Punishment and Political Theory

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• HART •
PUBLISHING
OXFORD and PORTLAND, OREGON
1999

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Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?

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1. Introduction

There appears to be an important difference for a theory of punishment between underlying assumptions about liberal, communitarian, and republican accounts of state and community.[1] This seems especially true of attempts to justify punishment which focus on it as a mode of *communication* with offenders. For aside from the censure it is meant to deliver, punishment is—on the account we shall be examining below—meant to induce within the offender a process of self-interrogation and reform and to reconcile him with those he has wronged. Particular conceptions of the state and community turn out to be crucial components of a communicative theory of punishment.

What if we were to complicate slightly the underlying conception of community by substituting the usual liberal or communitarian version with what I shall call a "postcolonial" political community? I don't mean this as completely distinct from liberal or communitarian accounts. But I do think it is a context which raises interesting questions for theories of punishment generally, or so I hope to show. I mean to refer mainly to those countries such as Canada, Australia, New Zealand, and the USA where indigenous populations have been asserting their claims to traditional lands and, to varying degrees, rights to self-

* I am indebted for comments and help to John Braithwaite, Simon Caney, David Campbell, William Connolly, Antony Duff, Moira Gatens, Sidney Haring, Nicola Lacey, Matt Matravers, Susan Mendus, Alan Norrie, and Paul Patton. The chapter was written whilst I was a Visiting Fellow at the wonderful Humanities Research Centre at the Australian National University. My research was also generously supported by the Nuffield Foundation, for which I am extremely grateful.

[1] R. A. Duff, *Trials and Punishments* (Cambridge, Cambridge University Press, 1986); "Penal Communications: Recent Work in the Philosophy of Punishment", (1996) 20 *Crime and Justice: A Review of Research* 1-97; "Choice, Character and Criminal Liability", (1993) 12 *Law and Philosophy* 345-83; N. Lacey, *State Punishment: Political Principles and Community Values* (London, Routledge, 1988); J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Cambridge, Cambridge University Press, 1990).

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government. More specifically, I am referring to the apparent legal pluralism of such countries; "apparent" because it is a highly contested matter, especially with regard to the criminal law.

Is a communicative theory of punishment compatible with legal pluralism? The crucial issue is the relation between the conception of community and the role of communication. To what extent do the issues associated with Aboriginal claims about self-government affect the communicative function of the criminal law, and especially of punishment?

I shall admit now that much more needs to be said about the nature of a "postcolonial political community", and what makes it a distinct conception compared to liberal or communitarian ones. Some of this will, I hope, become clear below. But the bulk of this argument will have to be made elsewhere.[2] It is important to note that I am *not* arguing that countries such as Canada or Australia are, in fact, "postcolonial" states. Indigenous people continue to suffer from appalling deprivation and discrimination, much of it a direct legacy of colonialism. So colonialism is far from being perceived as something that has been overcome. To move beyond colonial to genuinely *post*colonial relations is thus an aspiration, not a description of the current state of relations between indigenous communities and the state.

The chapter is meant to prefigure larger claims about the historical and normative character of the relation between sovereignty and the public sphere. Very little will be said here to make this connection explicit. But crudely, if conceptions of the public sphere must, by definition, presuppose some kind of community and, not least, some kind of common language in which public deliberations take place—some common orientation in judgement (which is, of course, consistent with widespread disagreement between particular applications of judgement)—then what exactly is it that can be (or has been) shared?[3] My hunch is that conceptions of sovereignty and the public sphere are tightly intermeshed, and pursuing such connections sheds light on questions to do with the nature of late-modern political communities. For in contexts where the history of sovereignty is being rewritten (and thus the concept reshaped), and where it is as much the conditionality and negotiability of sovereignty that is at issue as it is its exercise, the nature of the public sphere must surely also be affected. Hence the focus on intercultural contexts. They present a palpable example of the preconditions for public communication under severe strain. Do "we" share, as a social, political, and legal community, a form of life within which diverse and overlapping sub-communities can find their place? Or are "we" instead merely a diverse collection of incompletely articulated

[2] For an initial attempt see D. Ivison, "Political Theory and Postcolonialism" in A. Vincent (ed.), *Political Theory: Tradition, Diversity and Ideology* (Cambridge, Cambridge University Press, 1997) pp. 154-71.

[3] The clearest analogy is to the nature of the common law. What are the preconditions for thinking about the law as "our" law, as one we understand as a source of legitimate obligations wherein those who judge and apply it possess the requisite standing—from our point of view—for doing so? I am grateful to Antony Duff for helpful discussion on this question.

communities between whom communication—when it occurs—is erratic, superficial and at worst, hostile?

The last claim is too swift—perhaps—if it suggests that the public sphere or the "common" law is literally inaccessible to certain individuals and groups, however much they feel themselves to be (or are) alienated from it. For it might be that under certain suitably stylised (i.e. hypothetical) conditions genuine communication *could* occur, and thus individuals or groups, given these conditions, might be said to be capable of belonging to a moral and political community whose normative rules and laws legitimately apply to them. I remain agnostic (for now) as to the ultimate success of this Rawlsian move. But the particularities of the intercultural context I examine below present an acute challenge for such thought-experiments.

The structure of the chapter is as follows. In section 2 I lay out an initial (and very cursory) distinction between liberal and communitarian accounts of the state, citizenship, and the criminal law. In section 3 I present my intercultural example. In section 4, I provide a sketch of a communicative theory of punishment, relying mainly on the work of R.A. Duff, who is particularly sensitive to underlying theories of state and community when thinking about punishment. I shall not be defending the "communicative theory of punishment" as a mode of punishment *per se*. Instead, I shall assume that it is at least a plausible account of punishment and indeed, one worth taking seriously (as I do). In section 5 I return to the intercultural example and try to draw out the challenges it presents for a communicative theory of punishment, and hopefully, how it prefigures a distinctive approach to thinking about the public sphere in these fractious times.

2. Liberal and Communitarian Accounts of the State Distinguished

On the communitarian view, citizens are bound together by "shared concerns, affections, projects and values".[4] Ideally, social interaction is structured by shared values and mutual concerns, and the criminal law is focused on not only protecting individuals from obvious and general wrongs (such as murder or theft), but from conduct that "strikes at [the community's] most central values, or its members most important interests".[5] Since a person can only find her well-being in some sort of community, which is structured by certain shared values and norms, a criminal is someone who flouts the laws of her community and thus the shared values therein. She "damages or destroys her relationships with other members of the community, and separates herself from them".[6] In breaching important community norms, the offender deserves censure, and it is the role of the criminal law not only to define and proscribe such public wrongdoing, but

[4] Duff, "Choice, Character and Criminal Liability", n. 1 above, at 381.

[5] Duff, "Penal Communications", n. 1 above, at 79; Lacey, n. 1 above, at p. 176 on upholding the "framework of values" of a community.

[6] Duff, "A Reply to Bickenback", (1988) 18 *Canadian Journal of Philosophy* 787–93.

also contribute to rectifying the damage done to the community and to the *offender herself*. Thus the distinction between public and private becomes more fluid, as some "private" dimensions of an offender's conduct might become relevant, given a communitarian account of the importance of the social framework within which she acts. Furthermore, it suggests that punishment plays a part in promoting and contributing to certain communal values and goods which are intrinsically related to our individual well-being, given a view of the person in which our relations with others (and social institutions) is central to our self-understanding.

On the liberal view (admittedly, close to caricature) social interaction is framed in contractual terms. Thus "discrete individuals" pursue their own conception of the good subject to constraints which allow others to do the same. Liberal citizens work out a way of living "next to each other" rather than "truly together".[7] The criminal law is meant to be focused mainly on breaches of the social contract; on those forms of conduct which harm or threaten interests that need to be protected if social life (conceived in contractual terms) is to be possible.[8] The law is "our" law insofar as it refers to a contractual "we" determined with reference to the terms of the social contract—with what we agreed or *would have* agreed to under certain hypothetical conditions.[9] Even if, from a liberal perspective, the communitarian conception of society is an attractive one, it doesn't follow that the state should be given the scope to promote such values through the coercive means of the criminal law (especially given the danger of our communitarian urges becoming nastily distorted).[10] Liberal theories, at least in relation to the criminal law and punishment, are said to be committed less to the promotion of public virtues or communal goods than they are to the enforcement of a basic framework of individual rights.[11]

3. An Intercultural Example

The most distinctive aspect of the postcolonial example for our purposes is the relation between legal pluralism and conceptions of political community. What are the consequences of legal pluralism for conceptions of political community? If more than one source of law is said to exist within a polity, then to what extent are we still considering a *single* political community? To what extent are we still able to talk about collective goods or public norms as being *shared* between citizens? Are different sets of norms applicable to different spheres of

[7] Duff, "Penal Communications", n. 1 above, at 85.
[8] Duff, "Choice, Character and Criminal Liability", n. 1 above, at 383.
[9] Duff, "The Common Law", unpublished paper.
[10] See R. Hardin, *One for All: The Logic of Group Conflict* (Princeton, Princeton University Press, 1995).
[11] See Lacey. n. 1 above, at pp. 164-5, at 181; but cf. D. Ivison, *The Self at Liberty: Political Argument and the Arts of Government* (Ithaca and London, Cornell University Press, 1997) on the promotion of liberal conduct.

the community? If so, how can the communicative function of the criminal law—and thus of punishment—be served? How can we speak of the offender violating our common norms and values. Whose norms? Which values?

I want to try and flesh out this intercultural example with reference to some recent political and legal developments in Australia. In 1992, the High Court of Australia declared that the common law recognised that Aboriginal customary law could provide a basis for title to land. Thus, "native title" survived the imposition of British sovereignty where there had been no legal extinguishment of this title, and where Aboriginal people had maintained some kind of connection to their "country". The basic formula for recognition in the decision was this:

> "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs".[12]

As a result, "Aboriginal law and custom is now a source of law in [Australia]".[13]

The majority judges were careful in limiting the implications of the decision with regard to further claims of sovereignty. Unlike countries such as Canada, the USA and New Zealand, where some form of legal and/or constitutional recognition of sovereignty had been accepted (if only in theory), no such precedent existed in Australia.[14] However it has not taken long for the logic of *Mabo* to be stretched to promote claims about self-government, if not by the court then by others. If native title arises out of Aboriginal law and custom, then that law and custom will direct other forms of conduct on the land. And if inherent rights to land exist, then why not inherent rights of self-government?[15] Granted, the settlement of land claims is logically distinct from the settlement of self-government claims.[16] But as land claims are negotiated and settled in a range of different ways, territorial security will give rise to further jurisdictional claims.

If Aboriginal people retain some form of sovereignty (the precise forms of which might vary according to the different peoples, regions, and historical contexts), then what is it that they are sovereign over?[17] The criminal law is a bitterly contested domain in this regard. In the USA, for example, where a limited "Domestic Dependent Nations" doctrine of Aboriginal sovereignty has been

[12] *Mabo* v. *State of Queensland* (No. 2) (1992) 66 ALJR 429.

[13] N. Pearson, "From Remnant Title to Social Justice", in M. Goot and T. Rowse (eds.), *Make us an Offer: The Politics of Mabo* (Sydney, Pluto Press, 1994), at pp. 180-1.

[14] But see H. Reynolds, *The Law of the Land* (Melbourne, Penguin, 1992).

[15] For a comprehensive discussion in relation to the USA and Canada, see P. Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford LR* 9 1311-67.

[16] There might also be strategic reasons for focusing on land rights rather than sovereignty issues, as least in the short term. See N. Pearson, "To be or not to be—separate aboriginal nationhood or aboriginal self-determination and self-government within the Australian nation?" (1993) 3 *Aboriginal Law Bulletin* 16.

[17] See D. Ivison, "Decolonising the rule of law; Mabo's case and postcolonial constitutionalism", (1997) 17 *Oxford Journal of Legal Studies* 253-79.

operative since the nineteenth century, control over the criminal law has been the site of intense conflict between federal, state and tribal governments. For American Indians, the extension of federal and state criminal statutes to Indian lands was (and still is) perceived to be a major tool of assimilation (thus destruction)—as in fact it was.[18] It remains the case today that state and federal criminal law has only limited application in most Native American political communities. The situation in Australia is very different (and different again in Canada and New Zealand). In many ways, it brings to the fore much more clearly the issues of concern in this chapter—namely, the justification of punishment in multinational and multicultural communities. This is because in Australia the lines between Aboriginal and non-Aboriginal legal and political spheres are much less clearly drawn. Thus the justificatory challenge—on both sides—is more acute and complex.

The matter cannot be resolved away, I believe, by straightforward declarations of "national" sovereignty (as is often implied in legal literature originating from the USA). That is, if Aboriginal people possess national sovereignty, then it follows they possess the right to declare and enforce laws, including the criminal law. End of story. What better represents both the right and the capacity to exercise sovereignty then the ability to enforce the criminal law? However, the question of Aboriginal sovereignty is a complex one. It is important not to leap to the conclusion that claims for sovereignty are reducible to claims for separate nationhood (despite the fact that the *language* of nationhood is often invoked in this regard, indeed, by Aboriginal people themselves). Aboriginal sovereignty is not reducible to the sovereignty of nation states. Claims for self-government are not simply rehashed claims of romantic nationalism. They are best understood, I think, as demands for the rethinking of the nature and shape of dominant understandings of political community. Hence the challenge to any account of the criminal law (and theory of punishment) in which the purpose is to contribute to the "maintenance, stability, and continuing development" of the community.[19] The point is not that the criminal law lacks authority because it lacks sovereignty given a conflicting (Aboriginal) source of "absolute" sovereignty, but that the sovereignty it claims misrepresents—by not recognising—the plural and overlapping nature of sovereignty in intercultural contexts.[20] Relations between the different forms of sovereignty need not take the shape of *either* mutually

[18] See R. Clinton, "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze", (1975) 18 *Arizona Law Review* 508; R. Williams, "The Algebra of Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence" (1986) *Wisconsin Law Review* 219; and S. Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and the United States Law in the Nineteenth Century* (New York, Cambridge University Press, 1994).

[19] Lacey, n. 1 above, at p. 172.

[20] This is true even in the USA, where there is a tight connection between Indian sovereignty and jurisdiction over the criminal law given the legacy of the Marshall decisions. Even the strongest defenders of Indian sovereignty often talk of the blending and co-ordination of legal traditions—where such blending involves positive recognition and respect rather than assimilation and imposition; see for example Williams, n. 18 above, at 219. Treaties (as in Canada, the USA and New Zealand) represent a tangible example of the layered nature of the sovereignty in these countries.

exclusive (thus inherently conflicting) domains, *or* the assimilation of one to the other. Insofar as a system of criminal law, and thus the conception of political community underpinning it, misrecognises Aboriginal law in this way, its legitimacy becomes problematic in two ways: (i) the values of the community it represents will not be those that Aboriginal people could possibly share or belong to, and thus (ii) its authority over Aboriginal people will be contestable in that it becomes an "alien imposition" rather than a legitimate source of obligation.

Note then that communicative theories which justify punishment, in part, as a means to reintegrate the offender into the moral community whose values he has offended against must be clear about the nature of the community to which the offender is being reconciled. I shall return to this point below. It is striking that historically, and in their day-to-day experience, many Aboriginal people have come to see the criminal law as simply a means to impose an alien and hostile conception of community over them, justified usually in terms of being for their own good. The fact that indigenous people in Australia, Canada, and the USA are amongst the most arrested and jailed people *in the world*, lends (depressingly) ample support to the acuity of such a perception.[21]

The initial sketch of a postcolonial context is still rather vague. Let me try to flesh it out a bit more with reference to some specific cases, again from Australia. Consider a recent case concerning the jurisdiction of Aboriginal law. In *Denis Walker* v. *State of NSW*, Mason CJ (as he then was) stated that:

> "there is nothing in *Mabo* [No. 2] to suggest that the parliaments of the Commonwealth and [New South Wales] lack legislative competence to regulate or affect the rights of Aboriginals or that these laws are subject to their acceptance, adoption, request or consent . . . English Criminal law did not, and Australian Criminal law does not, accommodate an alternative body of law operating alongside it".[22]

Walker had sought a declaration that the laws of New South Wales were inapplicable to him given that the offence for which he was charged occurred on Aboriginal land where customary laws and practices were still valid, and whose people had not consented to the imposition of British common law. Walker's counsel argued that the lack of consent undermined the assumed validity of colonial criminal law, and, moreover, that customary law was recognisable by the common law, as shown in *Mabo*. Mason CJ rejected this. If criminal statutes did not apply to Aboriginal people "it would offend the basic principle that all people should stand equal before the law". Different criminal sanctions applying to different persons for the same conduct, claimed Mason, "offends [against this] basic principle".[23] Furthermore, even if "customary criminal law" survived

[21] See for example the *Royal Commission into Aboriginal Deaths in Custody* (Canberra, 1991); Haring, n. 18 above, at p. 24; *Aboriginal Peoples and the Justice System* (Ottawa, Ministry of Supply and Services Canada, 1993).

[22] (1994) 26 ALR 321 at 322-3. A summary discussion of the case can be found in (1995) 3 *Aboriginal Law Bulletin* at 39-41. See also Mason CJ in *Coe* v. *Commonwealth* (1993) 118 ALR 193 at 200. In this paragraph I am drawing on Ivison, n. 17 above.

[23] (1994) 126 ALR 321, at 323.

settlement, it had been extinguished by the passage of general criminal statutes. There can be no "alternative body of law" operating alongside Australian criminal law. So it must either be unrecognisable by the court or have been extinguished.

Leaving aside some of the broader philosophical issues to do with Mason's conception of equality (he makes a strong assumption about equal treatment consisting in *identical* treatment), consider the reasoning about the imposition of the criminal law. It is far from obvious that the criminal codes of different states extinguished Aboriginal law on these matters.[24] The Australian Law Reform Commission certainly did not presume this in an exhaustive and quite extraordinary report on the possible recognition of Aboriginal law.[25] *Mabo* certainly did not suppose that the Crown's radical title to land extinguished native title, which is defined relative to Aboriginal law. So Mason must assume that Aboriginal customary law, *except to do with land title and management*, is incompatible with Australian law. But this is a rather arbitrarily drawn distinction. As one Aboriginal commentator has put it, it is "absurd [if] our title to land is recognized but the laws and customs which give meaning to that title are treated as if they do not exist".[26]

The conflict here is between two bodies of law in one political community, and between two different conceptions of the criminal law. The conflict might be even more acute then consideration of *Walker* suggests. Consider another case to do with alternative conceptions of punishment. In *R* v. *Minor*,[27] the Crown appealed against a sentence handed down to an Aboriginal defendant who pleaded guilty to counts of manslaughter, causing grievous bodily harm, and aggravated assault. He was sentenced to a total of ten years imprisonment. The sentencing judge directed that he be released upon entering into a bond (set at three years) after serving four years of his sentence. The crucial thing to note is that the sentencing judge took into account evidence concerning the punishment the defendant would be subject to under Aboriginal law—the "payback" (as it is referred to) that was to be delivered by his community (and which the defendant understood and apparently consented to undergo).[28] The Crown

[24] See K. E. Mulqueeny, "Folk-Law or Folklore: When a Law is Not a Law. Or is it?" in Stephenson and Ratnapala (eds.) *Mabo: A Judicial Revolution?* (St. Lucia, University of Queensland University Press, 1993), p. 177.

[25] *The Recognition of Aboriginal Customary Laws* (Canberra, 1986).

[26] M. Dodson, "From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems," (1995) 20 *Aboriginal Law Bulletin* 2.

[27] (1991/2) 2 NTR 183; cf. *R* v. *Warren, Coombs & Tucker* reported in (1996) 1 *Australian Indigenous Law Reporter*, at 622-6.

[28] Something needs to be said about Aboriginal conceptions of punishment generally, though the detail cannot be examined here. The important point is that disputes arise and are resolved with reference to the general moral framework of Aboriginal law, the goal of which is to rebalance relations upset by the offence or dispute. Punishments range from "spearing" to duelling, shaming, compensation, and banishment. (Note that the form of "payback" at issue in *Minor* was spearing in the thigh; see *Minor* at 195-6. I return to this case below.) Failing to carry out such punishments can mean a dispute not being "closed off", and thus perpetuate the conflict and sense of injustice felt by the victim, the families involved, and the community as a whole. Many of these practices, and

argued, on appeal, that the sentence was in error for (among other reasons) taking into consideration the relevance of Aboriginal law in calculating the respondent's release date. Furthermore, there was some question as to whether "payback" itself could even be considered lawful activity.

Now there are two important issues at stake in *Minor* (at least for our purposes); (a) that the release date was fixed with reference to the interests of the wrong community (i.e. the defendant's rather than the "community at large"),[29] and (b) that the form of punishment—"payback"—involved the court in sanctioning *unlawful* activity. So again, the conflict is between two bodies of law in one political community, and we can see further how this can involve competing, or at least very different, conceptions of punishment.

certainly the beliefs underpinning them, continue to be relevant in a number of Aboriginal communities today. Perhaps the most controversial of these has been spearing. This involves the offender being speared in the thigh or leg, though in a non-lethal, and more often than not, symbolic fashion. It has been made even more controversial given the fact that customary law does not always recognise that it is only the offender who should be punished, but sometimes the various kin relations as well. Thus blame and responsibility are distributed differently than in European systems. Some of these elements appear to violate the principles and spirit of the general criminal law, as well as aspects of the United Nations Declaration of Human Rights. Spearing might also simply be considered a form of torture, and thus condemnable whatever the cultural circumstances. I cannot consider this fully here. However, spearing is a form of punishment and not, strictly speaking, part of an initiation rite or ceremony required of all community members, or applicable exclusively to one sex (as in the case of cliterodectomy, for example). Nor is it meant to disable the offender permanently or cause grievous harm. The circumstances of it occurring are, rather, regulated and mediated by communal processes which include both the victim and the offender—the latter, admittedly, usually in light of social opinion and pressure. It is also striking the extent to which "traditional" punishments are subject to negotiation and modification given the specific circumstances. Spearing (and other modes of punishment, such as banishment) is justified as being a more appropriate punishment (in some but not all circumstances) compared to the "European" alternatives, namely imprisonment. This seems a reasonable given the importance Aboriginal people place upon the socialising and (re)integrative effects of clan and/or kin networks, and the vast over-representation of Aboriginal people in Australian prisons. The *explicit* toleration (or recognition) of non-lethal spearing is, however, a perplexing issue from a non-Aboriginal perspective. According to the common law, consent does not make deliberate woundings or beatings lawful, and indeed was rejected as a defence in one case concerning such a payback (see *Mamarika* v. *The Queen* (1982) 42 ALR 94). And yet the practice of Australian police and prosecution services has been to take into consideration the voluntary nature of these punishments when deciding whether prosecution is warranted—which has, in fact, been extremely rare. On Aboriginal conceptions of punishment generally, see D. Bird Rose, *Dingo Makes us Human* (Melbourne: Cambridge University Press, 1992), at pp. 153-64; *The Recognition of Aboriginal Customary Law*, 2 vols (Australian Law Reform Commission, 1986), at pp. 287, 364-8, 372-3, with detailed case studies at 351-9; K. Maddock, "Two Laws in One Community" in R. M. Berndt (ed.), *Aborigines and Change* (Canberra, AIAS, 1977); N. Williams, *Two Laws: managing disputes in a contemporary Aboriginal community* (Canberra, 1987); *Royal Commission into Deaths in Custody: Three Years On* (Canberra, 1995), at pp. 148-78; see the interviews with Aboriginal Legal Aid lawyers in J. Faine, *Lawyers in the Alice: Aboriginals and Whitefellas' Law* (Sydney, Federation Press, 1993). See *Minor* at 193-5. On the over-representation of Aboriginal people in prisons, and their relationship to the criminal law generally, see *Royal Commission into Aboriginal Deaths in Custody*, 5 vols (Canberra, 1991).

[29] *Minor*, n. 27 above, at 191.

4. A Communicative Theory of Punishment

How does a political theory of punishment that aspires to meet the justificatory demands of transparent communication cope with such deep diversity? Before we can tackle this question, we need to examine the basic framework of a communicative theory of punishment.

A communicative theory of punishment appears to combine two distinctive and yet usually opposed values.

1. A strong *Kantian* commitment to respect for individuals as rational moral agents. Thus it is invoked against consequentialist theories which allow for the utility or instrumental value of punishing individuals for the sake of promoting some overarching good. According to the communicative theory, individuals must be treated as agents to whom reasons must be given and from whom assent should be sought. Law is not a set of rules simply imposed on a community, but instead "addressed" to it on the basis of values held in common.[30]

2. A *communitarian* thesis about the content of individual citizens' conceptions of the good. Individuals are perceived as being constituted, in part, by their relations with others and various social institutions and practices. That is, these social relationships help constitute the moral identity of an individual and his conception of the good. Individual goods depend on this social framework, and thus on certain communal goods generally which enable and help maintain these social relations. Note that insofar as individuals realise the importance of such a common framework and thus have good reason to foster and help maintain it, they might seek (through political and social action) to shape and change it. Of course this too is often a collective enterprise.

It follows that those norms and values which are central to the framework of the community will occupy a key position in the justification of the domain and scope of the criminal law. Aside from the protection of important individual interests, it will include consideration of the social impact of various forms of conduct; the harm done to fellow citizens, to the values of the community, and (given the communitarian thesis) to the agent's *own good*. Crime involves a breach of these different relationships. The criminal separates himself from the community, his fellow citizens, and thus an important source of his own self-understanding and good.

If punishment can be justified, then it must be justified in terms acceptable to a rational moral agent who is a member of a community which partly constitutes his moral identity and self-understanding. Furthermore, the purpose of punishment will be to repair and restore what the crime has damaged, and not to deliver the criminal's "just deserts", express revenge, or be a means of promoting some other socially worthwhile end. Instead, given the conjunction between a Kantian respect for autonomy and a communitarian thesis about the

[30] R. Cotterrell, *Law's Community* (Oxford, Oxford University Press, 1995).

source of citizens' self-understanding, punishment becomes a *mode of communication* with a responsible moral agent who has—for various reasons—fallen astray of his community, his fellow citizens, and himself.

In what sense can punishment be conceived of as communicative? Mainly, it seems, in terms of its purpose. The purpose of punishment is to repair or restore what the crime has damaged.[31] Duff writes of the aim of punishment being to reconcile the moral breach opened up between the criminal, his community, and his own good. Punishment communicates insofar as it brings the offender to understand and repent the wrong he has done. It directs attention to the moral wrongness of the act.[32] Punishment censures, but it doesn't merely *express* censure; it (should, ideally) constitute a penance,[33] focusing attention on the wrongdoing and thus inducing and reinforcing a *re*pentant understanding of the act.

Punishment is necessary, and still merits being delivered in certain cases as "hard treatment", for two reasons: first, because of the kind of beings we are; "unwilling to face up to our wrong-doings, even when we are ourselves committed . . . to the values which we have flouted". A self-imposed penance, or that imposed by others, helps check the "powerful temptation to evade the issue by self-deceptive excuses or justifications".[34] Secondly, because if we take the common values and norms of our community seriously, then we must be prepared to criticise, condemn, and censure breaches of them. Such censure, communicated through hard treatment, is justified because its purpose is reparation, reconciliation, and rehabilitation. These communicative aims are best pursued through communicative punishments.[35] Of course, this suggests the theory will favour certain kinds of punishments (such as community orders, mediation schemes and the like) over others (such as incarceration; though imprisonment

[31] Duff, "Penal Communications", n. 1 above, at 48.

[32] *Ibid.*, at 52.

[33] The language is Duff's; a penance is defined as: "a painful imposition which expresses and symbolizes the painful remorse which the wrong-doer does or should feel"; see Duff, n. 6 above, at 788.

[34] *Ibid.*, at 787–8.

[35] I remain wary of this aspect of the theory; is hard treatment really compatible with an essentially communicative justification of punishment? If hard treatment is ineffective at deterring criminals, and if a consequentialist justification of hard treatment fails because it justifies treating individuals (sometimes) as less than rational moral agents, then why should we believe hard treatment will be any better as a mode of communication? And if communication is our goal, then why bother with punishment at all? Why not redescribe the issue as one of "solving communication conflicts" or "social problems". Duff addresses these challenges directly, arguing that a community must uphold certain basic values and thus recognise and censure breaches of those values, especially ones involving "serious victimising wrongs" ("Penal Communications", n. 1 above, at 74–87). Taking moral wrongs against the community seriously, even when we have reparation, reconciliation, and rehabilitation as our goals, does not mean abandoning punitive measures but adopting "communicative punishments". Inflicting hard treatment is thus compatible with the goals of communicative punishment (see especially *ibid.*, at 82-3). Duff argues that the issue is really one of reconceptualising—rather than abandoning—our understanding of punishment. I wonder about the extent to which such a reconceptualisation doesn't become, in fact, a demand for a different concept altogether. I am grateful to John Braithwaite for pushing me on this issue, and for his patience in discussing his own important work in this area.

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So much for a rough sketch of the communicative theory. There are two key elements we need to be clear about: first, *the critical role of the communitarian thesis*. Individuals find their good in the context of a community. Communities are, in part, defined by a set of shared norms and values which need to be promoted and protected—as public goods—in order to enhance the social framework within which individuals develop and revise their own conceptions of the good. Citizens are members of a moral community, and insofar as this context is crucial for the development of their own identity and good, they have a duty to uphold this social and co-operative framework, for example, by obeying laws whose purpose is (genuinely) to promote and enhance fundamental collective and individual interests.[36] Punishment then, will be justified only when it involves censuring conduct which offends against these basic values, and where this process of censuring is essentially communicative, that is, where its purpose is to persuade the offender to get to grips with the wrongness of his action and to reintegrate himself into the community from which he has been separated.

The second key element is *the internal connection between community, communication, and punishment*. Given the Kantian insistence on treating individuals as rational moral beings, and thus as individuals who should come to understand and accept conceptions of the right and the good as autonomously as possible (where autonomy is a matter of degree, given the communitarian thesis), political modes of communication will have to be *transparent*. Punishment, understood as a mode of communication, is no different. It should bring the offender to understand and repent the wrong he has done, and thus rehabilitate and reconcile him to the community from which he has separated himself. In other words, punishment should be non-manipulative (but not necessarily non-coercive), and in keeping with treating the individual as a rational moral agent. What is being communicated? That the offender's conduct is inconsistent with certain fundamental values and norms of the community of which he is a member. The crucial connection is between the transparency of the communication and its content; i.e. the common values and norms which are

[36] If we are morally obliged to obey the laws of the political community of which we are a member, it doesn't mean that such obligations are rationally inescapable; no theory of obligation seems able to offer such an account, and there are good reasons to think none ever could. Political obligation follows from the communitarian thesis above, it seems, because we are obeying laws (including the criminal law) whose purpose is to maintain and enhance a social framework indispensable to important individual and communal goods. The obligation is thus owed to our fellow citizens and, it follows, to the institutions we establish in the name of upholding and maintaining such a community. Of course, it doesn't follow that a community couldn't pass unjust laws (i.e. ones which do not serve the "proper" ends—in this case, the communicative ends—of the criminal law) or that individual non-conformists wouldn't be justified in rejecting the dictates of a law or set of laws with which they disagreed. (Conversely, the mere existence of disagreement with a law or set of laws doesn't automatically undermine the obligatoriness of that law.)

said to bind individuals together such that the offence can be identified, the censure delivered, and thus the penance induced.[37]

At this point, however, the combination of communitarian and Kantian values becomes problematic.[38] On the one hand, a thoroughly communitarian communicative account of punishment might hold that the accused deserves to be offered appropriate reasons because he is entitled to such treatment as a member of that community. The appropriate reasons, in other words, would be relative to his standing in that community. According to a more Kantian account of punishment, on the other hand, the status of the accused is tied strictly to him deserving equal respect as a rational moral being, rather than to membership of a particular community. These Kantian and communitarian demands need not conflict, but they can. For them not to, the norms and values of a particular community of which one is a member must be consistent with the Kantian demand that everyone is deserving of equal respect. But there are diverse ways in which the demand for equal respect can be met. What counts as reasonable will depend, in part, on social practice and the particular circumstances of a political community. Can a balance be struck, in these instances, between the particular practices of a community and the universal demand for treating others with equal respect?

5. Communicative Theory and the Challenge of the Intercultural Context

Let us return to the intercultural context outlined in section 3. Remember there I identified the challenge I thought it might present to any communitarian theory: namely, if more than one source of law is said to exist within a polity, then to what extent are we still considering a single political community? In what sense are we still able to talk about fundamental values and norms as being *shared* between citizens? This is crucial for the communicative theory of punishment, for if we cannot show that a community of citizens share a set of fundamental norms and values, then it is not clear exactly what is being communicated to the offender via the "communicative punishments" carried out in the name of the community. This affects the claim about transparency, since individuals must understand (or come to understand) why it is they are being punished in order to be capable of sincere repentance and thus reconciliation and rehabilitation. If the norms and values in the name of which the (communicative) punishments are carried out are not norms or values the offender

[37] Duff distinguishes between "coercion by good and relevant reasons" and "the kind of coercion which aims simply to induce assent by whatever means may be effective". Note, however, that just because the justification for punishment is transparent, it doesn't follow that the offender will necessarily think it appropriate or just. I might be perfectly clear as to why you are punishing me but still think those reasons to be completely inappropriate, or indeed failing to "communicate" with me.

[38] I am grateful to discussions with Matt Matravers and Simon Caney on this point.

shares, or cannot be shown to be ones he *should* share, then communication becomes, if not blocked, then at the very least, scrambled.

The basic challenge is that given (what I have called) a Kantian insistence on treating persons as rational and autonomous moral beings, and a communitarian thesis about the source of people's self-understanding and conceptions of value, can the theory do with anything less than a very "thick" communitarian theory of shared beliefs and values? If it cannot, then the theory—despite all of its promise and appeal—is the worse for it, since contemporary political communities are becoming more diverse, not less. If it can, then just how "thin" can the communitarian thesis become before the communicative element is fatally undermined?

Note that the intercultural example is not meant as analogous to the philosophical problem of generating moral norms from scratch, or to the challenge presented by principled moral (and immoral) non-conformists. These examples assume that the problem is to generate some set of moral norms, and thus moral obligations, *ex nihilo*, usually by appeal to a story of rational bootstrapping (*a là* Hobbes or Hume). Our example is very different. The former is the problem of the relative absence of rationally inescapable principles of morality, the latter with the relative abundance of modes of moral understanding and commitment. Hence the problem of the nature of the community (and its norms and values) to which citizens are said to belong. Aboriginal people don't lack the concept of a moral community—or indeed of punishment—rather they have different conceptions of them. Assimilation, for example, was often justified precisely in terms of reintegrating and "rehabilitating" Aboriginal people into a proper moral and political community. From an Aboriginal perspective, the imposition of the common law and English legal norms in the Americas and Australasia was seen as the imposition of an alien system of legal norms meant to coerce them (if hardly induce, via rational persuasion) into membership of a literally foreign political community.[39]

These points are meant to press against the underlying conceptions of community in communicative theories of punishment. Now obviously the communitarian thesis, teamed as it is with a Kantian respect for individual autonomy,

[39] *A fortiori* it undermined the social basis of self-respect constituted by membership in a community, a good the communicative theory is particularly keen to recognise and protect. Assimilation, of course, is not a good example of the kind of reintegration sought by communicative modes of punishment. But it is part of the historical context which any justification of legal doctrine (or theory of punishment) runs up against in the intercultural contexts I have mentioned. I leave undeveloped the complex relation between historical context and philosophical justification. For an excellent discussion of the competing conceptions of historical time between indigenous and "settler" populations see P. McHugh "Crown-Tribe Relation: Contractualism and Co-existence in an Inter-cultural Context", in G. Davis *et al.* (eds.), *The New Contractualism?* (Melbourne, MacMillan, 1997), pp. 198-216; J. G. A. Pocock, "Tangata Whenua and Enlightenment Anthropology", (1992) 26 *New Zealand Journal of History* 28-53; Joseph Carens, "Complex Justice, Cultural Difference, and Political Community" in D. Miller and M. Walzer (eds.), *Pluralism, Justice and Equality* (Oxford, Clarendon Press, 1995), pp. 45-66; cf. J. Waldron, "Superseding Historic Injustice", (1992) 103 *Ethics* 4-28.

can tolerate some slack, some level of dissent and disagreement about values; for example, about:

> "fundamental or structural features of a community's life (as between capitalist and socialist ideals) . . . the precise meaning and implications of values . . . about values which are more fundamentally controversial [e.g. the institution of private property] . . . about how much the law should demand of us, and what its scope should be . . . about the proper aims of criminal punishment. In all these ways a citizen might find himself at odds with the laws of his community; and he may see moral reason to break those laws, either because they are themselves . . . immoral, or because their breach is, he thinks, a legitimate tactic of dissent or resistance; we cannot, I think, show that such disobedience is always irrational".[40]

Furthermore, a premium is placed on individuals coming to understand for *themselves* whatever values do structure a community—on "an autonomous and authentic allegiance" to these values. So there is no question of simply imposing some conception of the good or right, since "manipulative modes of persuasion or coercion" produce assent which is neither authentic or autonomous.[41] However this seems to be about identifying the plausible limits of community—of "principled non-conformism"—and about the need to allow as much scope as possible for disobedience (for example, by limiting the scope of the criminal law), rather than about the values actually constitutive of a particular community. And it is precisely this which is at issue in the intercultural case.

As I have tried to show, the two basic claims at the heart of the communicative theory are a Kantian principle of respect for individual autonomy, and a communitarian thesis about the sources of the self. These form the crucial background to the conception of community at work. But we need to know more. Turning to our example, would a political community constituted by different conceptions of law, and thus of punishment, be compatible with the goals of a communicative theory of punishment? It depends on the values constituting that community. If, for example, Aboriginal law was recognised as a genuine source of law, then one manifestation of a community's commitment to respecting individual autonomy and a communitarian thesis about the sources of individuals' self-understanding, might entail granting a significant degree of jurisdiction to that body of law. This commitment might also entail granting that conceptions (and modes) of punishment within this domain will not necessarily mirror those in other domains. Thus when someone is said to have offended against the fundamental interests or values of the community (triggering the need for censure and thus communicative modes of punishment), a prior question would have to be answered; against which community? And members of the different communities would have to be willing to accept the diversity of modes of justification and punishment as representative of different, but equal

[40] Duff, n. 6 above, at 790.
[41] *Ibid.*

and legitimate, expressions of membership to the same deeply diverse polity. A genuinely "postcolonial" community would be one in which such conceptions were not ruled out *a priori* as falling outside some predetermined set of common norms and values. This prefigures a very different conception of sovereignty and the state; one of different but co-ordinate internal sovereignties,[42] or as Patton has put it, a state which is "no longer a unique locus of sovereign power, but a space of negotiation and accommodation between two or more bodies of law".[43]

But if the values are sufficiently rich and diverse enough to accommodate Aboriginal claims, don't they present problems for the communicative force of the justification of punishment? To a certain extent, this is what Mason CJ and the Northern Territory court were struggling with in the cases discussed above. Remember that Mason talked about the impossibility of there being two bodies of law applicable in one territory because they might impose conflicting demands on an individual, as well as violate the principle of equality before the law. This is not only a claim about the nature of equality, but about a particular conception of moral and political community. For there obviously can be two bodies of law in a single territory as long as there is some agreed rule or procedure to determine what happens in the event of a conflict (as occurs, in fact, in federal and confederal systems). But Mason's point is an important one in the context of a communicative theory of punishment. Is the "violence" that might be sanctioned by a court in allowing Aboriginal "payback" an offence against the fundamental values of a political community aligned with the principles of Anglo-Australian law? In *Minor*, was the fixing of a release date with reference to the Aboriginal community to which the respondent belonged misplaced, insofar as it ignored the interests of the "community at large"?[44] We might see

[42] See Ivison, n. 17 above. Pocock writes of a partnership between distinct "layers of sovereignty" as constituting a fundamental rethinking of nation states such as New Zealand, Canada, and Australia; see "A discourse of sovereignty", in N. Philippson and Q. Skinner (eds.), *Political discourse in early modern Britain* (Cambridge, Cambridge University Press, 1993), p. 420.

[43] Paul Patton, "Aboriginal or Indigenous Sovereignty", unpublished paper, at p. 12. Another way to consider the pluralism of contemporary political communities might be to emphasise the democratic possibilities at hand. Thus, the fundamental values and interests of a community might be judged according to their democratic pedigree—whether arrived at and percolated through a robust democratic filter, and hence contestable and subject to revision. This raises interesting and complex issues in relation to intercultural contexts. Aboriginal people have only received the right to vote in the last 20 years. Some of the most abhorrent and destructive policies concerning land rights, education, and social welfare have been carried out with apparently strong "democratic" backing. This has occurred partly because of the under-representation of Aboriginal voices in policy-making forums, a situation often made worse by the majoritarian tendencies of many Western democracies. Of course, more positive and progressive democratic possibilities also exist. The vision of a democratic community outlined by Lacey is an attractive one (n. 1 above, at p. 176). The pursuit of a "common, if diffused social good, which all citizens have reasons to uphold and to the formation of which all citizens have a real chance to contribute" (*ibid.*, at p. 177) restates the challenge of identifying what constitutes *common* yet at the same time *diffused* social good(s) which all citizens—in a multinational and multicultural political community—can identify with and have equal opportunity to contribute to. See also I. Shapiro, *Democracy's Place* (Ithaca and London, Cornell University Press, 1996).

[44] *Minor*, n. 27 above, at 191.

each as representing a dilemma of communication; the offender in each instance receiving mixed signals from different communities, and thus the mode of punishment (either as sought in *Walker*, or as proposed in *Minor*) failing the communicative test. In other words, that the persuasive force of the mode of punishment is anything but transparent, and in danger of slipping from persuasion to coercion by means other than "good and relevant reasons".[45]

There might be resources, however, within the communicative approach which are useful in such complex intercultural circumstances. Duff mentions the importance of the "context of communication"; that is, the "appropriate communication with the particular offender".[46] This is crucial not only for communicating the censure the crime deserves, but to help bring the offender to understand and accept the wrongness of his action. Could this be extended in the direction of the deeply diverse ways in which citizens might understand their membership in a "postcolonial" political community? Could non-Aboriginal citizens accept an often radically different "context of communication" in recognising Aboriginal law as a relevant source of law? Could Aboriginal people accept the limits to their "law ways" which come not only with the rapidly changing nature of the world in which their laws now exist, but with trying to co-ordinate their varying forms of self-government with others in a social and political space of "accommodation and negotiation"?

It is instructive, I think, to turn back briefly to the discussion of Aboriginal punishment by Mildren J in *Minor*. This is a sensitive and extremely interesting judgment in light of the discussion above. He identifies very clearly that this is a case in which reference is being made to two distinct bodies of law in one territory, though obviously from the perspective of a judge charged under one body of law to pass judgment on the other. But Mildren argues:

> "[t]his was no occasion for blindly following an unthinking conservative path; it required, as this Court often has in the past been called upon to do when dealing with the approach to Aboriginals and the criminal law, to find a solution by means which ensured that justice was done, even if the means adopted were unusual or novel. I reject, therefore, the submission that the release date was fixed by reference to an extraneous circumstance, or for that matter, that undue emphasis was given to the interests of the Hermannsburg community [i.e. the Aboriginal community]".[47]

The matter, of course, was decided in an "Australian" court according to "Australian" criminal law, and thus might seem to render the question of any effective alternative body of law (or "coordinate sovereignty") moot. But this is much too simplistic an analysis of the competing conceptions of community (and sovereignty) at play, for it suggests that the question is either/or; *either* separate communities (based on separate sovereignties and separate laws), *or* one subsumed under (or assimilated to) the other. This not only misdescribe

[45] Duff, n. 6 above, at 792.
[46] Duff, "Penal Communications", n. 1 above, at 61.
[47] *Minor*, n. 27 above, at 197.

the complex overlapping nature of the history of relations between Aboriginal and non-Aboriginal people and systems (who have, after all, interacted for centuries), but overlooks the possibilities of alternative arrangements based on different conceptions of sovereignty and community.[48] Note that liberal political theorists worry that granting self-government rights might entail tolerating non-liberal norms and practices. Thus, self-government is acceptable, but only if compatible with generally liberal norms. This is a difficult issue which deserves more attention than I can give it here. But I shall make three points. First, a banal but important point; self-government does not *necessarily* entail the violation of civil and political rights, as if the analogy is with that of the "absolute" sovereignty of a nation state.[49] That view of sovereignty is dubious anyway, whether applied to Aboriginal or any other political community. The political forms of Aboriginal self-determination will emerge in relation to the diverse traditions and practices of Aboriginal people who, though obviously not insulated from Western conceptions and practices of government, are distinct from them. Secondly, the goods which are promoted and served by liberal rights are themselves realised in a myriad of ways within the liberal tradition itself. So it does not follow from a concern with individual rights that Aboriginal self-government should be presumptively suspect. A concern for civic participation, freedom of speech, or gender equity generates constraints on both non-Aboriginal and Aboriginal governments. But the manner in which these constraints are instantiated will vary with relation to Aboriginal institutions, just as they vary with regard to non-Aboriginal institutions (as for example between different provinces in Canada, or between Scotland and England in the United Kingdom). The evolving international law of indigenous peoples—in which Aboriginal people themselves are playing a large part—constitutes another source of constraint. Furthermore, some Aboriginal communities might in fact *choose* to be ruled by, for example, Canadian or Australian law in certain domains, and Aboriginal law in others. (Equally, non-Aboriginal people might choose to be ruled by Aboriginal norms or laws in certain domains.) Thirdly, the issue cannot be summarised as a straight-forward clash between collective and individual rights. As we have seen, a significant strand of liberal political theory accepts the importance of communal and collective goods as being intrinsically related to individual well-being. This is often reflected in the way basic rights are situated in particular constitutional contexts which allow for a variety of interpretations and expressions (as in the case of Canada's Charter of

[48] See the nuanced discussion in J. Tully, *Strange Multiplicity: constitutionalism in an age of diversity* (Cambridge, Cambridge University Press, 1995). For an interesting discussion of the different ways in which self-government arrangements might emerge, and the constraints and limits they might be subject to, see *Aboriginal Peoples and the Justice System* (Ottawa, Ministry of Supply and Services Canada, 1993).

[49] For a helpful discussion from an aboriginal perspective see M. Boldt and J. A. Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians", in M. Boldt and J. A. Lond (eds.), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto, University of Toronto Press, 1985), pp. 333-46.

Rights and Freedoms, to a certain extent). Now there are important senses in which some Aboriginal interests *are* best understood in communal rather than individualistic terms (for example, given the distinctive relation to land or "country"). And this might require some form of recognition or protection in terms of a collective right. But not every interest or good sought by Aboriginal communities will take this form.[50] There are important issues here to do with different conceptions of equality, but these are not reducible in every instance to a *conflict* between individual and collective rights.[51] A collective right to land, for example, is justified often in terms of not only protecting the particular relationship indigenous people have to their land, but also in terms of contributing to the capacity for individuals to lead meaningful lives.

But I cannot conclude an essay on punishment sounding so sanguine. When confronted with the possibility that the communicative purpose of punishment might escape the offender—that he might remain unpersuaded as to the need to repent and modify his conduct (other than for instrumental or prudential reasons)—Duff writes:

> "I must still aim, however despairingly, to transparently persuade you rather than to manipulate you. And, second, the fact that you might treat my forcible criticisms simply as providing a prudential reason for modifying your future conduct does not mean that in pressing them on you I am manipulating you; how you respond to my criticism is up to you; so long as my criticism is both in intention and in character aimed at and apt for transparent persuasion it accords you the respect which is your due".[52]

On one level, this is an admirable claim. No matter how much we might despair of the unconvinced (and thus unrepentant) criminal—whether principled, pathological, or amoral—we still owe it to them, as rational and moral beings, to accord them the respect of justifying their punishment in communicative terms. But on another level, it disconcerts. For it suggests that we can insulate ourselves from the moral discomfort of punishment, by fulfilling certain justificatory conditions so as to locate ourselves somehow beyond moral reproach. But the etiology of human will and desire is such a dense network of competing and contrasting influences and contexts, that to think a singular theory could extract us from the murky ambiguities of punishment might be thought of as a kind of conceptual violence itself. Communication and punishment just do not sit comfortably together. The latter is always in danger of being corrupted by the intrusion of desires for revenge or resentment, often fueled and borne by cultural and social markers of race, gender, and class, and by historical contexts

[50] Of course there will be conflicts; see M. E. Turpel, "Home/land", (1996) 10 *Canadian Journal of Family Law* 17-40; and R. Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (London, Penguin, 1996).

[51] For example, does equality before the law require a *prima facie* rejection of all race-conscious distinctions (save for "temporary special measures"), or might a more contextualised understanding allow for concepts such as "native title" to be taken as compatible with a commitment to substantive equality?

[52] Duff, n. 6 above, at 792.

difficult to contain and transcend. The way in which the history of relations between Aboriginal and "settler" communities continues to condition and affect Aboriginal and non-Aboriginal attitudes towards criminal responsibility and punishment is a palpable example of this. The fact that it is so difficult to insulate the demand for punishment from such contexts is not, however, simply a counsel for despair. Rather, it provides an additional source of constraint on our modes of punishing; the constraint that comes from recognising the inherently ambiguous nature of our desire to punish. It should check our justificatory self-satisfaction at having punished someone (we reassure ourselves) for the sake of their own good. It should keep pushing the argument about punishment to go on, long after we think everything has been said and done.