that somewhere something in Duff's account must have gone astray. Nonetheless, like good works in general, even the problematic aspects of Duff's theories are illuminating. I wish to stress at the outset that this is a great book: lucidly written and well-organized (in spite of drawing considerably from previously published material), impressively researched, and rigorously argued; it is obligatory reading for anyone interested in the philosophy of punishment and criminal law theory. It is indeed impressive how difficult it is to point out any major shortcomings in Duff's book, and this amply attests to Duff's ingenuity and scholarship. Given the ambitiousness of the project that Duff has set for himself, even only partial success in meeting the stated goals is noteworthy and admirable. Yet, as I present the main themes in Duff's book, I will focus upon the problematic aspects of Duff's central theses, in an attempt to advance the debate regarding the most important and engaging themes: the justification of punishment and its connection to political philosophy. There are other themes that Duff discusses in the book, but I cannot do justice to all of them here.

Duff begins his book with a comprehensive and useful survey of the different philosophical justifications of

punishment. The topic of the justification of punishment, as Duff points out, has become increasingly complex. The more or less straightforward, orthodox way of distinguishing between consequentialism and retributivism, according to which consequentialists justify punishment attending to its consequences, and retributivists justify punishment attending exclusively to desert, has now become obsolete, as the debate has gained in sophistication and subtlety. The specialized literature is (over-) crowded with sub-types of justifications of punishment: negative retributivism (desert is merely a necessary condition for punishment), positive retributivism (desert is a sufficient condition for punishment), side-constrained consequentialism (consequentialism circumscribed by desert), in addition to a wide variety of “mixed theories” of punishment (theories that seek to combine retributivism and consequentialism in multifarious ways).

Within Anglo-American legal scholarship, ever since the combined influence of Austin’s positivism and Mill and Bentham’s utilitarianism, the favored position had been consequentialism, with retributivism typically pejoratively described as a dressed-up form of vengeance. In the 1960s, however, a retributivist revival took place.<sup>3</sup> Whether or not retributivism is considered to be the correct view, it is no longer seen as *atrocious* to be a retributivist.<sup>4</sup> Perhaps it is puzzling that it took so long for retributivism to gain ground on consequentialism, given that some forms of consequentialism easily lend themselves to grotesquely

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3. For a sample of this revival, see Herbert Morris, *Persons and Punishment*, 52 *Monist* 475 (1968); George P. Fletcher, *Rethinking Criminal Law* (1978); Jeffrie G. Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of Law* (1979); and the work of Michael S. Moore, above all the articles compiled in his *Placing Blame: A General Theory of the Criminal Law* (1997).

4. At least in the philosophical literature, up until not too long ago, to defend retributivism was indeed seen almost as barbaric. Recall the anecdote, as told by K.G. Armstrong in *The Retributivist Hits Back*, 70 *Mind* 471, 471 (1961) regarding C.S. Lewis’s inability to publish his famous *The Humanitarian Theory of Punishment in England*, simply because it defended retributivism. The caricature of retributivism as vengeance is still prevalent in many academic disciplines.

counter-intuitive practices, such as punishing innocents. But, consequentialism has proven to be a rich, resilient theory, reinforced by the irresistible consideration that any theory that does not care about consequences, as retributivism purports to be, is just stubborn, and out of touch with reality.

In spite of the merits of Duff's survey of the different justifications of punishment, it is nonetheless hard to characterize his own favored justification of punishment (a justification of punishment that has been in the making since Duff's earlier *Trials and Punishments*).<sup>5</sup> Duff unequivocally describes his justification of punishment as a "species of retributivism" (27), as one of "three lines of retributivist thought" (21), though he also admits that his justification of punishment combines retributivism with the "forward-looking purpose" common to consequentialism (30), and that his account is not "purely retributivist" (21). The best way to understand Duff's justification of punishment is to pay attention to Duff's own name for it: "communicative punishment." Duff's communicative punishment has a great deal in common with the well-known "expressive theories of punishment."<sup>6</sup> The essence of expressive theories of punishment is that it is important to educate wrongdoers, to help them (secularly) repent, by expressing to them the rationale of our *moral* condemnation.

There are two general differences between Duff's communicative punishment and other expressive theories of punishment. First, Duff insists upon a distinction between the "expression" and the "communication" of punishment, arguing that "communication involves, as expression need not, a *reciprocal* and *rational* engagement. . . expression requires only one who expresses" (79). Second, Duff also insists that, strictly

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5. R.A. Duff, *Trials and Punishments* (1986).

6. Many authors, going as far back as Plato, endorse, albeit in different ways, expressive theories of punishment. We owe the label "expressive" to Joel Feinberg, coined in his article, *The Expressive Function of Punishment*, 49 *Monist* 397 (1965).

speaking, “punishment is not... a matter of moral education” (168), for the “kind of moral paternalism [essential to theories that emphasize the moral education aspect of punishment] is anathema to traditional liberals” (90), and Duff, in this regard, sides with those traditional liberals. While the first of these views could be seen as a welcome (albeit perhaps a bit unnecessary) addition to traditional expressive theories of punishment, it can hardly be seen as a major difference between Duff’s communicative punishment and classical expressive theories of punishment. The second difference is more significant and it is the result of Duff’s attempt to present a theory of punishment fully consistent with liberalism. This attempt is, as we shall see below, a complicated affair. I will turn to the more general discussion of how Duff’s favored justification of punishment fits within general political philosophy only after I have discussed the specific views that he has in relation to the justification of punishment.

Duff discusses “three lines of retributivist thought that have figured in recent debates” (21). These are “The removal of Unfair Advantage” line, the “Punitive Emotions” line, and his own “Communicative Punishment” line.

The first line of retributivism, as its name clearly indicates, revolves around the idea popularized by Herbert Morris (though seminally found in Kant and Hegel) that wrongdoers gain unfair advantages with their wrongdoings, and that it is only fair that such advantage be taken away from them.<sup>7</sup> Duff does not really discuss the problems with this account; he merely points to the numerous objections that have been leveled against it, including objections raised by “its own early adherents” (22). Duff, correctly, echoes the general objection that in order to cast doubt upon the retributivist credentials of this position it is enough to point out how this retributive line underestimates desert, which is the central element of retributivism. More dubious is Duff’s argument that this

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7. See Morris, *supra* note 3, *passim*.

form of retributivism is committed to the view that “all crimes, qua deserving of punishment” are “*mala prohibita*” (22). For example, Duff would claim that in a society that did not punish murder, a person getting ahead in life by committing murders, would, *ex hypothesi*, not thereby be gaining an unfair advantage. But this might assume the problematic views that (1) legal enactment is a necessary condition for unfairness, (2) that all wrongs are legal wrongs, and (3) that all punishment is state punishment.

In any event, Duff’s echoing of the standard objection, his considering it “conclusive” (22) strikes me as at odds with his very own claim that this line of retributivism “certainly addresses the tasks that a retributivist theory must discharge. It is a non-consequentialist account” (21). After all, it remains to be seen whether the expressions “non-consequentialist theories of punishment” and “retributivist theories of punishment” have the same identical meaning.

The second line of retributivism that Duff discusses links punishment to certain emotions that crime provokes. Here Duff focuses on mainly two retributive accounts: Jeffrie Murphy-Jean Hampton’s and Michael Moore’s.<sup>8</sup> Both of these accounts seek to vindicate the virtues of some retributive emotions like resentment, anger, guilt, etc. These emotions need not be vicious or irrational. Duff points out a problem with the strategy of attending to emotions: “it is not . . . clear *just* what the wrongdoer should suffer” (24). To be sure, to establish the exact characteristic of the appropriate retributive punishment (remember Shylock’s pound of flesh) is indeed a difficult problem, yet just to note this difficulty does not refute this account of retributivism. Many a true theory involves difficult aspects.

Duff also pays attention to a famous thought experiment Moore has devised: that of imagining ourselves as committing a horrible crime, and then sincerely

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8. See Jean Hampton, *The Moral Education Theory of Punishment*, in 13 *Phil. & Pub. Aff.* 208 (1984) and Jeffrey G. Murphy, *Marxism and Retribution*, in 2 *Phil. & Pub. Aff.* 217 (1973).

reflecting upon the punishment that, introspectively, we (individually) would conclude we (individually) deserved. Moore suggests that a decent person, upon imagining having committed such a horrible crime, would “feel guilty unto death.”<sup>9</sup> Moore then questions the legitimacy of the decision not to extend our first-person assessments to cases involving third parties. This is an interesting way of defending retributivism. Yet, Duff argues that Moore’s thesis is not too helpful: for it “appears to amount to little more than an appeal to the intuition (expressed in first-person cases through the emotion of guilt) that ‘the guilty deserves to suffer’” (25). Duff’s dismissal of Moore’s line of retributivism strikes me as too facile. For clearly this is not the only argument that Moore advances in favor of this line of retributivism. I cannot help but echo Douglas Husak, one of the most prominent contemporary criminal law theorists, in his assessment of Moore’s retributivism as presented in *Placing Blame*. Husak describes it as “perhaps the most comprehensive and far-reaching examination of the philosophical foundations of the criminal law since Jeremy Bentham.”<sup>10</sup> I will not here go into any detail trying to defend Moore’s far-reaching defense of retributivism, though I would like to note that many arguments in Moore’s defense of retributivism are indirect, (“back-door arguments,” as Moore calls them<sup>11</sup>). Instead of directly arguing for retributivism, Moore frequently highlights deep problems with its alternatives. If these problems are wide-spread and serious enough, the case in favor of retributivism gains in compelling strength. This is not a disreputable strategy, and it is very common to normative theorizing in general; for example, it is quite common and effective in defending, say, objective, cognitivist, fallibilist accounts of morality. Rather than directly proving that ethics is objective, cognitive, and fallible, one proves that subjectivism, non-cognitivism, and

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9. See Moore, *supra* note 3, at 145.

10. Douglas N. Husak, *Retribution in Criminal Theory*, 37 *San Diego L. Rev.* 959, 959 (2000).

11. See Moore, *supra* note 3, *passim*.

non-fallibilism, are fraught with difficulties. But Duff summarily dismisses this strategy, and with it the second line of retributivism, without really engaging in the examination of the nuances of this sort of defense of retributivism.

The third line of retributivism, the one that Duff favors, is communicative punishment. I have already sketched the ways in which Duff's communicative punishment differs from traditional expressive theories of punishment. What is necessary in order to understand how communicative punishment differs from traditional retributivist theories is to attend to a logical relation between punishment and its justificatory aim that Duff claims is the essence of retributive theories. In retributive theories, the logical relation between punishment and its justificatory aim is *necessary*, whereas in consequentialist theories this logical relation is *contingent*. Duff, in short, appeals to logic in order to mark off the distinction between retributivists and consequentialists.

Other difficulties aside, to the extent that in an obviously revisionist move, Duff grounds the distinction between consequentialism and retributivism in logic, communicative punishment is best seen as a "mixed theory" of punishment. (This seems to be the case in spite of Duff's protestations to the contrary: by way of conclusion to a section of the book entitled "Punishment and Communication," Duff tells us that his account is not "partly consequentialist" (30), though, as we have seen already, Duff admits (21) that his account is not purely retributivist either.) Mixed theories of punishment seek to resolve the dispute between retributivists and consequentialists by pointing out that retributivism and consequentialism are actually not in opposition.<sup>12</sup> Retributivism, on many mixed theorists' view, is merely a "logical" or "conceptual" doctrine: punishing the undeserving is, as a definitional, logical matter, simply not

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12. For the classical mixed theories of punishment see Anthony Quinton, *On Punishment*, 14 *Analysis* 512 (1954); John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955); H.L.A Hart, *Punishment and Responsibility* (1968).

punishment.<sup>13</sup> Duff's maneuvers are similar to those of the classical mixed theorists. He bases the distinction between retributivism and consequentialism not on the role that consequences play in the justification of punishment (consequentialists give the consequences of punishment great importance while retributivists give them little or no importance) but on the nature of the logical relation between punishment and its justificatory aim (see 1 *passim*). (To be sure, traditional mixed theorists turned retributivism itself into a mere logical thesis, and Duff is not doing that, though he, like them, appeals to logic to ground the cliff between retributivism and consequentialism.)

Duff focuses on three forms of consequentialism: deterrence, incapacitation, and rehabilitation (6, ff.) in order to show that they exhibit a contingent relation between punishment and its aims. Even if Duff's allegation that these three consequentialist rationales (admittedly popular and plausible) exhibit a contingent relation between punishment and its justifying aims is true, it remains to be seen whether *all* possible forms of consequentialism are doomed to manifest merely contingent relations between punishment and its justifying aims. Imagine a vulgarly utilitarian form of consequentialism (all that matters is the maximization of desire-satisfaction) whereby when someone does something wrong, a plebiscite is conducted by the government polling the population to determine the punishment that would most please said population. The very way in which this strange form of punishment is set up seems to guarantee that whatever punishment is inflicted is indeed necessarily (not contingently) connected with its justifying aim (pleasing the greatest number of people). Duff has not shown that the relationship between punishment and its aim is necessarily contingent in consequentialist theories; he has not shown that there are no conceivable forms of consequentialist punishment which

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13. This famous maneuver, the "definitional stop," is visible in the works cited in the preceding quote. See sources cited *supra* note 10, *passim*.

might exhibit necessary connections between punishment and its justifying aim. And it is poignantly incumbent upon Duff to show this, insofar as it is Duff himself who introduces logic as a means to distinguish between retributivism and consequentialism.

Duff does discuss, under a subsection heading entitled “Consequentialist Responses,” other less familiar consequentialist theses, but rejects some of them, again, due to their inability to present a necessary connection between punishment and its justifying aim. Others he rejects on different grounds, and these are worthy of attention. Duff claims that “strict consequentialists (Duff also refers to them as “pure” and “complete” consequentialists) must take the good specified by their theory of the good to be a good that is to be maximized” (10). Thus, the maximization of this good could allow for violations of individuals’ rights. But it is hard to see why consequentialists *must* be maximizers. The connection between “consequentialism” and teleological ethical theories (theories that define the right and the good independently of each other, and that hold that the right consists in the maximization of the good) is more complex than Duff makes it out to be. Typically, no doubt, consequentialism has been seen as the specific application of a type of ethical theory, teleology, to the case of punishment; retributivism, similarly, has typically been seen as the specific application of a type of ethical theory, deontology, to the case of punishment. (Deontological theories do not claim that the right consists in maximizing the good.) But these views are problematic. One could be a retributivist in the specific case of punishment, and still be a consequentialist regarding ethical theory in general. Consider, for example, Michael Moore’s discussion of a maximizer of deserved punishment: a retributivist might refuse to punish a deserving person, if this allows for the punishment of a larger number of deserving persons.<sup>14</sup> Nor is it inconsistent for a general consequentialist not to be a maximizer, as rule-utilitarianism and as many forms of “side-constrained”

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14. Moore, *supra* note 3, at 155.

consequentialism and other mixed theories of punishment in the specific case of punishment show.

Duff believes that the ones who should perforce be maximizers are the pure (strict, complete) consequentialists. Yet, he has not shown that a purely consequentialist theory of punishment needs to be a maximizing theory. A version of the distinction pertaining to comprehensive moral theory between act- and rule-utilitarianism might also obtain within a theory of punishment: a theory which seeks long-term maximization of the good in the infliction of punishment, and which thereby rejects maximizing the good in every single case when there is an opportunity to punish. Duff's arguments affect only what he calls purely consequentialist theories, but there are other forms of consequentialism. So much so, that the fact that Duff combines retributivism with forward-looking elements and that he admits that his theory is not purely retributivist, makes it difficult not to see his theory as an instance of side-constrained consequentialism

Moreover, since Duff has not shown that desert is the only justifying aim of punishment which stands in a necessary connection with the infliction of punishment, the connection between Duff's theory and any recognizable form of retributivism turns out to be even more problematic. The retributive credentials of Duff's theory are not derivable from its obvious communicative character. For it is not at all clear what the status of the connection between the retributive and the communicative enterprises is. As Duff sensibly notes, the communicative aspect of punishment is not "necessarily retributivist" (27), for "consequentialists can also regard the expression of censure as a useful function of punishment" (27). Moreover, Duff also admits that "communicative actions in general typically have a forward-looking purpose" (30). So, it seems that the argument that allows Duff to classify his own view as retributive is to a great extent based on logical maneuvers regarding necessity and contingency, and to a lesser extent on communication. One wonders to what

extent the role that logic plays in Duff's theories is obscured by his predominant discourse of communication (and this wondering covers the very title of the book).

Now, a term in the title of the book which is undisputably central to Duff's aims is "community." For Duff's account of communicative action is deeply entrenched in a view about communal ties. In fact, Duff explicitly begins the pertinent chapter of the book (chapter 2) by claiming that "a normative theory of punishment must include a conception of crime as that which is to be punished. Such a conception of crime presupposes a conception of the criminal law—of its proper aims and content, of its claims on the citizens" (35). That is, a theory that explains why we should punish, should also explain what crimes are, and also elucidate the political implications of the criminal law. While no doubt it would be helpful to have such an organic and comprehensive account of state punishment, it is not clear why these things are really *necessary*. Someone *could* be, say, a retributivist about punishment, without being concerned with all these political issues.

While important aspects of Duff's book are steeped in the debate between liberals and communitarians, he at the same time refers to the classificatory dimension of this debate as "fruitless" (35). Aside from this peculiar stance regarding the classificatory debate (a stance which also explains Duff's laudable efforts—mostly in the last two chapters of the book—to connect theoretical discussions with practical concerns), Duff idiosyncratically emphasizes an alleged opposition between liberalism and consequentialism. Duff suggests that we pay attention to the "liberal values that fueled the moral reaction against consequentialist conceptions of punishment in the 1970s" (36). But, the debate between liberals and communitarians is broader than any debate in punishment theory and, in any event, it is different from the debate between deontological and teleological theories in ethics. By and large, the liberal-communitarian debate is a political debate (as opposed to an ethical debate, and certainly as

opposed to the retributivism-consequentialism debate) regarding the scope and functions of the state. The distinction between liberals and communitarians ought to be grounded on the relation between the right and the good and the role that the state plays in connection to this relationship—not in connection to the peculiarities of this or that theory of punishment.

Moreover, if there is a particular theory of punishment which is in tension with liberalism, retributivism would be the obvious candidate. Retributivism is sometimes associated with legal moralism (the view that *every* blameworthy act should be punished by the state). Such forms of retributivism, by no means rare, seem to be at odds with bulwark principles of liberalism, such as the harm principle, the right to privacy, and the neutrality of the state as to specific theories of the good, etc. In a recent criminal law textbook, edited by Moore, Leo Katz and Stephen J. Morse, after a section devoted to the discussion of the limits of the criminal law which includes texts in which Moore defends both retributivism and legal moralism, the following questions are posed to the students: “Is Moore pretending to be a liberal? Can a moral realist/retributivist/legal moralist be a liberal? Or is liberalism best defined so as to exclude adherence to the former views?”<sup>15</sup> Clearly, the sensible assumption behind these questions is that there is some tension between some forms of retributivism and liberalism.

Liberals believe that just as the state should not endorse any particular religion, it should not endorse any particular theory of the good either. Communitarians, on the other hand, believe that the state must endorse (or cannot help endorsing) a certain theory of the good. One famous communitarian objection to liberalism is that the liberal credo itself contains a certain theory of the good, and thus, that its alleged neutrality *vis-à-vis* different conceptions of the good is spurious. The standard liberal response is to stress the fact that liberalism is not a

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15. Foundations of Criminal Law 154 (Leo Katz et al. eds., 1999).

comprehensive moral doctrine, that it is merely political and that at worst it contains a certain, perhaps inescapable, theory of the good, but merely a *thin* theory of the good, and that, thereby, liberalism, if not wholly neutral regarding different theories of the good, is as neutral as possible (and at any rate clearly neutral as to different *thick* theories of the good).<sup>16</sup>

Duff argues that since “a recent feature of the ‘liberal-communitarian’ debate has been a blurring of the boundaries between these supposedly opposed schools,” it is clear that “we can be ‘liberal-communitarians’ or ‘communitarian-liberals’” (48). While it is true that this debate has become subtle and sophisticated, and that there might be room for some sort of middle ground, Duff’s view that the boundaries have been blurred, and so, presumably that no meaningful difference between the two views could be maintained should give us pause. It could be argued that the boundaries are more elusive, that the way of distinguishing between the two political theories is more round-about and complicated, than earlier believed, and yet insist that the boundaries are as definite as they ever were. (The same point could be made about other normative debates: retributivism-consequentialism, natural law-positivism, etc.) Furthermore, if the boundaries between any two theories are indeed blurry, then it might not make much sense (aside from some sort of transitory pedagogy) to claim that the solution is to combine those two theories, for it turns out that one cannot speak meaningfully of two theories anyway. The epistemological discussion of boundaries, that is, how we can know where liberalism ends and communitarianism begins (or vice versa), is radically different from the ontological discussion of where those boundaries are. (Blurriness, as used by Duff, strikes me as an epistemological notion.)

Duff’s strategy is to defend a “kind of ‘liberal-communitarianism’” (35), and this is accomplished by

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16. In relation to this debate, see John Rawls, *Political Liberalism* (1993); Stephen Mulhall & Adam Swift, *Liberals and Communitarians* (1992); Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (1994).

endorsing “a form of communitarianism—of ‘liberal-communitarianism’—that gives a central place to versions of the values dear to liberal hearts” (42). This maneuver faces an obvious difficulty, since the sorts of values that liberals “hold dear” are not, ontologically, on a par with the sorts of values that communitarians endorse. That is, liberal values are in a sense meta-values, institutional (not belonging to a comprehensive moral theory) values that allow for individuals to choose whatever personal values they wish to pursue. But communitarian values are not meta-values, but values relating specifically to individuals’ theories of the good, entrenched in comprehensive moral theories. It is thus difficult to combine liberalism and communitarianism without smuggling a thick theory of the good into liberalism.

As an example of a liberal community, Duff presents the academic community. This example “shows that there can be normative communities whose members are bound together by a shared commitment to certain defining values and by mutual respect and concern in the light of those values, *but that do not have the intimate, all embracing and potentially oppressive character that liberals [and Duff himself] fear*” (46, emphasis added). Yet, in spite of Duff’s arguments, the claim that these values do not give rise to the sort of all-embracing, intimate and potential oppressiveness that liberals and Duff fear, might strike the liberal as merely stipulative.

Duff’s concern with community explains his otherwise off-putting remark to the effect that “the criminal law of a liberal polity should be a ‘common law’” (56). Out of context, this remark might suggest that Duff underestimates the importance of basic principles behind theories of punishment, such as the non-retroactivity of criminal laws, the *actus reus* requirement, and others. Appealing to historical evidence, Duff claims that the original meaning of common law “transcended the distinction between statutory and non-statutory law” (59); instead, the expression initially sought to capture the intimate connection between law and community. All Duff

means by 'common law' is the law that the community gives itself.

The strong link between community and law gives rise to claims of the following tenor: "the voice of the law is (or it aspires to be) the voice of the community addressing itself, the voice of all the citizens addressing one another and themselves" (60). Surely remarks of this tenor would not be appealing to liberals. But there are additional problems facing Duff's close-knit amalgamation of law and community. For example, Duff recognizes that we are simultaneously members of different communities, that communities overlap, that membership in communities is partial rather than total, that membership in communities is a matter of fact as much as a matter of aspiration, etc.; but then it would follow that there are many common laws corresponding to the different communities to which we belong, which would of course give rise to all sorts of jurisdictional, let alone logical, complications. Moreover, what are we to do with criminal cases involving non-members of the community? Duff, sensibly, recognizes that there is a complicated relationship between the harm crimes cause to the individual victims and the societal harm that crimes (sometimes even attempted crimes) cause.<sup>17</sup> Duff claims that the wrongs that the (common) criminal law ought to punish are "wrongs which we share with the victim as fellow citizens" (63). Duff goes on to add that: "this is not to say that they are wrongs against 'the community' rather than against their direct victims. They are wrongs against their direct victims *as members of the community*, and so also wrongs against the community" (63, emphasis added). Aside from the difficult discussion as to what exactly the good that the criminal law seeks to protect is, it seems that Duff would have difficulty dealing with wrongs involving non-members of the community. For imagine a traveling man who, passing through the territory of a given community of which he is not a member, is

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17. For more on the societal harm caused by attempts, see Lawrence C. Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 *Phil. & Pub. Aff.* 262 (1974).

wronged. How can the members of the community say, as Duff would have it, that the wrong to the stranger is a wrong to him insofar as he is “a member of the community” since, *ex hypothesi*, this person is not a member of the community? To the extent that one attempts to solve this sort of difficulty by appealing to broader and broader notions of community (until we reach something like the “community” of all human beings), is to the same extent to gradually abandon communitarianism.

The difficulties related to the problem of membership in a community do not end with the problem of dealing with non-members. For Duff claims that sometimes a “community can include (can insist on including) some who reject its values or do not want to see themselves as members; it can legitimately insist that they are nonetheless bound by its laws and answerable before its courts” (195). The criminal law, however, would not be a “common law” for those forcibly included in a community to which they do not wish to belong. Remember that for liberals, “exit rights,” i.e., the rights to leave this or that cultural, ethnic, or lifestyle group, are crucial.<sup>18</sup> (Of course, exit rights are not easily applied in the context of “leaving” the state itself: this is a difficult problem for liberals.) The problem of establishing how exactly Duff’s liberal-communitarianism can impose itself on others remains unresolved. And, on a related note, it is hard to see exactly how Duff can cogently maintain that “those who suffer systematic, persistent exclusion are members of the community that excludes them” (196).

One corollary to this discussion of communities’ membership criteria, so crucial to the talk of community, is that the interplay between liberalism and the criminal law is a very complex subject matter. Aside from its complexity, the connections between theories of punishment and general moral and political theories constitute a fascinating and important topic. Duff discusses these connections with

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18. For more on exit rights, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995); Brian M. Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (2001).

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savvy and depth. I have focused here on problematic aspects of Duff's ambitious project of connecting theories pertaining to different, yet importantly related, domains, in an effort to advance the themes that Duff discusses. Duff's theses are invariably thought-provoking and enlightening. That some of Duff's theses may face difficulties is, if true, partly the result of the daunting tasks that he undertakes in this book. Duff's attempt to present an analytically rigorous theory of punishment framed within the context of comprehensive political and moral views deserves the highest praise, and should, I hope, give rise to further work in this direction.