

Punishing Noncitizens

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ABSTRACT *In this article, I discuss a distinctively nonparadigmatic instance of punishment: the punishment of noncitizens. I shall argue that the punishment of noncitizens presents considerable difficulties for one currently popular account of criminal punishment: Antony Duff's communicative expressive theory of punishment. Duff presents his theory explicitly as an account of the punishment of citizens – and as I shall argue, this is not merely an incidental feature of his account. However, it is plausible that a general account of the criminal law of the kind of idealized state that Duff focusses on will need to say something about how that law deals with noncitizens. In particular, I claim, it will need to provide a justification for punishing them. Because Duff's account says nothing about the punishment of noncitizens, it cannot do so. Furthermore, although Duff's more recent suggestion that noncitizens should be thought of as being guests in the state on whose territory they are present may provide for an account of their criminalization, it cannot easily be extended into an account that provides a justification for their punishment.*

Introduction

Philosophical theorists of punishment typically focus on a restricted range of kinds of instances of punishment: for example, cases where the offender is a rational and responsible individual agent, breaking a justified law of a legitimate state of which the offender is a citizen in good standing, on the territory of that state and so on. They often do so because they take such cases to be both exemplary and theoretically central. Call such cases 'paradigmatic' instances of punishment, and other cases 'non-paradigmatic' instances.

In this article, I shall focus on a distinctively nonparadigmatic instance of punishment: the punishment of noncitizens. I shall argue that it presents problems for one currently popular account of criminal punishment: Antony Duff's communicative expressive theory of punishment. In his 2001 book *Punishment, Communication and Community*, Duff argues that we bear two kinds of duty to our fellow citizens: a duty to call them to account for wrongdoing through processes of criminal law and a duty to impose harsh treatment on offenders with a view to communicating to them the wrongness of their conduct, in a way that invites them to repentance. The existence of this duty explains why punishment is permissible, in the fact of considerations that might otherwise give us conclusive reasons to refrain from punishing.

Duff's presentation of his view suggests that these two duties are duties that we owe to citizens *qua* citizens. In more recent work, Duff has distinguished between the tasks of a theory of criminalization and those of a theory of punishment. The former

addresses questions about why it is appropriate to hold offenders to account through criminal trials. The latter seeks to explain why it is appropriate to inflict hard treatment on them.

In what follows I shall argue that Duff's argument for the existence of a duty to impose harsh treatment on offenders depends on the notion of citizenship and in particular on an account of the value of proper relationships between citizens in a democratic republic and the reasons why citizens owe them to one another. Relationships that exist between citizens differ from relationships between citizens and noncitizens in various respects. It is unclear whether the kinds of consideration which underpin the existence of a duty to punish citizens establish the existence of a duty to punish noncitizens.

I shall argue that they do not. In particular, I shall argue that Duff's recent suggestion that the relationship between citizens and noncitizens can be understood as being analogous to the relationship between hosts and guests does not help him make the case he needs to make for the existence of a duty to punish noncitizens.

The Criminal Law of a Democratic Republic

Antony Duff and Sandra Marshall have recently attempted to articulate the place that punishment might play within the criminal law of 'a democratic republic – a society which aspires to be a polity of free and equal citizens'.¹ They argue that any such account must do two things. It must explain how those who are subject to the criminal law can legitimately be called to account through the process of the criminal trial. It should also show how the forms of hard treatment which constitute punishment can legitimately be imposed on citizens who have been convicted in a criminal trial.

Following Duff's own practice, I shall distinguish in what follows between theories of criminalization, which are intended to perform the first task and theories of punishment which are intended to perform the second.² I am primarily interested in showing that the case of noncitizens raises a problem for Duff's account of punishment rather than his theory of criminalization. However, since criminal punishment is the normal and expected consequence of being convicted in a criminal trial, the two parts of a theory of criminal law cannot be separated from one another entirely. So it is appropriate to situate Duff's account of punishment within an account that encompasses claims about both criminalization and punishment.

Duff and Marshall argue that in a state of the sort they are concerned with, criminal law should be seen as law that is common 'in the sense that it is our shared law, not one imposed by a separate sovereign.'³ They therefore favor a view of punishment on which it makes sense to regard convicted offenders as being occupants of a particular kind of active civic role and suggest that the communicative theory of punishment that Duff has developed in a number of works has precisely this feature.⁴⁵

On this account, it is constitutive of punishment that it should involve an attempt to communicate to the offender the wrongness of their offence, and that it is essential to the justifiability of punishment that the communication in question be one that the recipient is free either to accept or reject. Duff also holds that when conceived of in properly communicative terms, punishment aims at the reconciliation and reintegration of an offender into society.⁶

We might regard the view that successful communication to an offender of their wrongdoing will have these results as an ambitious empirical claim. Since Duff emphasizes that almost all existing penal institutions fall short of the ideal he delineates, it is difficult to see what empirical evidence we might have for this claim. An alternative reading of Duff's view would construe him as making a conceptual claim. On this reading, it would be constitutive of an individual's reconciliation or reintegration into society that they acknowledge the common nature of the criminal law under whose authority they are punished by actively undertaking the role of the convicted offender.⁷ I shall take Duff to have in mind a view of this sort.

Punishing Noncitizens – The Problem

It is not clear whether this account of the criminal law of a democratic republic can provide us with a plausible account of the relationship between noncitizens and the criminal law. The account of punishment to which Duff and Marshall appeal – that put forward in Duff's 2002 book *Punishment, Communication and Community* – is presented explicitly as an account of the punishment of citizens.⁸ Furthermore, it is not clear whether noncitizens can undertake the distinctive civic role that Duff and Marshall assign to offenders, nor whether a democratic republic can justifiably expect them to do so.

Duff has, admittedly, addressed questions about how noncitizens relate to the criminal law in some detail in his more recent work on criminalization.⁹ However, this work does not address questions about punishment directly: it seeks to explain how noncitizens might be liable to being called to account for breaches of laws that they have no part in making. It does not purport to explain why we might be justified in imposing punitive hard treatment on those noncitizens who have been found to breach the criminal law. The imposition of hard treatment on offenders involves distinct and arguably greater costs to those who impose it and greater burdens on those on whom it is imposed than the process of calling to account in a criminal trial. So its justification is a distinct, and plausibly more difficult, task.

Conceptions of Citizenship

How should we understand the notion of citizenship to which Duff and Marshall appeal? We might distinguish here between a 'lay' conception of citizenship, on which citizenship is a formal legal status conferring a range of benefits including the right to vote in legislative elections and what I shall call an 'enriched' conception on which citizenship involves active engagement in a political community in addition to this formal legal status. On the 'enriched' conception, we might count as citizens all those who count as citizens on the lay conception and also pay taxes, engage in organized productive activity in ways regulated by the state, or send their children to be educated in publicly provided schooling.¹⁰

It might also be tempting to count as citizens, in an extended sense of the term, those who engage in the kinds of activities that would qualify them as citizens under the enriched conception of citizenship, but who do not count as citizens under the lay

conception. However, this would be inconsistent with Duff and Marshall's use of the term. Consider their suggestion that citizens of a democratic republic should be able to regard the criminal law as 'their' law. We can plausibly see those who have the right to vote in legislative elections as being engaged in a collective decision-making process of which law in general and the criminal law in particular is the outcome. There is a very clear sense in which the law is 'their' law. Those who do not count as citizens in the lay sense do not have this reason for seeing the law as 'their' law: it is only theirs insofar as it is the law to which they are subject – what Duff and Marshall describe as 'the law of a separate sovereign'.

On both the lay and enriched conceptions of citizenship, the citizens of a democratic republic are authors of that law. Since the law has many authors, it is a collective enterprise: a work of joint authorship in which the citizens are coauthors. But since we are talking of a democratic republic, they are also plausibly equal coauthors: equal not in the sense that they play an equal role in producing the law, but in the sense that product – the law under which they stand – is equally theirs. The relationship that exists between citizens in such a republic is, among other things, that of being joint coauthors of the laws under which they live.

Noncitizens and the Criminal Law

With this understanding of citizenship in mind, it is worth reviewing a range of different kinds of noncitizens with whom the criminal law might need to deal. First, there are visitors and temporary residents who have no intention of making a protracted stay in a given country, and no aspiration to either full or partial membership in its political community. Second, there are those who are not yet citizens or not yet fully so: those who are too young to count as being fully citizens of a state and those who are prospective citizens – individuals who intend to acquire citizenship of a country to which they have immigrated, but they have yet to satisfy one or more conditions that are required for full citizenship.

There are also other kinds of case: those who are resident in a country and are at least in principle capable of acquiring citizenship but who may have no intention of doing so; and those who are long-term residents but who are effectively barred from membership because of birth, because their retained citizenship of another country prevents them from attaining citizenship where they live, or because they are unable to satisfy any of a range of required conditions of citizenship.¹¹ The distinction between these cases and the first two may be blurred at the edges: someone may arrive in a country as a tourist, a refugee, or an asylum-seeker intending only a short and temporary stay only to find themselves for one reason or another becoming a relatively long-term resident.

An account of the criminal law of a democratic republic might need not cover all possible kinds of noncitizens. If a properly constituted democratic republic should not allow resident citizens to be deprived of their citizenship, an adequate account of the criminal law of such a state need not explain how this law applies to those who have been so deprived. Nevertheless, it must explain how it can apply to long-term residents who have no plan or prospect of acquiring citizenship.

Duff and Marshall might argue that they need not do so because a legitimate democratic republic must offer a path to citizenship to all long-term residents. However, even when such a path is offered, it might be refused. Lea Ypi and Helder de Schutter have argued that long-term residents have a duty to seek citizenship.¹² Suppose they do: it does not follow that the duty can legitimately be legally enforced. Even if it can, there is still no guarantee that all those to whom it applies will fulfil it.¹³

Someone might argue that those who have voluntarily avoided taking up a path to citizenship can have no complaint if they are held to account under the criminal law. This may be correct. However, it does not follow that citizens of a democratic republic act permissibly in subjecting noncitizens to their law. The relationship between permissibility and standing to complain is a delicate one. It does not, in general, follow from the fact that I have no standing to complain if you do X that it is permissible for you to do X. One thing that may undermine my standing to complain is hypocrisy. If I steal from others, I may have no standing to complain if you steal from me. It does not follow that your stealing from me is permissible: you should not steal from anyone.

Furthermore, even if we can justify holding individuals who have refused a path to citizenship to account in criminal courts, it does not follow that we are justified in subjecting them to the kinds of hard treatment that are characteristic of punishment. And we will have good reasons for doubting that we are justified in doing so if our justification for treating fellow citizens in these ways makes ineliminable appeal to the notion of citizenship.¹⁴ On the view of punishment that Duff and Marshall advocate, it appears to.

Need We Punish Noncitizens?

Even if the criminal law of a democratic republic must address noncitizens, we might wonder whether democratic republics could avoid punishing those who are convicted in such trials. Perhaps removal from the territory of a state constitutes a plausible alternative. This suggestion is hard to sustain. There will be some individuals whom states cannot remove and some offences where removal will be a disproportionate and for that reason impermissible response. Finally, even where possible and permissible, removal may constitute a form of punishment.

Removal may not be a viable alternative to punishment for a range of reasons. There may be no state other than the one in which the offender has offended that is willing to accept the offender, especially if, as may happen the offender is stateless. Even where this is not so, the state in whose territory the offence is committed may have treaty obligations which preclude them from handing over the offender to a state of which they are a citizen.

Even when removal is a practical possibility, it will typically involve measures that constitute hard treatment – at least intuitively speaking – such as arrest and confinement, imposed by an appropriate authority, and in response to a breach of an antecedent regulation. On some accounts this may be enough to make it into punishment.^{15,16}

Some philosophers hold that the hard treatment imposed on offenders in response to wrongdoing can only be punishment if it is inflicted with the intention of harming

those subjected to it. Zach Hoskins has recently distinguished between punishment and what he calls ‘collateral legal consequences’ along these lines.¹⁷ Collateral consequences are a relatively undertheorized area. However, it is plausible that there are some constraints on the kinds of consequence that can permissibly be inflicted in offenders.¹⁸ For example, we might think that restrictions of employability that make it impossible for those convicted of minor low-level offences to obtain gainful employment of any sort at the end of a sentence.

In some cases, removing an offender from a community where they have made their home will be as a serious harm as preventing them from entering gainful employment (indeed, we can imagine cases where it encompasses that harm). If constraints of proportionality rule out the former, they will also rule out the latter. If so, then even if removal constitutes an alternative to punishment, it may not be an alternative that is available to a democratic republic.

That aside, it is not clear that removal is an alternative to punishment. Elsewhere I argue that what is required for hard treatment inflicted by an appropriate authority in response to wrongdoing to count as punishment is not an intention to harm, but measures that foreseeably harm individuals like those on whom those measures have been inflicted.¹⁹ Such measures will constitute punishment provided they involve some kind of expressive dimension. This expressive purpose may involve communication with an offender about their offence, denunciation of wrongdoing to a political community, the expression of solidarity with victims, or a range of other expressive functions.²⁰

On this view, the removal and handing over of noncitizens who are long-term residents may well constitute punishment. Since removal from a community in which one has been a long-term resident for the purpose of being handed over to another state will typically be a measure of a sort which can be expected to harm individuals of the class on whom it is inflicted, it satisfies his condition for harshness. Furthermore, it is also plausible that it satisfies his expressive condition.

Christopher Bennett has suggested that dissociation from offenders is a form of natural expression of moral disapproval.²¹ If so, it is plausible that the form of dissociation involved in forcible and involuntary removal of offenders expresses this in an especially emphatic manner. Whether or not we agree with Bennett that there is a ‘natural’ expression of moral disapproval, in practice removal is likely to involve procedures that will be understood by those who experience them and perhaps also those who carry them out as involving the censure of those whom they are inflicted on. If so, removal seems to have the right kind of expressive profile to constitute punishment.

The Role of Citizenship in Duff’s Account of Punishment

Duff’s argument for the permissibility of punishment depends on the idea that punishment is something we owe to offenders. Duff suggests that a liberal state ‘owes... to its citizens as potential criminals... to treat and address them as members of the normative political community.’ In doing so, it must ‘address... them as citizens... who must thus be called to account and censured for their breaches’ of ‘the community’s public values’.²² Duff conceives of this as a relational duty, and in particular a duty owed to citizens *qua* potential offenders.

If successful, this argument establishes the existence of a duty to call to account. However, it is not obvious that this duty must be discharged by means of forms of censure that involve punitive hard treatment. In the light of Section 2's distinction between the tasks of a theory of criminalization and those of a theory of punishment, we might see the argument as belonging to the theory of criminalization rather than the theory of punishment.²³

One way of bridging the gap between the conclusion of this argument and the claim that we have a duty to punish is to appeal to the goods that can be achieved by punishment when this is conceived of along communicative lines. If these goods are especially valuable goods, which we owe to our fellow citizens, we may have a duty to try and make sure our fellow citizens are furnished with them, even if the means by which we do so are – as punishment is – both materially and morally costly.

In Section 2, I noted that on Duff's view the goods of reconciliation and the restoration of relationships disrupted by criminal behavior are among those that punishment can achieve. In Section 3, I noted that he and Marshall are committed to the view that the relationship that exists between citizens in a democratic republic is, among other things, that of being equal coauthors of the laws under which they live.²⁴ Someone who regards a democratic republic as a kind of state we can realistically aspire to may well regard the kinds of relationships which exist between citizens of that kind of state as being particularly valuable. Philip Pettit, for example, has written eloquently on the value of living in a state which passes what he calls the 'eyeball test', in which citizens can relate to one another on equal terms without fear or deference.²⁵

Here is a reason for thinking that this is not simply a good, but a good that citizens owe one another. It is appropriate, in a democratic republic, to think of citizenship as a status which is owed, rather than bestowed to those who qualify for it. Furthermore, if the laws of the state are our laws, it is citizens who owe this to those who so qualify. Fellow citizens in a democratic republic are equal participants in the making of laws they live under – one might say, coauthors of those laws.

Authorship is more than a relationship of production: it confers a status with respect to what is produced. In a collaborative enterprise, equality in authorship requires acknowledged equality in status. For citizens to be equal participants, they must see one another as equal participants. So if citizens owe the status of citizenship to those who qualify for it, they also owe to their fellow citizens a relationship in which they see them as equal coauthors of the laws. But this is, I suggested, what proper relationships between citizens in a democratic republic require (and thus part of what on Duff's account, the communicatively conceived punishment of offenders can bring about). If this is correct, the goods involved in proper relationships between citizens are not only peculiarly valuable, they are part of what citizens owe to one another.

Understood in this way, Duff's argument for the existence of a duty to inflict hard treatment which depends on the idea that there are particularly valuable goods inherent in proper relationships between citizens and which we owe to our fellow citizens. But the values that are involved are values which seem to be peculiar to relationships between citizens: they are those involved in being equal participants in the making of laws. There is no reason for thinking that citizens owe them to those who are not coauthors of the laws: that is to say, to those who are not citizens.

Punishing Noncitizens as Though They Were Citizens

Suppose we agree that relationships between citizens do have value, that restoring these relationships also has value, that punishment can play a role in restoring them and that the value that they have plays a role in justifying our punitive practices. We might hope to justify that the practice of punishing noncitizens by arguing that it could achieve some good of similar value.

One way in which it could do so would be by establishing the very same kind of relationship between citizens and noncitizens as we take to exist between citizens. Within the context of a democratic republic of the sort that Duff favors, this relationship involves, as I have already observed, that of being joint coauthors of the law to which we are subject.

If we held that punishing noncitizen offenders might be justified in this way, we would be committed to the view that punishment involved inviting them to become citizens in at least the lay sense of citizenship. It seems initially implausible that this could be something that we could owe to noncitizens in general. But it is perhaps less implausible that we might owe it to those noncitizens that we are precluded from handing over to other states or to those who have been long-term residents of our political communities.²⁶

Nevertheless, the suggestion seems overdemanding, presumptuous, and paradoxical. It is overdemanding in requiring states who punish noncitizens to be willing to offer them the status of full members of a political community.²⁷ For it does not seem obviously unjust for a state to impose requirements for citizenship which offenders may not meet. It would both be unjust and create perverse incentives if the state waived these requirements for those who offend against the criminal law. It is presumptuous, since in some cases the offenders in question may have no desire to become part of our political community. Furthermore, they may have good reasons for refusing to do so. Such reasons might include reasons of conscience, as well as sanctions imposed by other states of which they are citizens (for example, loss of citizenship for themselves or their children). Finally, it is paradoxical since there are some laws such as immigration law whose purpose is, precisely, to regulate membership of the political community. It is hard to see how punishment for breaking laws of this sort could be seen as aimed at reintegrating individuals into a community from which those laws debar them from membership.²⁸

Despite its drawbacks, Duff might be willing to accept a view of this sort. Still, it would be a surprising and noteworthy consequence of our best theory of punishment that it should have these consequences for our views about who should be a citizen. We might think there is a more plausible alternative.

Noncitizens as Guests

On Duff's view, the punishment of citizens aims at their reintegration into a community insofar as it is a restoration of the relationship that ought properly to exist between citizens of a society. Since that is not the proper relationship between citizens and noncitizens, the punishment of noncitizens should aim at something different:

namely, the restoration of the proper relationship between noncitizen offenders and citizens.

To fill out this somewhat schematic suggestion, we need an account of the proper relationship between citizens and noncitizens. Duff's work on punishment does not address this issue. However, in a number of recent works on criminalization, Duff has suggested that we might take the criminal law to address noncitizens as guests.²⁹

Here are two passages in which Duff outlines a view of this sort.

We can understand their normative position (*sc.* that of non-citizens) by seeing them as guests – visitors to whom the polity and its members owe duties of hospitality and who owe the polity and its members the respect and concern that guests owe their hosts. It might seem that the idea of hospitality cannot give such non-citizens the kind of secure status they should have...but this is far from inevitable; we can talk seriously of *duties* of hospitality that we owe guests....I simply want to appeal to the familiar idea that we owe duties, characterizable as duties of hospitality to those we invite or admit into our homes.³⁰

Guests have a particular status in relation to their hosts, a status that brings with

it both rights and responsibilities. What is relevant here is that guests are ...bound by the criminal law, in that they must answer in the hosts' courts for wrongs they commit while guests. The law that ... binds them is not their law, the courts that call them to answer are not their courts, speaking in the voice of their fellow citizens; but their distinctive role as guests puts them in a particular relationship to that law—one that gives them distinctive relational reasons to respect it, and gives its citizens relational reasons to hold them to account for their actions as guests.³¹

One question that the first passage raises is precisely who the 'we' is that can understand the normative position of noncitizens as guests and what 'understanding' might amount to here. I take Duff's suggestion to be a theoretical proposal, addressed to the scholarly community of theorists of criminal law as to how the normative position is best understood, rather than a practical proposal, addressed to a community of citizens, as to how we should treat noncitizens. To take it otherwise would be uncharitable: it would be to take Duff as holding, as he surely cannot, that the audience to whom his remarks are addressed consists only of those who are citizens of states to whose criminal law they are subject.

There are significant differences between the two passages I have quoted.³² The second seems to claim, as the first does not, that noncitizens are, literally, guests. For Duff here says that when noncitizens are held to account in criminal courts, they are held to account 'for their actions as guests'. One cannot hold someone who is not a guest to account for their actions as a guest: if they are not a guest, there are no such actions for which to hold them to account. The first passage claims less. It suggests that it might be appropriate to see noncitizens as guests. This would presumably be true if citizens are in fact guests. But it might also be true even if they are not. The appropriateness of regarding citizens as guests might instead be the appropriateness of an illuminating analogy.

There is, however, one important claim entailed by both passages: namely that we can draw on our understanding of the host-guest relationship in order to better understand the relationship between citizens and noncitizens. This suggestion can be seen encompassing three distinct claims. First, the guest-host relationship is normatively freighted: that is, it generates a network of rights and duties that are peculiar to relationships of that particular sort. Secondly, the relationship between a citizen and a noncitizen present on the territory of the state of which they are a citizen is also normatively freighted. Third, the citizen/noncitizen relationship is either an instance of or sufficiently analogous to the guest-host relationship that reflection on the normative freighting of the former will help us to understand the normative freighting of the latter.

My criticisms of Duff's proposal will focus on this package of claims. If the criticisms are correct, they will establish not only that citizens are not literally guests, but also that their normative position, with respect to the criminal law, is importantly dis-analogous from that of guests in the home of a host. Even if the relationship between citizens and noncitizens is analogous to the relationship between hosts and guests, this does not establish that we have a duty to inflict hard treatment on noncitizens. Hosts may have a duty to call guests to account, but it is not clear that they have a duty to restore relationships with them in ways that involve the inflicting of hard treatment. So even if the position of noncitizens is analogous to that of guests, this will not explain why they should be punished.

Exploring the Host-Guest Relationship

One can be a guest in many kinds of space: homes, workplaces, classrooms, exclusive clubs, and – perhaps – sovereign states. Duff appears to regard being a guest in someone's home as a paradigmatic case of the relationship: notice here his appeal in the first of the passages I have cited to the existence of duties owed to individuals who are guests in one's home.

There are also many kinds of homes. Owner-occupied or rented houses, rented rooms, monasteries, boarding schools, and army barracks can all qualify. However, although there may be significant differences in the normative freighting of our relationship when you are a guest in a house that I own, or a room that I rent, a monastery in which I reside, or a barracks in which I am quartered, I shall take Duff's appeals to the familiarity of the host/guest relationship to indicate that nothing in his argument turns on features of that relationship that exist when I am a guest in your monastery or the barracks you are quartered in, but not in other cases.

It may seem plausible that there are illuminating analogies between the position of guests in a home and that of noncitizens in a state. Homes are naturally thought of as spaces which individuals occupy not for any particular purpose or in pursuit of any particular end, but simply as a place in which one may pursue a variety of (lawful) ends. States – or at least, liberal states – share this feature in a way that workplaces, classrooms, and clubs do not.

One might nonetheless have qualms about taking the relationship between a host and guest in an (ordinary) home as the central case for understanding the relationship between citizen and noncitizen. While many of the other settings in which someone

may be a guest will have rules which either are or are taken to be essential to their smooth running and the achievement of their constitutive aims, the same is not necessarily true of homes. Homes – especially homes in which children are being brought up – may have rules. However, it is not in anyway essential to something's being a home that it should be an environment governed by its own specific rules. By contrast, it is plausibly essential to something's being a state that it should be so governed.

Duff's remark that for his purposes it is unimportant whether one is 'invited *or admitted*' suggests that he takes details of how the relationships with which he is concerned come into existence to be relatively unimportant.³³ However, one might expect the contours of the normative freighting of particular instances of the guest-host relationship to be affected by matters such as the spirit and circumstances in which one is allowed to enter a place, the purposes for which one is admitted, and the attitude of those who are already present in the space take to one's presence.

These things will, for example, affect the extent to which one should be grateful to one's host and the ways in which it is appropriate to demonstrate ones gratitude. One might also think that if the analogy between the guest/host relationship and the citizen/noncitizen relationship is a good one, the differences between invitation and admission under a formal scheme in which (say) one's admissibility is subjected to formal – and in some cases quasi-adversarial – scrutiny, or in a situation in which one's admission is legally compelled but permitted subject to formal protest are analogous to the differences between being admitted freely and grudgingly.

These points suggest that a charitable interpretation of Duff's view will require us to abstract away from certain features of the host-guest relationship. Duff himself provides relatively little guidance as to which features of that relationship he takes to be essential to it and which he takes to be unimportant. Here, there are four relatively abstract features that we might take to be significant.

First, the normative freighting of the relationship is variable: its details will depend on such matters as the purposes for which I have been invited, the spirit and circumstances in which the invitation has been offered, and prior moral relationships between the host and the guests. Second, and despite this variability, the duties and responsibilities that arise out of the host/guest relationship are relational. That is to say, they are directed, or second-personal, duties: duties owed to particular individuals – namely, those we have invited or who have invited (or admitted) us. Third, the normative freighting is reciprocal: hosts have duties to guests and guests have duties to hosts. Fourth, the normative freighting is asymmetrical: although hosts have duties to guests and guest have duties to hosts, what guests owe to hosts is not the same as what hosts owe to guests.

Problems for the Analogy: Punishment

If there is indeed an analogy between the host/guest relationship and the citizen/noncitizen relationship, then there is at least some plausibility in the suggestion that the features of the host-guest relationship to which I have drawn attention – and in particular, the second-personal nature of the duties to which it gives rise – might play a role in explaining how citizens might be justified in holding noncitizens to account

under the criminal law. If so, Duff has good reason to call on this analogy in his account of criminalization.³⁴

However, when we punish people, we impose distinct – and in many cases more serious – burdens on them, and we incur distinct and often heavier costs than we do when we call them to account in the criminal trial. So the justificatory bar that we have to reach in the former case is distinct – and typically higher – than the one we need to meet in the latter. Even if the second-personal nature of the host/guest relationship can explain how noncitizens are justifiably held to account under the criminal law, it is not clear that it can explain why we have a duty to punish.

As we saw in Section 7, the notion of citizenship plays at least two significant roles in Duff's theory. It explains why punishment is valuable – because it restores the relationship that ought to exist between citizens – and it thereby plays a role in explaining why we have a duty to realize this value (because this is something which we owe to our cocitizens). However, there are at least two reasons to doubt that the relationship between host and guest can do the same kind of work in the case of punishment of noncitizens as the relationship between citizens does in Duff's account of the punishment of citizens.

First, even if state-imposed punishments, conceived of along communicative lines, can restore a relationship between citizens, it is less clear that it can do so in the case of the relationship between hosts and guests. Some forms of punishment seem better conceived of as superceding or bringing to an end the host-guest relationship rather than restoring it. If we regard expulsion as a form of punishment (as I have argued we should, and as Duff seems willing to) then it provides a clear case of a form of punishment which ends the host-guest relationship rather than restoring it.

The same is also true of incarceration. The host-guest relationship is, paradigmatically at least, voluntary on both sides; but someone who is incarcerated is no longer present in the place where they are incarcerated as a matter of voluntary choice. If they are conceived of as guests, it must be in an extended sense of that notion to whose normative freighting our grasp of the familiar relationship between hosts and guests provides no clear guide.

The communicative theorist might respond that what matters here is not whether the host/guest relationship is restored during the period in which the offender undergoes their punishment but whether it is restored at the end of the period of incarceration to which an offender is sentenced. However, this response is inadequate. Those who are incarcerated sometimes commit further offences while incarcerated. To punish them, the state must retain the standing to address the offender while incarcerated. If that standing depends on the host-guest relationship, that relationship must persist through the period of incarceration.

Furthermore, it is natural to think of the communication via hard treatment which constitutes punishment as continuing through the period of a prisoner's incarceration. But if the state's standing to address this communication depends on the second-personal nature of the host-guest relationship, and that relationship no longer exists, then the state would presumably lack the standing to continue the communication, and thus the punishment.

A defender of Duff's position might say that if he conceives of the citizen/noncitizen relationship as being analogous to, rather than an instance of, the host/guest relationship, these points do not establish that the citizen/noncitizen relationship cannot be so

restored. Agreed: but if it can, it is to that extent *not* analogous to the host/guest relationship. Alternatively, we might say, a relationship which is susceptible of being restored by expulsion or incarceration is interestingly disanalogous from the host-guest analogy. If so, there are reasons to doubt that the values inherent in that relationship can best be understood by considering the values inherent in the host/guest relationship.

Here is a second difficulty. Suppose the host-guest relationship – or something appropriately analogous to it – can be restored *via* communicatively conceived punishment. In his account of the punishment of citizens, Duff relied on two further ideas about the value of proper relationships between citizens. The first is that the value of such relationships was sufficient to outweigh the moral and material costs involved in instituting a system of punishment. The second is that these goods are goods that we owe to our fellow citizens.

Duff's account of the second-personal nature of relationships between hosts and guests leaves room for the idea that we might owe some kinds of goods to noncitizens. It is less clear that we owe to them the goods involved in the restoration of right relationships between citizens and noncitizens. For, I argued in Section 7, the reason we owe the restoration of right relationships to our fellow citizens is precisely that we share with them in the task of joint authorship of the laws under which we live.

In order to have a similar argument for the idea that we owe the restoration of proper relations between citizens and noncitizens, we would need to find something in the citizen/noncitizen relationship which explained why we should owe this to noncitizens. We might think that the analogy between noncitizens and guests provides this: that is to say, we might think that one thing which hosts do owe to their guests is at least the opportunity to restore these relationships when they have been ruptured.

However, it is worth noting that the argument for the existence of a duty to punish citizens depended not only on the idea that the restoration of proper relations was something that citizens owe to one another, but also something particularly valuable: something valuable enough to outweigh the costs involved in punishment. It does not follow from what I have said so far that the restoration of proper relationships between citizens and noncitizens can be conceived of as having a value analogous to that of the value of restoring the right relationship between citizens. Nor does it follow from the supposition that the host-guest relationship is a valuable one. For one might take the relationship between citizens to have a distinctive kind of value, which makes its restoration also distinctively valuable.

There are at least two reasons for thinking that the relationship between citizens has this feature while the relationship between host and guest does not. First one might regard human beings' capacity for membership in a political community to be one that is central to their flourishing. If so we have a particularly strong reason for responding to offending members of the community in ways that restore rather than impair that capacity. In many cases that will require their reintegration into the particular political community against whose laws they have offended. For this may be the only political community of which they are a member or of which, in virtue of their offending, they have a chance of being a member.

Although one might argue that human beings capacity to receive and offer hospitality is a core human capacity in the same kind of way as their capacity for membership in a political community, it is hard to see why someone's receiving hospitality from

one particular source should be as central to their exercise of this capacity as their membership in a particular political community is central to their exercise of the capacity for citizenship. Indeed it is unclear why this capacity would have to be exercised via an individual's being a guest in a political community at all. This suggests that even where punishment is capable of restoring the guest/host relationship, its capacity to do so may not ground a duty to punish noncitizens even though its capacity to restore relationships between citizens can ground a duty to punish.

One might feel that even if human beings' exercise of their capacity for membership in a political community plays a central role in their flourishing, this is insufficient to generate a duty to punish as opposed to a reason – potentially outweighed by the material and moral costs – to do so. If so, the arguments I have outlined would not show that the communicativist expressivist faced greater difficulties in accounting for the punishment of noncitizens than citizens. It would instead be a sign of a deeper problem for communicative expressivism. Here is one way in which that difficulty might be met. Articulating it reveals a second reason for doubting that the host/guest relationship can play the same kind of role in a theory of punishment as the relationship between citizens.

What – other than the value of citizenship – might ground a duty, rather than a mere reason, to punish? One tempting possibility is a right to citizenship. Hannah Arendt has suggested that there are good reasons for thinking that there is such a right, conceived of as a 'right to have rights'.³⁵ We might see such a right as being grounded in the kind of value that the exercise of the capacity for citizenship has in human flourishing. But we need not do so: we might instead see it, as Arendt seems to have done, as an essential kind of protection against dehumanization.

For such a right to do the kind of job that Arendt envisages, it must be a right which is both universal and inalienable. If so, then the fact that offenders are members of some political community or other is something that is morally inescapable for us; there is no morally acceptable state of affairs in which an offender's relationship with their fellow citizens is simply suspended. If so, then punishment might be something we owed to our fellow citizens, rather than simply something which realized an important value. However, even if we thought we could make sense of a right to hospitality, it is hard to see why we should think that the right to hospitality in a particular community should be conceived of as an inalienable right in the way that the right to citizenship might.

Someone might, with good reason, argue that a right to take refuge is as important, and is important for the same kinds of reasons, as Arendt's 'right to have rights'. But we should note three things about this suggestion. First, to argue from an inalienable right to take refuge to an inalienable right to enter into relationships of guesthood is to presuppose that the relationship between citizens and noncitizens is analogous to the relationship between hosts and guests, not to make a case for that view. Secondly, an inalienable right of the sort proposed need not be conceived of as a right to take refuge in any community whatsoever (and insofar as such a right is institutionalized in the world today, it is not conceived of in this way). Finally, while a right of this sort might conceivably ground a duty to punish refugees, it is hard to see how this argument could be extended in a way that might generate a duty to punish other kinds of noncitizens.

Conclusion

I have argued that Duff's communicative expressivist account of punishment cannot explain why states should be permitted to punish noncitizens. I have also argued that this is a significant lacuna for a theory of punishment that hopes to tell us how punitive practices might be justified in states of the sort that we might aspire to live in. Those who are still attracted to expressivism may wish to consider alternative versions of expressivism, which do not depend as heavily on the notion of citizenship as Duff's, such as the pure expressivist theory put forward by Joshua Glasgow and Thaddeus Metz or the denunciatory version of expressivism I defend elsewhere.³⁶ Whether views of either sort could survive the level of detailed scrutiny to which I have submitted Duff's account is a question for another day.

I also take my arguments to illustrate the importance of considering nonparadigmatic instances of punishment when theorizing about punishment. There are, of course, good reasons for theorists of punishment to consider what I have called paradigmatic cases of punishment carefully in their theorizing: if we cannot explain why punishment is permissible in such cases, we probably cannot explain why it is permissible at all. But focussing only on paradigmatic instances of punishment may lead us to be overly sanguine about our punitive practices. It is likely that very many instances of punishment – if not the majority – involve nonparadigmatic instances of punishment. If theorists of punishment want their work to improve the moral acceptability of our practices, these are the kinds of case they should focus on.³⁷

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NOTES

- 1 R. A. Duff and S.E. Marshall 'Civic Wrongs' in A. Dzur, I. Loader and R. Sparks (eds) *Democratic Theory and Mass Incarceration* (Oxford, Oxford University Press 2016) p. 35.
- 2 For Duff's view of the relationship between criminalization and punishment, see Duff op. cit. 2018 chapter 5, especially pp. 220ff. This is not the only way in which one might conceive of a theory of criminalization. For alternatives, see James Edwards 'Criminalization without punishment.' *Legal Theory* 23 (2017): 69–95; Ambrose Lee 'Public wrongs and the criminal law.' *Criminal Law and Philosophy* 9 (2015): 155–170.
- 3 Duff and Marshall op. cit., 2016 p. 35.
- 4 Duff and Marshall op. cit., p. 46.
- 5 Especially in Antony Duff, *Trials and Punishments* (Cambridge: Cambridge University Press 1986); Duff op. cit. 2001.
- 6 Duff op. cit. 2001.
- 7 This provides the offender with the active role which Duff and Marshall take to be entailed in a conception of the criminal law as common law.
- 8 Duff defines the task of a theory of punishment as follows: 'criminal punishment could and should be inclusionary... something we can do... to *ourselves* as full, if imperfect, members' of a 'community of citizens' (italics Duff's).
Duff op. cit. 2001 p. 77.
- 9 R.A. Duff *The Realm of Criminal Law* Oxford, Oxford University Press 2018; Antony Duff, 'A Criminal Law for Citizens', *Theoretical Criminology*, 14, 3 (2010): 293–309; R. A. Duff and Marshall, S. E.

- 'Relational reasons and the criminal law' In B. Leiter & L. Green (eds.), *Oxford Studies in Legal Philosophy*, vol. 2, (Oxford, Oxford University Press 2013).
- 10 Duff op. cit. 2001.
- 11 A further kind of case with which I do not deal is with those who meet the formal conditions for membership in a political community but who are alienated to a degree that means we should not see them as being full members of the political community. For useful discussion of such cases, see Tommie Shelby 'Justice, deviance, and the dark ghetto.' *Philosophy and Public Affairs* 35 (2007):126–160; Jules Holroyd 'Punishment and justice.' *Social Theory and Practice* 36 (2010):78–111; Benjamin Ewing 'Recent work on punishment and criminogenic disadvantage.' *Law and Philosophy* 37 (2018):29–68.
- 12 Lea Ypi and Helder de Schutter 'Mandatory citizenship' *British Journal of Political Science*, 45 (2015): 235–251.
- 13 We cannot escape giving an account of how the criminal law can address noncitizens by saying that a duty to seek citizenship should be enforced through the criminal law. Duff and Marshall might suggest instead that the duty be enforced through immigration law and that immigration law is distinct from criminal law. However, even if it is possible to make a principled distinction between immigration law and criminal law, we need to consider the kinds of sanctions that noncompliance might entail. If those sanctions do not entail removal from the territory of the state, we will still need an account of how the criminal law applies to noncitizens. For noncitizens will still be able to commit offences after those sanctions have been applied. On the other hand, removal to another state will not always be a practical possibility. Some individuals are stateless: there is no guarantee any state will accept them. Furthermore states often have treaty obligations not to hand over individuals to states which fail to meet minimal human rights standards. Finally, we shall see in the next section that removal from the territory of the state in which an individual lives may either be ruled out on grounds of proportionality, or if not ruled out, constitute a form of punishment.
- 14 I thank a referee for the *Journal of Applied Philosophy* for raising this question.
- 15 Herbert Hart 'Prolegomenon to the principles of punishment.' *Proceedings of the Aristotelian Society* 60 (1959):1–26.
- 16 For discussion of related issues, see Bill Wringer 'Perp walks as punishment', *Ethical Theory and Moral Practice* 18 (2015):615–629.
- 17 Zach Hoskins *Beyond punishment* Oxford, Oxford University Press (2019).
- 18 Hoskins relies on considerations about hypothetical consent to argue for proportionality-based constraints. But as far as I can see, the argument he gives would apply to anyone who is subject to the criminal law of a given state and not only to those who are citizens in Duff and Marshall's sense.
- 19 Bill Wringer 'Must punishment be intended to cause suffering?' *Ethical Theory and Moral Practice* 16 (2013):863–877; 'Punishment, jesters and judges: A response to Nathan Hanna.' *Ethical Theory and Moral Practice* 22 (2019) :3–12.
- 20 Feinberg, J. 'The expressive function of punishment.' *The Monist* 49 (1965):397–423.
- 21 Christopher Bennett . 'The varieties of retributive experience' *Philosophical Quarterly* 52 (2002): 145–63.
- 22 Duff op. cit. 2001.
- 23 See footnote 2.
- 24 Other kinds of good may be characteristic of other kinds of community in which punishment has a place, such as a university or religious community: here, a duty to punish might be grounded in the values inherent in the relationships involved in membership of those communities. However, here we are concerned in particular with the place of punishment in the criminal law of a democratic republic.
- 25 Philip Pettit *On the People's Terms* Oxford, Oxford University Press 2012.
- 26 Lars Vinx pointed this out to me.
- 27 It might be more plausible to think that punishment aims at reintegrating offenders into a moral community. But a view of this sort would be in tension with Duff's rejection of the view that the criminal law typically addresses those over whom it claims authority in the name of a moral community (op. cit. 2018 chapter 3).
- 28 And as Duff seems willing to countenance. Duff op. cit. 2018 chapter 3.
- 29 Duff op. cit. 2018; Duff and Marshall op. cit. 2016, op. cit.y 2013; Duff op. cit. 2010.
- 30 Duff 2018 p. 122.
- 31 Duff and Marshall 2013 p. 207.
- 32 I thank a referee for the journal for drawing my attention to these differences.
- 33 Duff 2018 pp 122–3.

- 34 We might nonetheless wonder whether and how far the reciprocal nature of the host-guest relationship is duplicated in the juridical features of the citizen/noncitizen relationship. Reasons of space preclude a full examination of the issues that arise here, though I hope to discuss them in future work.
- 35 Hannah Arendt *Origins of Totalitarianism*. New ed. New York: Harcourt Brace Jovanovich (1973).
- 36 Joshua Glasgow 'The expressivist theory of punishment defended.' *Law and Philosophy* 34 (6):601–631 (2015) Thaddeus Metz 'How to reconcile liberal politics with retributive punishment.' *Oxford Journal of Legal Studies* 27 (2007):683–705; Bill Wringe 'Rethinking expressive theories of punishment: why denunciation is a better bet than communication or pure expression' *Philosophical Studies* 174 (2017): 681–708.
- 37 An earlier version of this article was presented in a workshop on Non-Paradigmatic Forms of Punishment at the MANCEPT workshops on Political Theory in September 2017 organized together with Helen Brown Coverdale. Subsequent versions have been presented to two Work in Progress seminars in the philosophy department at Bilkent University and a second MANCEPT workshop on punishment and legitimacy organized by Andrei Poama and Milena Tripkovic. I'm grateful to audiences on all these occasions, as well as extensive written comments from Lars Vinx, Ambrose Lee, Anthony Duff, Helen Brown Coverdale, and several anonymous reviewers for the *Journal of Applied Philosophy* all of which played a role in helping the article to assume its current form.