

The Offender's Part in the Dialogue

Kimberley Brownlee¹

[A version of this paper will be published in *Crime, Punishment, and Responsibility: Festschrift for Antony Duff*. Rowan Cruft, Matthew Kramer, and Mark Reiff (eds.). Oxford University Press.]

1. Introduction

In the communicative theory of punishment advanced by Antony Duff, a liberal state uses criminal conviction and lawful punishment both to communicate condemnation of an offender and to endeavour to engage that offender in a moral dialogue about her conduct. According to Duff, ‘the [criminal] trial seeks to engage the defendant in a rational dialogue about the justice of the charge which she faces, and to persuade her – if that charge is proved against her – to accept and make her own the condemnation which her conviction expresses’ (Duff 1986, 233). The aim is to bring the offender to appreciate the wrongness of her action, and not simply to recognise the prudential reasons to follow the law. Indeed, in Duff’s view, punishment not only communicates both condemnation and a desire for repentance and reformation by the offender, but also gives the offender an opportunity to communicate her repentance by accepting the punishment, apologising, and making reparation where possible.² But since it is the condemnation of a wrong that itself immediately justifies the imposition of punishment, the communication of that condemnation to the offender need not be successful for punishment to be justified. Duff states that:

The moral possibility of trials and punishments does not, of course, depend upon their actual success in bringing wrongdoers to engage in the communicative enterprise, or to answer for, to repent, or to make amends for their crimes: we must address the wrongdoer as someone who *could* respond appropriately, else there is no sense in seeking a response from him; but the value and importance of the attempt to engage him in a penal dialogue does not depend on its actual or likely success. (Duff 2009, 91.)

Punishment is necessary, irrespective of whether success in communication will occur, because a society that condemns in advance certain kinds of conduct as wrong cannot be sincere in that condemnation if it ignores or is silent when persons engage in such wrongs (Duff, 2001, 28).

Various objections confront the view that lawful punishment could represent society’s effort to engage an offender in a rational, reciprocal moral dialogue. One such objection, to which Duff is sensitive, I will call the Scripting Problem. The Scripting Problem is as follows. Since punishment is *imposed* upon an offender irrespective of her will, and *requires* her to engage in the public ritual of apology and penance with its expected expressions of grief and remorse regardless of whether she feels those emotions or accepts the judgement upon her, it is a process that fails to respect the offender as a person and as a full and equal citizen. It fails to respect her because it is impervious to whether she is misrepresented in the exchange, forced to be duplicitous in her interactions with society and victims, or forced to be untrue to herself. As Duff himself puts the objection: ‘To require [offenders] to apologize is to write their side of the communicative dialogue for them – whereas if we respect them as fellow citizens of a liberal polity, we must leave them free to write

¹ I would like to thank Anna-Karin Andersson, Matthew H. Kramer, Michelle Madden-Dempsey, and Christoph Ortner for their helpful comments on previous versions of this paper. I thank Rowan Cruft, Matthew Kramer, and Mark Reiff for their work as the editors of this Festschrift. I wish to thank Antony Duff for giving me the benefit of his probing and thought-provoking reflections in our conversations on these issues and other issues.

² Duff 2001. It is worth noting that Duff defines *communication* in rich, dialogic terms as a *rational and reciprocal* act that aims to engage another person ‘as an active participant in the process who will receive and respond to the communication...[I]t appeals to the other’s reason and understanding – the response it seeks is one that is mediated by the other’s rational grasp of its content’ (Duff 2001, 79-80).

their own side of the dialogue' (Duff 2001, 110) .

Duff offers two responses to the Scripting Problem. First, he says that the objection would be forceful if the apology required the offender to demean or to humiliate herself as no doubt many existing penal practices do. But, since punishment is not, by nature, necessarily demeaning, a required public apology need not be self-degrading. Second, he argues that the *required* nature of the public apology ritual pertains to the offender's participation in that process, not to her attitudes toward it. She is not required to be genuinely apologetic and remorseful for her conduct. The formality of the ritual leaves open, and is intended to leave open, the question of sincerity, because it would be overly intrusive to inquire into the offender's actual attitudes and because, like any other process of rational persuasion, it is fallible; the offender must be free to remain unpersuaded and unrepentant (Duff 1998, 165).

Duff has doubts about these two responses, some of which track my own doubt that we respect an offender as a person and equal citizen when we, first, *tell* her what she ought to say in words or do in deeds by way of apology and reparation, and then second, *compel* her to say and do those things. To suggest that such treatment is consistent with respecting the offender's liberty to write her side of the dialogue is, I think, akin to suggesting that a person who has food stuffed in her mouth is nonetheless respected in being at liberty not to swallow.

Duff addresses this lingering worry by recommending a practical modification to the apology ritual. In brief, at the time that sentence is passed on an offender, she should have the opportunity to state that she does not undertake the various requirements of the punishment as an act of apology (Duff 2001, 111). Nevertheless, once she has undertaken those requirements, she should be treated by society as having 'paid her debt' since she has done the acts required of her that are consistent with a genuine apology. Thus, although the state compels her attention, it does not, and ought not, to require her either to feel apologetic or to represent her acts as acts of repentance and apology. This practical suggestion allays the worry that the unrepentant offender is both misrepresented in the process and forced to be untrue to herself, at least at the time of sentencing. But it does not allay either the worry that the offender who is fully repentant prior to punishment is misrepresented as needing to undergo this process of punishment to be brought to repent (though, presumably, she is not forced to be untrue to herself since her repentance should prompt her to embrace society's censure of her conduct) or the worry that the conscientious, communicative offender – the civil disobedient – is misrepresented as being merely defiant when she actually seeks to engage society in a dialogue of a different kind from that pursued by the state. I return to such cases below. Duff's practical suggestion also does not allay the more modest worry that, in time, the ordinary, unrepentant offender may come to disavow her declaration of defiance, but will not again have a public forum like her sentencing in which to communicate her stance toward her punishment. As a vehicle for offenders to communicate to society and victims, this platform at the time of sentencing is an imperfect one.

Moreover, despite providing this communicative opportunity at the time of sentencing, Duff's account of lawful punishment remains dismissive of the offender's actual attitudes and would-be communicative efforts; the state still *tells* her how she should communicate to society and victims in the way of penances and reparation, and then *makes* her go through the motions of taking those communicative steps.³ This contrasts sharply with a commonsense notion of *rational dialogue*, the central features of which I sketch out below (Section 2). My purpose in what follows is to use this notion of *dialogue* to explore two further objections to the claim that lawful punishment can be plausibly conceptualised in dialogic terms. The first of these objections moves beyond the general Scripting Problem to highlight the more specific concern that, in certain cases, the offender's formal script – of growing awareness of, and remorsefulness for, her wrongdoing, as

3 In 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara', Duff does respond briefly to the objection that the *imposed* nature of punishment precludes it from being plausibly characterised in dialogic terms. I address Duff's response in Section 4 below. See Duff 2000, 411-426.

well as apology, and commitment to reparation and reform – diverges from what the offender actually should want to say (Section 3). Categories of offenders for which this is true (to different degrees and for different reasons) include, as noted above, wholly repentant offenders who repent their offences prior to punishment and who should not be misrepresented as being on a par in attitude and reasoning with unrepentant offenders, and conscientious, communicative offenders such as civil disobedients whose breach of law is conscientiously motivated and who wish to engage with society in a dialogue of a different sort from that ostensibly pursued through punishment. We might call this the Generic-Script Problem. Since the position of the fully repentant offender has been examined by others,⁴ I shall focus upon the conscientious offender, for whom Duff's account makes modest, though inadequate, accommodation.

The second of these objections focuses upon a more general concern for the standard communicative theory, which lies in the state's act of condemning the offender (Section 4). This objection begins by observing that ordinary interpersonal dialogues can accommodate one person communicating condemnation to another, despite the aggressive connotations of *condemnation*, because neither party has the standing to alter the other's moral or legal status in ways that disrupt the rough equality and reciprocity between them necessary for them to engage in a genuine dialogue. By contrast, the state's communication of condemnation to an offender, be it through formal censure or more concrete forms of hard treatment, is a performative act that alters the legal status, if not the moral status, of the offender in a way that disrupts the conditions necessary for genuine dialogue. Let us call this the Status-Change Problem.

In articulating the Generic-Script Problem and the Status-Change Problem, I do not aim to undermine an account of lawful punishment as a communicative practice. I believe that there is considerable theoretical and practical value in conceiving of punishment in communicative terms, the general recognition of which is due largely to Duff's thoughtful work. Rather I aim to put pressure on the claim that such communication, while it may be rational and transparently persuasive in its aims, is well-conceived of as a *reciprocal* exchange analogous to interpersonal moral dialogue.

2. Conditions for Dialogue

Although Duff defines *communication* in rich, dialogic terms as a rational and reciprocal form of engagement, he says little about the notion of *dialogue* itself. Even so, I believe that what I say here about the nature of dialogue is broadly consistent with his usage of the term. Briefly, a *dialogue* is a sustained, purposive conversation or verbal exchange of thought carried out by two or more persons.⁵ A *moral* dialogue is such an exchange that has as its subject either a moral issue or an issue that has moral implications. Often a moral dialogue will involve or address some moral disagreement.⁶ From this spare description, we can distil at least five broad conditions for genuine dialogue.

The first is reciprocity between the parties. Reciprocity in this context has two dimensions. One dimension relates to the roles that each party plays. For a dialogue to occur, each party must be an active participant in the interaction in that each must intentionally play the dual roles of communicator and receiver. The other dimension relates to each party's recognition of the other's dual roles. A reciprocal exchange is marked by mutual recognition of the conventional communicative claim-rights, duties, and privileges that each has as an active participant in this interaction.

Second, a dialogue is a more sustained and extensive interaction than other kinds of broadly

4 See Tasioulas 2003, 101–132; Tasioulas 2006, 279–322; and Bagaric and Amarasekara 2000, 124–189.

5 The following analysis of the nature of dialogue expands upon a brief discussion in Brownlee 2007, 430–458.

6 The moral disagreement may be about the nature or status of morality, the nature or status of a given moral principle or value, the application of a certain moral principle, the moral evaluation of a given act or type of conduct in light of a particular moral principle or value, and so on.

reciprocal exchanges such as a simple call and response or an exchange of threats, or a wordless meeting of minds.

Third, as a purposive conversation marked by mutual recognition of each party's rights and duties, a dialogue is a reason-giving, argument-based, progress-oriented interaction. The parties attend to each other's contributions and modify their responses in light of those contributions; their exchange is neither a quarrel nor a one-sided monologue. Its purposes are constructive, didactic, and rationally persuasive. This does not mean that a dialogue necessarily leads to a reasoned resolution or an agreement amongst the parties. Rather, their engagement in this kind of interaction implies a certain mutual orientation toward progress in common understanding.

Fourth, there are connotations of fairness and equality in a dialogue. Implicitly, the parties are represented as equals in the relevant sense of being equally active and equally empowered participants to the exchange; this implied equality arises not only from the first condition of reciprocity in the parties' reciprocal recognition of each other's communicative rights and duties, but also from the third condition of the reason-giving, argument-based nature of the exchange where each party is addressed as a reasoning agent. Being equally active does not mean that each party must have and make use of equal space in the communications. Rather, it means that each has an equal right not only to speak when she wishes (provided that she respects the equal rights of the other), but also to be heard and to be understood. Communication is not only an other-directed activity, unlike expression, but a *successful* other-directed activity. Communication is the successful transmission of data from a communicator to a receiver, which, in a dialogue, is done with the intention of eliciting certain kinds of responses from the receiver and of attending appropriately to those responses.

Finally, so that what each party communicates may be credibly taken to be what each party wishes to communicate, the parties to a dialogue are necessarily broadly willing (if not enthusiastic) participants to the exchange in the sense that they are not subject to duress or manipulation.⁷ Such non-subjugation is necessary for their exchange to be genuine and genuinely reciprocal, and for them to be and to be seen to be equal in the relevant sense. In light of these five conditions, dialogue is paradigmatically a verbal exchange marked by mutual respect.

Some of the above conditions are clearly problematic for an account of criminal justice that conceives of lawful punishment in dialogic terms. For instance, the last condition – willingness – cannot be presumed to apply to the offender confronting punishment (an issue which is addressed below). Nor can the fourth condition of equal empowerment be presumed to apply to citizens in their relations with their state (let alone between offenders and their state). However, the imbalance in power between a state and its citizens is not the kind of inequality that concerns us here because it is not an inequality that precludes the possibility of genuine dialogue, though, it does have a bearing upon the conditions for dialogue. This is best explicated through an analogy. There is a significant, albeit less extreme, imbalance of power between a parent and a child. Yet, this does not prevent a parent and child from engaging in a dialogue as equals in the relevant sense of being equally active participants. However, there is a limitation to their equality in that the child's communicative claim-rights depend for their enforcement upon continued recognition of them by the parent. The same is true only to a far lesser degree of the parent's communicative claim-rights against the child since the parent has considerable power to ensure that she is heard regardless of whether the child acknowledges her communicative rights. This imbalance in power, like that between the state and its citizens, suggests that, between such parties, the conditions for dialogue may be only shakily met.

3. Dialogue with a Generic-Script

The five conditions for dialogue impose some success-related constraints upon the intentions

⁷ I thank Michelle Madden Dempsey for helping me to clarify this point.

and actions of any party who can claim with legitimacy to be *trying* to engage in a dialogue, and thus they check the power of any so-intentioned parties to mistreat their putative dialogue partners. First, the conditions bar a sincere party from wilfully ignoring or immunising herself (or itself) from the would-be communications of the dialogue partner. As Onora O'Neill observes in more general terms:

Doing nothing isn't standardly a way of having no effect on others' possibilities for self-expression, given that the standard point of expression is communication. Doing nothing may convey disapproval and hostility. In extreme cases lack of response may reasonably be read as ostracism or rejection, as conveying the message that the other is not (or not fully) human. More commonly, doing nothing signals that what the other seeks to convey will be viewed as mere expression and not as a communication. (O'Neill 1986, 523-551.)

Readiness to heed and to interpret correctly the other party's would-be communications is necessary for communication between two parties to succeed. Without such readiness, communication fails and no dialogue occurs.

Second, the conditions for dialogue constrain a sincere party in both her chosen *means* of communication and her chosen *mode* of communication. To claim legitimately to be endeavouring to engage in a dialogue, she must consider whether the means that she uses to communicate – words, actions, images, body movements, facial expressions – are likely to foster understanding of her message. And she must also consider whether her mode or manner of communication – be it aggressive, assertive, conciliatory, or cowardly – will serve her communicative aims in a way that is compatible with the reason-governed, reciprocal nature of dialogue and its didactic purposes. Forcibly conveying a view in a threatening way is incompatible with genuine dialogue when it constitutes a failure to recognise the communicative claim-rights and equal status of the other party.

Third, the conditions for dialogue impose some success-related constraints upon the *content* of a party's communication in that she must consider whether the content of her message is something that the other party has the capacity not only to understand, but also to reply to if he wishes. Each party must modify the content of her would-be communication when comprehension and an ability to respond on the part of the other are unlikely to follow.

These three success-based constraints upon would-be dialogue partners create difficulties for a dialogic conception of state punishment. While the second and third constraints on means, mode, and content can in all likelihood be accommodated since they require only modification in the processes of communication, the first constraint – readiness to heed the other – is more problematic for an account that subsumes such readiness under a formal process that largely disregards offenders' attitudes as irrelevant to their relations with the state. This is the thrust of the Generic-Script Problem, namely, that in particular cases – such as full repentance prior to punishment or suitably constrained conscientious disobedience – the convicted person should not wish to recite the formal script of apology and commitment to self-reformation; and to require her to do so through the ritual of punishment and apology not only disrespects her, but makes a mockery of the ideal of genuine moral dialogue undertaken voluntarily and reciprocally on a plane of roughly equal footing by parties who are responsive to the communicative contributions of the other. In the case of the wholly repentant offender, this ritual misrepresents her by presenting her as being of a similar mind and attitude as unrepentant offenders who need to be brought to appreciate the wrongness of their acts and the reasons for reparation and repentance. As such, her punishment, when comparable in harshness to that of an unrepentant offender, is indefensibly dismissive of her sincere emotions of remorse, regret, and repentance, and her fervent desires to remedy relations.⁸ If the state, through its

8 Christopher Bennett is sensitive to this kind of objection in his defence of the 'apology ritual'. Bennett argues that concerns about sincerity and misrepresentation do not make the apology element (the imposition of duties to make amends) an empty ritual that could be left out. Rather, it highlights the limits of what the state may take its

criminal justice system, does nothing to alter its communications to such an offender in light of her attempted responses, then the offender's communicative efforts seem to be, in the eyes of the state, mere acts of expression and not communication.

The same is true, to a different degree and for different reasons, in the case of a conscientious offender. Duff's account is more accommodating of conscientiousness than it is of repentance. For instance, he observes that,

...what the law says (and thus what punishment says) to a principled dissident whose values the community should respect will be different from what it says to other kinds of dissident. Suppose...that someone kills a terminally ill friend, in the honest belief that this is morally justified (or even required), although the law counts it as murder. The law still says to her, as it says to all citizens, that such killing is wrong, and her punishment still aims to bring her to see and accept that it was wrong. But it now portrays that wrongfulness to her as more like a *malum prohibitum* than a straightforward *malum in se*. Even if, for respectable reasons, she dissents from the content of the law, she ought to obey it out of respect for the law and as a matter of her duty as a citizen. Her punishment must therefore embody this more complex message, and will properly be lighter than that imposed on someone whose crime did not flow from respectable values. (Duff 2001, 122.)

This departure from the Generic Script provides partial accommodation for conscientious offenders. However, the accommodation is inadequate in two respects. First, this script of lesser censure is still a blanket script of censure, which disregards the fact that some conscientious offenders, such as suitably constrained civil disobedients, can embody a more nuanced conception of citizens' duties than the duty to obey the law out of respect for the law. The more nuanced conception recognises that citizens have duties to know the law, to contribute to the development of the law, and to endeavour to refine and improve the alignment between the law and the central values of a liberal polity, but not a general, unqualified duty to obey the law out of respect for the law. Second, this script of lesser censure does not distinguish between non-communicative conscientious offenders – conscientious evaders – who wish to retain a protected space for personal morality, and communicative conscientious offenders – civil disobedients – who, unlike other offenders, wish to engage with society in a moral dialogue. Punishment of a suitably constrained civil disobedient is more problematic in this respect than punishment of a conscientious evader because it misrepresents a person who wishes to engage in dialogue; it misrepresents her as being either remorseful or perversely defiant for modest breaches of law that she undertook to draw attention to a perceived concern or injustice. Such misrepresentation might not only stifle reflection and debate upon the merits of her cause, but also perpetuate injustice. As the history of liberal and illiberal societies shows, it is sometimes the law and not the offender's conduct that should undergo revision. Recognition of this fact is lost if the offender's attitudes are viewed as irrelevant to her relations with the state.⁹

responsibilities to be in bringing about a resolution. The state does not have the responsibility to condemn all wrongs; its responsibilities extend only to addressing those wrongs that are of concern to the community – public wrongs. The state tasks the wrongdoer to remedy the public wrong. Given the intrusiveness of demanding a sincere apology, only apologetic action may be legitimately required of the offender. Whether the offender is genuinely repentant and remorseful is irrelevant to his relations with the state. See Bennett 2008, 172-3. This position is examined critically in Brownlee 2010.

9 Additionally, when deciding how to respond, authorities should be sensitive to the fact that an offender may be defiant toward certain kinds of responses, but not toward others. The defiant offender's apparent unreceptiveness may be due to the modes of communication that authorities have adopted to address her. If her reasons for being unreceptive are well-founded, and if she would be receptive to other responses that are more respectful of her conscientiousness, then authorities must consider whether such responses would be more appropriate.

4. The Status-Change Problem

Let us take up the more general problem of the state's condemnation. I maintain that the conditions for ordinary interpersonal dialogue do not rule out the communication of condemnation by one person to another because, in interpersonal interactions, condemnation is relatively innocuous. Although *condemnation* has a stronger negative connotation than does *adverse opinion* or *negative judgement*, one ordinary person's condemnation of another does not alter the latter's status as a party to any dialogue between them unless that condemnation signals a termination of relations rather than an invitation to discuss the charge.¹⁰ When the condemnation does signal a termination of relations, then the condemnation is a performative act because all subsequent would-be communications by the condemned party become, in the first instance, mere acts of expression. When, by contrast, condemnation signals an invitation to discuss the charge, the condemned party retains her ability to respond to the charges on a footing of rough communicative equality and reciprocity because her dialogue partner has not exercised his limited power to alter her moral standing in relation to him.

This contrasts sharply with the nature and force of condemnation in either a religious context or a legal context, certainly when the latter is conceived of in quasi-religious terms of *secular penance*, *absolution*, and *atonement* as Duff conceives of it. In a religious context, to be condemned by a properly empowered party is not simply to be judged harshly. Rather, it is to experience a radical demotion in one's moral status (and sometimes one's legal status) and, consequently, a negative alteration in one's rights and duties. The word 'condemnation' shares an etymological lineage with the word 'damnation'. To condemn someone is to doom that person to punishment, to damn that person to hell, or to inflict damage or loss upon that person. When a spiritual authority condemns a member of the congregation, that performative act not only negates her standing within the religious community, but also ostensibly interrupts her relationship with the Deity. The spiritual authority's act undermines the possibility for dialogue about the conduct that prompted the condemnation since the condemned party no longer has the standing to engage in an equally empowered, rational and reciprocal exchange about it. The same is true, I argue, of condemnation by the state in the process of criminal justice.¹¹ Although the notion of *condemnation* is most apt in capital punishment cases where the sentence really does doom the convicted person, condemnation and hard treatment even in much milder contexts radically demotes the offender's legal standing, social standing, rights, and duties, in a way that undermines the present possibility for dialogue about the offending conduct.

Let me be clear about what I am not saying. First, I am not saying that the state, as a morally complex, and often morally tainted, entity, lacks the moral credibility necessary to engage any party in a moral dialogue. Second, I am not invoking a *tu quoque* argument to the effect that, although condemnation of an offence may be appropriate, the state lacks the moral standing to issue it because it is engaged in offences far worse than those for which it would condemn an offender.¹² For present purposes, it is not necessary to take a stand on the *tu quoque* argument. What I am saying is that the state's act of condemning an offender disrupts the conditions of rough

10 A further issue for the interpersonal case may be whether the communication of condemnation necessarily signals a shutting down of the mind and receptiveness of the party who communicates it. If condemnation cannot but be accompanied by a wilful immunisation against the response of the other, then it is incompatible with genuine dialogue. But, this concern seems overstated. As an argument-based enterprise, dialogue is built to withstand dispute, disagreement, and judgement; its formal constraints of reciprocity and fairness should allow for liberality in communication.

11 Duff's use of other quasi-religious notions such as *secular penance* indicates that this quasi-religious reading of *condemnation* is not inappropriate in an analysis of his theory of punishment. In his paper 'Penance, Punishment, and the Limits of Community', Duff defends the view that religious ideas such as *penance*, *atonement*, and *absolution* can have a place in a liberal normative theory of criminal punishment, but regrettably does not discuss the religious connotations of the notion of *condemnation*. Compare Duff 2003, 295-312.

12 See Cohen 2006, 113-136.

communicative equality and reciprocity necessary for genuine moral dialogue.

There are at least four possible replies to the Status-Change Problem, which differ in their degree of plausibility. The first reply is that this objection is a matter of semantics. If the inner logic of *condemnation* by the state is ineliminably performative, and cannot but disrupt an offender's claim-rights and privileges as a would-be interlocutor, then we should simply put aside such language and deploy the more modest language of *censure* and *disapprobation*. Thus, what the state does when it punishes an offender is communicate its censure and disapprobation for the offender's conduct.

This reply is unconvincing for two reasons. First, the communication of censure and disapprobation is not all that is going on when the state convicts, sentences, and punishes an offender. As Duff notes, on his view, it is not that society simply communicates to an offender the censure that her offence deserves and then hopes that she will make the censure her own in remorse; nor is it that society simply offers the offender a forum in which to communicate her remorse should she come to repent her crimes. Rather, society *requires* her to go through the process of punishment as a form of secular penance. That quasi-religious process is said by Duff to be necessary for her absolution and reinstatement in the community. Second, the notion of *censure* itself has a performative quality, though its connotations are not as heavily loaded as those of *condemnation*.

A second reply to the Status-Change Problem grants that lawful punishment does constitute a communication of condemnation in the rich, performative sense outlined above, but denies that an accurate fleshing out of the structure of condemnation – x condemns y for conduct z – gives rise to the Status-Change Problem because what is condemned is not the offender, but the offensive conduct.

One difficulty with this reply is that, although Duff does speak of condemning an offender's conduct, he also speaks often of condemning the offender herself. He states, 'A conviction does not merely record a finding that this person committed the crime charged: it condemns him for that crime; it is a communicative act, communicating censure to the convicted defendant' (Duff 1998, 162). There is also the deeper issue of whether it makes sense to speak of condemning an offence independently of condemning an offender since it is the offender, and not the offence, that is doomed to punishment. A second, more important difficulty is that, irrespective of whether it is plausible to speak of condemning an offence independently of condemning an offender, the effect of condemnation is that the offender suffers a demotion in status, which affects her present capacity to enter into a dialogue with society about her conduct.

A third reply is that, although my concerns about condemnation identify a legitimate practical problem of how the state's communication will be taken by the offender and by others since both may regard the state's condemnation in the rich, performative terms I have outlined, my concerns do not identify a deeper logical problem about the use of condemnation in the state's strategy to engage the offender in moral dialogue. Duff states:

...while there is clearly room, and need, for empirical investigation into the actual impact of criminal censure on offenders and on the wider public (what message is actually heard, and to what further effect), and while there is also room, and need, for empirical investigation into the effect of different kinds of styles of censuring, the justification of censure I have offered does not depend on such empirical facts. (Duff 1998, 163.)

Rather, what justifies censure or condemnation within the communicative theory is the *wrong* that the offender has done. This reply, while it is consistent with the claim that punishment seeks to be transparently persuasive, does not allay the worry that such persuasion, given its condemnatory force, cannot be reciprocal.

A fourth reply, which Duff makes to a related objection,¹³ is that ‘there is certainly room in the criminal process for the offender's voice to be heard: at her trial, in deciding her sentence, and through her response to her punishment.’ Duff continues:

There are of course strict limits on what she will be heard to say and, in the end, neither verdict nor sentence are up to her: the court, speaking for the law and for the community whose law it is, claims the authority to determine these matters. However, enforced claims to effective authority do not make dialogue of a morally significant kind impossible. I can, for instance, engage in philosophical dialogue with my students, addressing and respecting them as rational beings, whilst still claiming the authority to require work from them, and to assess and grade that work. (Duff 2000, 414-415.)

The difficulty with this response can be best stated by expanding upon Duff's academic analogy. Yes, as I noted above with the example of the parent and child, in principle, an authority such as a professor (or a government) can engage in a dialogue with those under her authority because, although the communicative rights of ‘dependants’ are conditional upon the authority's recognition of them, there are success-based constraints for dialogue which require any authority who genuinely seeks to engage in dialogue to recognise the dependants’ communicative claim-rights. But this is where the difficulty for condemnation arises. If Duff were to bar a disruptive student from attending the next class or were to ask an unprepared student to leave the class or were to fail a poorly performing student, he would engage in communicative acts that temporarily undermined the possibility for dialogue. Certainly, the conditions for dialogue might be restored subsequently, say, when the recalcitrant student comes to see Duff in his office to show that she understands the reason for the condemnation and to discuss reinstatement, but those conditions are not achieved at the time that the student's status within the class is radically altered by Duff's exercise of censoring authority.

It may be possible to re-present this fourth reply by distinguishing the two central parts of the criminal justice process – the first being the criminal trial and the second the conviction, sentence, and imposition of punishment – and by arguing that the first is the proper institutional analogue to interpersonal dialogue since, at trial, a person is called to account as a suspect and is provided a public forum in which to answer charges and, if necessary, to make a defence. On Duff's view, the criminal trial is a two-stage process of ‘answerings’:

We should...see the criminal trial as a formal process through which an alleged wrongdoer is called to answer to his fellow citizens, by the court that speaks in their name. He is called, initially, to answer to the charge of wrongdoing—either by pleading ‘Guilty’, thus admitting his culpable commission of the wrong; or by pleading ‘Not Guilty’, thus challenging the prosecution to prove his guilt. If the prosecution does prove that he committed the offence, he must then answer for that commission: either by offering a defence—a justification or excuse which shows that he should not be condemned for committing the offence—or by submitting himself to the court's formal condemnation and to the sentence it imposes. The criminal trial is thus a formal analogue of the informal moral processes through which we call each other to account for wrongs that we have committed: it addresses the defendant not simply as someone who is the subject of a formal inquiry, but as a citizen who is to participate in the process, and who is expected to answer to his fellows for his alleged violation of the values that define their polity. (Duff 2010, 11.)

During the trial process, there is no condemnation or communication of censure yet, and therefore,

13 Bagaric and Amarasekara (2000, 173), argue that, since punishment is imposed, it cannot be represented as a communicative dialogue.

the Status-Change Problem does not arise (though it cannot be denied that the legal and social status of a suspect is altered by her having charges to answer). Such a forum, which precedes condemnation, does seem broadly acceptable as an analogue of interpersonal dialogue, if we put aside cases of unwillingness to plead. The next stage in the process is that of punishment, which, in this reply, is not to be conceived of in dialogic terms, but in more simple, one-sided, communicative, reason-based terms. This kind of reply, while potentially compelling, is not entirely open to Duff because, on his view, the aims and purposes of the trial are continuous with those of punishment, and hence the process as a whole is intended to be viewed in the reciprocal terms of moral dialogue.

5. Concluding Remark

This discussion has shown that it is implausible to think of lawful punishment in dialogic terms. Despite society's best intentions, its condemnation has an ineliminably performative quality that is incompatible with the reciprocal, communicatively equal, willing, and responsive enterprise that is a genuine dialogue. Moreover, for particular categories of offenders such as wholly repentant offenders and suitably constrained civil disobedients, condemnation that is insensitive to their efforts to engage in genuinely reciprocal interaction fails to respect the moral and social significance of their attitudes and arguments. Both of these objections speak to the general concern that, it may be impossible, in criminal justice processes, for *both* society and offenders to be actual speakers and hearers in the sense that the state is responsive, at least in principle, to the communications made by the offender, and the offender retains the standing and communicative rights needed to engage in such a dialogue.

The objections discussed here do not undermine the claim that lawful punishment can be communicative and rationally persuasive in its aims. Just as the laws and the trial process (ideally) respect persons as autonomous agents, aiming to guide their conduct and to give them moral reasons, to follow the law, so too punishment for breach of law can reflect transparent moral persuasion, seeking the offender's assent, acknowledgement of wrongdoing, and acceptance of the moral reasons to follow the law. This is a powerful way to think about the most defensible form that punishment might take. The point is simply that such acts by the state are not well-characterised as efforts to engage in a moral dialogue.

References

- Bagaric, Mirko, and Kumar Amarasekara. 2000. 'The Errors of Retributivism.' *University of Melbourne Law Review*, 24, 124-189.
- Bennett, Christopher. 2008. *The Apology Ritual*. Cambridge: Cambridge University Press.
- Brownlee, Kimberley. 2007. 'Protest and Punishment.' In Ross Harrison and Michael Freeman (eds), *Law and Philosophy*. Oxford: Oxford University Press, 430-458.
- Brownlee, Kimberley. 2010. 'Retributive, Restorative, and Ritualistic Justice.' *Oxford Journal of Legal Studies*, 30, 385-397.
- Cohen, G.A. 2006. 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists.' *Royal Institute of Philosophy Supplement*, 81, 113-136.
- Duff, R.A. 1986. *Trials and Punishments*. Cambridge: Cambridge University Press.
- Duff, R.A. 1998. 'Desert and Penance.' In Andrew Ashworth and Andrew von Hirsch (eds),

Principled Sentencing: Readings on Theory and Policy. Oxford: Hart Publishing.

Duff, R.A. 2000. 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara.' *Melbourne University Law Review*, 24: 2, 411-426.

Duff, R.A. 2001. *Punishment, Communication, and Community*. Oxford: Oxford University Press.

Duff, R.A. 2003. 'Penance, Punishment, and the Limits of Community.' *Punishment and Society*, 5:, 295-312.

Duff, R.A. 2009. 'Can We Punish the Perpetrators of Atrocities?' In Thomas Brudholm & Thomas Cushman (eds), *The Religious in Responses to Mass Atrocity: Interdisciplinary Perspectives*. Cambridge: Cambridge University Press.

Duff, R.A. 2010. 'Inaugural Address: Towards a Theory of Criminal Law?' *Proceedings of the Aristotelian Society Supplementary Volume lxxxiv*.

O'Neill, Onora. 1986. 'The Public Use of Reason.' *Political Theory*, 14, 523-551.

Tasioulas, John. 2003. 'Mercy.' *Proceedings of the Aristotelian Society*, 103, 101-132.

Tasioulas, John. 2006. 'Punishment and repentance.' *Philosophy*, 81, 279-322.