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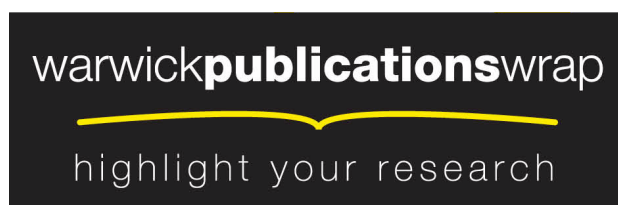
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## TERRORISM, PUNISHMENT, AND RECOGNITION

Henrique Carvalho\*

*This paper discusses some theoretical and practical challenges that terrorism poses to a normative theory of punishment, using a theory of recognition as the main basis for critique. Punishment exists in constant tension with principles such as individual autonomy and human dignity, which the contemporary legal framework strives to uphold. The limits of this tension are both defined and challenged by situations of radical deviance, of which the current paradigmatic case is terrorism. Theorists such as Antony Duff who attempt to define punishment as a communicative endeavor, and thus justified in the eyes of a liberal political community, find a hard case in the figure of the terrorist. But such an analysis misses an important point in relation to the social nature of autonomy, and such absence risks jeopardizing the whole communicative process that punishment presumably preserves. From the perspective of recognition, this paper aims to reflect upon the criminalization of the terrorist in a way that not only criticizes it, but also puts the aforementioned justification of punishment into question.*

**Keywords:** *Duff, recognition, terrorism, communication, punishment, dialectics*

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Man is necessarily recognized and necessarily gives recognition. This necessity is his own, not that of our thinking in contrast to the content. As recognizing, man is himself the movement [of recognition], and this movement itself is what negates (hebt auf) his natural state: he is recognition.<sup>1</sup>

There seems to be a paradox between the pragmatic framework of the institution of punishment and any theory that attempts to justify it. There are strong grounds to agree with Antony Duff that “[t]errorism poses a significant challenge to a liberal account of punishment that emphasizes its communicative character and that seeks to reconcile punishment with a proper recognition of our fellow citizenship with those whom we punish.”<sup>2</sup> After all, the figure of the terrorist itself stands as something of a conceptually open term to legal and social theory; when a liberal legal system tries to fit a real person into such a complex category, it finds it hard to develop a theoretical justification that still upholds principles of responsibility and individual autonomy.

This paper is an attempt to contribute to the debate regarding the proper limits of the criminal law and the justification of a system of punishment, focusing on how to or whether to criminalize the terrorist, through a critique of the work of Antony Duff. In his article “Notes on Punishment and Terrorism,” Duff engages with just such a problem, and the opening phrase of the text, quoted above, delineates with clarity the way in which he attempts to provide a pathway to a solution. The precise question he asks is “whether we should see terrorists as criminals . . . , or as enemy combatants . . . , or as ‘unlawful combatants.’”<sup>3</sup> The perspective he chooses to answer it is that of a normative theory of punishment (evidenced by the fact that he asks the question of how we *should* see terrorists, not how we *do* see them) based on liberal assumptions, but with a particular emphasis on its communicative character. Focusing on the possibility to “reconcile punishment with a proper recognition of our fellow citizenship with those whom we punish,”<sup>4</sup> this liberal communitarian theory sees punishment as an instrument of recognition. The specific relation between these concepts is arguably the key not only to understand the challenge that terrorism poses to such a theory, but also to

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1. G.W.F. Hegel, *Hegel and the Human Spirit: A translation of the Jena Lectures on the Philosophy of Spirit (1805–6) with commentary III (1983)*.

2. R.A. Duff, *Notes on Punishment and Terrorism*, 6 *Am Behav. Scientist* 758 (2005).

3. *Id.*

4. *Id.*

understand why the reflections that Duff offers can be seen as problematic in themselves.

Thus, two main issues are evidenced in Duff's discussion of terrorism, and constitute the focus of this paper. The first comprises the tensions in a theory of punishment that tries to reconcile punishment with communication through an account of the liberal claims that surround responsibility and individuality. To confront this problem, the paper will delineate aspects of Duff's theory and examine its assumptions in Part I. Then, once the core of these tensions are linked with the notion of recognition, Part II of the paper will sketch a theory of recognition based on a discussion of Hegelian dialectics.<sup>5</sup> Such a critical perspective on responsibility and punishment can, one hopes, elucidate problems found in liberal legal theory.

The second issue relates more specifically to Duff's initial claim, that terrorism poses a challenge to a communicative theory of punishment. Part III will address this issue through the particular perspective developed in the previous sections. It will propose that, more than terrorism posing a threat to such an account of communicative normativity, serious examination of the liberal assumptions behind responsibility and respect for the individual can pose a challenge to the concepts of terrorism and punishment as established within contemporary theory.

## I. PUNISHMENT, COMMUNICATION, AND RECOGNITION

This section will consider Duff's account of punishment as a communicative endeavour, and relate questions in his notion of communication to the underlying issue of recognition. Duff's argument about punishment in "Penance, Punishment and the Limits of Community,"<sup>6</sup> in a nutshell, is that "we should understand criminal punishment as, ideally, a kind of secular penance."<sup>7</sup> Although traditional theories regarding the justification of punishment have firmly stated that the criminal law should refrain from inquiring too deeply into the subject's guilt or conscience, separating

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5. Although this paper focuses on specific aspects of Hegel's work, there are different emphases on Hegelian scholarship, some more rationalizing, some more critical. See, e.g., Alan Brudner, *Punishment and Freedom* (2009).

6. R.A. Duff, *Penance, Punishment and the Limits of Community*, 5 *Punishment & Soc'y* 295–312 (2003).

7. *Id.* at 300.

harmful or offensive conduct from inner motives, there has recently been a series of theories that aim to produce a thicker account of punishment, among which is “the idea that punishment should involve such elements as repentance and atonement.”<sup>8</sup> The notion of penance is taken from religious contexts, in which it constitutes “something necessarily painful or burdensome that is required of or undertaken by the sinner because of a sin,” or in other words, “a punishment for that sin.”<sup>9</sup> It has many purposes, among which is the induction of a repentant understanding of the sin and the communication of that repentance to the wronged party, not particularly as a way of evidencing it but more as an essential part of such repentance, that is, “a way of taking the matter seriously.”<sup>10</sup> “Penance,” says Duff, “thus looks both backward, to the sin for which it is undertaken, and forward, to the restoration of the sinner’s relationships with those whom she wronged”<sup>11</sup>; this goes hand in hand with Duff’s intent to find a middle-ground between retributivist (backward-looking) and consequentialist (forward-looking) perspectives on punishment.<sup>12</sup> In both instances, he claims penance shows itself as intrinsically inclusionary, as it portrays the sinner as a member of a community, who violated its values and, through the act of penance, can repair the relationship with the community that the wrongful acts have damaged.<sup>13</sup>

The idea of punishment as secular penance, then, characterizes it as “a communicative process between the offender and the polity,” a way in which “to make moral reparation for the wrong that was done.”<sup>14</sup> It pursues multiple aims: communicating the deserved censure to the offender; making them recognize the wrong for which they need to make moral reparation; bringing them to make such reparation, which also constitutes a form of forceful apology; and finally, through this process, reconciling them with the community. It is even a reformatory enterprise, as in the offender’s recognition of their wrong, he would also “recognize the need to reform his future conduct.”<sup>15</sup>

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8. *Id.* at 298.

9. *Id.* at 299.

10. *Id.*

11. *Id.*

12. For more on this see R.A. Duff, *Punishment, Communication, and Community* (2001); R.A. Duff & David Garland, *A Reader on Punishment* (1994).

13. Duff, *supra* note 6, at 299.

14. *Id.* at 300.

15. *Id.* at 300–301.

Although Duff does not go into detail about the communicative character of his theory or about his precise notion of community in the article presently under analysis (such details can mainly be found in his book *Punishment, Communication, and Community*,<sup>16</sup> and will be scrutinized later in this paper), he engages with a series of criticisms he expects to be directed by liberals against penance playing a proper role in a system of state punishment. This engagement is very illuminating in regard to the particular way in which he envisages that a system of punishment would address its subjects. He anticipates it might be argued that, as previously suggested, penance not only addresses the offender's conduct, but their moral attitudes in a deeper sense. Such invasion of the individual sphere can be accepted within a religious community, but not as a general exigency, for the following reasons: First, members of a religious community are free to leave it if they so choose, whereas citizens cannot separate themselves from the State. Second, because the sinner is a voluntary member of the community, they have chosen to submit themselves to its values, whereas a citizen does not have to accept all the values of their political community. Third, the confession involved in penance itself is voluntary, whereas punishment cannot be conditional on voluntary confession. And fourth, the sinner is still able to refuse to undertake the penance—at risk of excommunication or other kind of exclusion from community—whereas punishment is not and could not be optional.<sup>17</sup>

Duff addresses these potential objections in an explanation divided into three parts. First he claims that, whereas penitential punishment “seeks to engage [the offenders’] moral attitudes and feelings, it does not (it should not) seek to coerce those attitudes and feelings”; instead, “it aims to persuade, rather than to coerce, their moral understanding”<sup>18</sup>; it is, as he puts it, “an exercise in forceful moral communication.”<sup>19</sup> Second, “criminal punishment need not and should not be as ambitious as religious punishment”<sup>20</sup>; the criminal law focuses instead “on the wrongfulness of the criminal deed, on the wrongful attitudes or concerns directly manifested

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16. R.A. Duff, *Punishment, Communication, and Community* (2001).

17. Duff, *supra* note 6, at 301–2.

18. *Id.* at 302.

19. *Id.*

20. *Id.* at 303.

in that deed,”<sup>21</sup> and does not need to reach as deep as religious punishment, aimed to affect the soul of the offender and thus going over the border set by liberal conceptions of privacy. Third, finally, Duff argues that the expectation that the state “show its citizens the respect due to them as responsible moral agents” leads to the conclusion that the state “must address them in the kind of moral language that is central to this account of punishment.”<sup>22</sup> Thus, the criminal law should be ready to expose the wrongfulness involved in crime, and to censure this wrongfulness in a way that allows citizens to recognize it and repent. More than a practical suggestion, communicative punishment would be a requirement; a “communicative system of punishment,” Duff argues, “is what we are owed.”<sup>23</sup>

To try and understand the weight of Duff’s tripartite defense of his theory of punishment, it would be useful to examine his three claims in the inverse order in which they were presented. To begin, then, within the claim that a communicative system of punishment is owed to citizens lies the assumption that the state ought to respect its citizens as responsible moral agents. Particular conceptions of responsibility and agency come thus to the fore, embedded within liberal philosophy in principles such as individual autonomy, rationality, and self-determination.<sup>24</sup> Duff has long struggled with the attempt to find a compromise between individualist requirements for agency and rationality in the criminal law, and communitarian notions of moral contingency in responsibility, suggesting such compromise can be found in the idea of the citizen as a moral agent bound by the community of the state.<sup>25</sup> Since Duff’s conception of citizenship sees the citizen necessarily as a moral agent, Duff sees individual autonomy and freedom not only as rational requirements, but also as values shared and sustained by a liberal community.<sup>26</sup>

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21. *Id.*

22. *Id.*

23. *Id.*

24. A more detailed discussion of the connection between these principles and the idea of responsible agency can be found in Alan Norrie, *Crime, Reason and History* (2001), and Andrew Ashworth, *Principles of Criminal Law* (2009).

25. See, e.g., Duff, *supra* note 16, ch. 2; R.A. Duff, *Answering for Crime*, ch. 2 (2009); Alan Norrie, *Punishment, Responsibility, and Justice*, ch. 5 (2000).

26. Duff, *supra* note 16, at 35.

So, if punishment seeks to recognize the citizen as a moral agent, that is, to be consistent with what Duff calls a “liberal political community,”<sup>27</sup> it has to be communicative. In *Punishment, Communication, and Community*, Duff argues against the idea of an “expressive” purpose in punishment, and for “its communicative purpose: for communication involves, as expression need not, a reciprocal and rational engagement.”<sup>28</sup> So, communication “aims to engage that person as an active participant in the process who will receive and respond to the communication, and it appeals to the other’s reason and understanding.”<sup>29</sup> From what this short description of communication indicates, it seems that Duff’s normative conception of punishment would indeed be very different from actual systems, and one could even go further and wonder whether the two would be at all compatible.

Second, the critical edge enunciated by the first claim does not stand alone; it is followed by the claim that the criminal law should focus on the “wrongfulness” of the offender’s deed.<sup>30</sup> To think in terms of wrongfulness without deeply qualifying it is, before anything, to imply a specific and previous moral judgment concerning the attitude of the offender, dependent on the shared values implied by his conception of community. The way in which the wrongful nature of the conduct is defined carries the weight of Duff’s communitarian perspective on punishment, for the criminal law is interested in “public” wrongs, which are to be understood as “wrongs in which ‘the public,’ the community as a whole, is properly interested”<sup>31</sup>; such public interest would be assessed and reflected by the state, through its democratic structures, and fed into the system of punishment.

Third, finally, upon determining such wrongfulness and identifying it in the offender’s conduct, the system would then engage in forceful moral communication. Duff’s connotation of this idea is that, although punishment is to be imposed on offenders against their will, it should be aimed at persuading, rather than coercing, their moral understanding. It must provide a clear moral message to the offender, and in Duff’s words, “We can try to force them to hear the message that their punishment aims to

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27. *Id.* at 79.

28. *Id.*

29. *Id.*

30. Duff, *supra* note 6, at 303.

31. Duff, *supra* note 16, at 61.



convey: but we must not try to force them to accept it—or even to listen to it or to take it seriously.”<sup>32</sup>

Despite the image of nonauthoritarian communication presented here, there is no doubt that the two poles of the communicative relation are not symmetrical. In *Punishment, Communication, and Community*, Duff claims that one aspect of communication is that it also seeks “to affect future conduct” by declaring some kinds of conduct as wrong in order “to persuade citizens (those who need persuading) to refrain from such conduct.”<sup>33</sup> Suddenly the earlier reciprocal aspect of communication seems to lose focus in favor of a more pragmatic notion of persuasion. Although the idea of persuasion can be nuanced in ethical, practical, and strategic ways, Duff is clear that the law aims at persuading the citizen to refrain from some conduct. The idea here is not to engage with the criminal in reciprocal dialogue; it is to convince them of the wrongfulness of their actions. Dialogue has a limited, one-way quality, and the “communicative” aspect is merely a means to achieve persuasion; it aims “to bring citizens to recognize and to accept”<sup>34</sup> the wrongfulness of their conduct, but says nothing of recognizing any of the citizen’s claims in return. If the law identifies any “direct manifestation” of “attitudes or concerns” that fit preestablished moral considerations, the citizen’s position is taken to be “wrongful.”<sup>35</sup>

What comes out of this framework is that the offender is forcefully exposed to a moral message that they are deemed to be able to understand and to accept—and even though they are not forced to do either, the legal system ignores any argument to the contrary of its predetermined moral judgment. The justification for that is that the wrongfulness is public—that is, it represents the community’s (including here the offender’s) interests—and even if the law is basically saying to the offender “you are wrong, whether you accept it or not,” the process is deemed reciprocal. But such a formal recognition of the autonomy of the offender does not seem to fit into Duff’s previously bold and rather substantial enunciation of what communication entails—“a reciprocal and rational engagement” of the agent “as an active participant in the process who will receive and respond to the communication”<sup>36</sup>; it would

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32. Duff, *supra* note 6, at 302.

33. Duff, *supra* note 16, at 80.

34. *Id.* at 81.

35. Duff, *supra* note 6, at 303.

36. Duff, *supra* note 16, at 79.

be better understood as the previously eschewed notion of expressive punishment or, even worse (because it aims to persuade), as forced acceptance or imposition, which is not far short of indoctrination. The offender's options are reduced either to consent with the discourse contained within the criminal law or to remain silent, to submit; the pre-judgment contained in the wrongfulness of their actions already predetermines what they may be allowed to say, should they choose to "communicate." Such an authoritative notion of communication can hardly be said to be reciprocal.

If Duff is right that we—as members of the political community—are owed a communicative engagement on the part of the legal system, the core of the matter, then, becomes the question, can his normative theory of punishment be up to the task of doing justice to the assumptions within his own conception of the liberal legal principles? Not only that, if this claim is to be taken seriously, can any system of punishment achieve this level of communication with the offender? That is, can it recognize those it aims to punish as responsible moral agents and engage with them in reciprocal dialogue, instead of merely forcing them to unidirectionally accept the system's rules?

Punishment seems to derive its justification from its backward-looking relation to the crime and its forward-looking relation to the preservation of community bonds; both relations seem to be dependent on some notion of communication, which is in itself dependent on one's conception of political community. The communicative engagement, by its turn, aims at recognizing the subject as a responsible moral agent. If Duff's theory "seeks to reconcile punishment with a proper recognition of our fellow citizenship with those whom we punish,"<sup>37</sup> such recognition seems to ground responsible moral agency, and thus deserves special attention from a critical examination of the framework in which punishment operates. Recognition is arguably the key to understanding the problematic relationship between punishment and communication.

## II. THE NATURE OF RECOGNITION

If we are going to take the idea of recognition seriously, there is no better way to start than with Hegel, whose work in the topic has retained its

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37. Duff, *supra* note 2.

significance in contemporary social theory. The quote at the start of this paper refers to Hegel's *Jena Lectures on the Philosophy of Spirit*,<sup>38</sup> the most comprehensive of his texts on recognition, developed right before his work on the *Phenomenology of Spirit*.<sup>39</sup> Hegel's account of recognition is one of the greatest modern influences on the idea of mutual interdependence in society and on communitarian challenges to atomistic notions of individuality.<sup>40</sup> From the quote it is possible to highlight the idea of solidarity, as "[m]an is necessarily recognized and necessarily gives recognition,"<sup>41</sup> and the idea that recognition—as a constituent of human agency—is intrinsic to human being: "This necessity is his own . . . man . . . is recognition."<sup>42</sup> Taking these two initial thoughts into account, this section will first look into a discussion of recognition from Duff's perspective on the term. It will then move on to consider how recognition is linked with punishment in Hegel's political philosophy, before delving into a deeper reflection on the concept through Axel Honneth's comment on Hegel's early critique of the social contract<sup>43</sup> and Hegel's account of "Independence and Dependence of Self-Consciousness: Lordship and Bondage"<sup>44</sup> in the *Phenomenology of Spirit*, along with Alexandre Kojève's own interpretation of it.<sup>45</sup>

In *Punishment, Communication, and Community*, Duff talks about "the 'recognition' of fellowship . . . in a political community,"<sup>46</sup> contrasting this idea with the liberal individualist conception of choice, which emphasizes the volitional character of choosing what to believe, what values and principles to accept. Duff sees recognition as "basic to moral life and thought" as "[w]e must attend to the world and to other people as sources of moral demands on us . . . and we must recognize others as our fellows."<sup>47</sup> The emphasis in this perspective is precisely that such bonds, such recognition of fellowship, is "given in moral experience,"<sup>48</sup> something that can be rationally questioned but cannot be denied or set

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38. Hegel, *supra* note 1.

39. G.W.F. Hegel, *Phenomenology of Spirit* (1977).

40. See, e.g., Charles Taylor, *Sources of the Self* (1992).

41. Hegel, *supra* note 1.

42. *Id.*

43. Axel Honneth, *The Struggle for Recognition* (1995).

44. Hegel, *supra* note 39, at III–19.

45. Alexandre Kojève, *Introduction to the Reading of Hegel* 3–30 (1980).

46. Duff, *supra* note 16, at 53.

47. *Id.*

48. *Id.*

aside: “I might not be required by either psychology or logic to accept these bonds . . . but I am, morally, stuck with them.”<sup>49</sup> This goes hand in hand with Duff’s idea of wrongfulness as a moral demand from the community to the individual, although the idea that these demands are given in moral experience is arguably something for which Duff does not properly account.

Hegel, however, provides in his *Philosophy of Right*,<sup>50</sup> his main work in political philosophy, why the notion of recognition is so important to the constitution of crime and punishment. Recognition is in the core of the idea of right, reflected mainly on the notion of property, where “[t]he embodiment which my willing thereby attains involves its recognisability by others.”<sup>51</sup> Such recognition is guaranteed by the realization of a contract that represents the common will of the parties. The idea of wrong appears in Hegel as a negation of the common, universal will made by a particular party to the contract.<sup>52</sup> The nature of the wrong, then, is to go against the common will established in the contract. What is important to realize here—something with which Duff would probably agree—is that “[w]rong thus presupposes the establishment and existence of some mutually recognized common will that finds expression in contract”<sup>53</sup>: without a contract, without some previous agreement, there is no wrong.

The worst kind of wrong to Hegel is the wrong of transgression, or crime; it is “characterised by a criminal’s rejection of another will’s capacity for rights”<sup>54</sup>; that is, it is an open negation of someone else’s rights. Punishment comes thus to the fore as a way of asserting the nullity of crime’s negation of rights, as right “reasserts itself by negating this negation of itself.”<sup>55</sup> Basically, when the criminal betrays the common will, he creates a law that can only be good for himself, and then punishment returns the criminal’s own law back to him, thus evidencing the wrongfulness of his actions and reaffirming the right contained in the common will. The most relevant point here to a discussion of recognition is precisely

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49. Id.

50. G.W.F. Hegel, *Hegel’s Philosophy of Right* (1967).

51. Id. at 45.

52. Id. at 64.

53. Robert R. Williams, *Hegel’s Ethics of Recognition* 152 (1997).

54. Thom Brooks, *Hegel’s Political Philosophy* 43 (2009).

55. Hegel, *supra* note 50, at 64.

to understand that punishment presupposes a common will, a social contract that is grounded on mutual recognition.

This social contract, by its turn, is an essential part of an established political community. Hegel criticized views of the social contract such as Hobbes's, saying that the contract breaks with the state of nature as if introducing an all-new social order that completely contradicts the old one; Axel Honneth identifies especially in Hegel's early work a deeper focus on intersubjectivity. When Hegel criticizes the idea of a social contract constituting the basis for the legal person, "Hegel wishes to show that the emergence of the social contract—and, thereby, of legal relations—represents a practical event that necessarily follows from the initial social situation of the state of nature itself."<sup>56</sup> In other words, in the very presupposition of a social contract organizing individual conduct, "theoretical attention must be shifted to the intersubjective social relations that always already guarantee a minimal normative consensus in advance"<sup>57</sup>; Hegel asserts the necessity "to integrate the obligation of mutual recognition into the state of nature as a social fact."<sup>58</sup>

Instead of individuals receiving a moral demand of fellowship from a community, Hegel's critique of the social contract inserts a dialectical movement in this relation—as fellowship is also what generates individuality. Hegel does not deny that conflict is intrinsic in basic human relations, but what he challenges is the nature of this conflict. Whereas a classic interpretation of the state of nature would suggest a conflict of claims based on "struggles for self-assertion," the Hegelian reading points rather to a process in which "individuals learn to see themselves as being fitted out with intersubjectively accepted rights," inscribed in a "struggle for recognition."<sup>59</sup> It happens that the struggle is not merely defined by the opposing subjects; it also defines them in return. What Honneth points out is that it is incorrect to see the antagonists in the state of nature as isolated, egocentric beings, for "the social meaning of the conflict can only be adequately understood by ascribing to both parties knowledge of their dependence on the other."<sup>60</sup>

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56. Honneth, *supra* note 43, at 41.

57. *Id.* at 42.

58. *Id.* at 43.

59. *Id.*

60. *Id.* at 45.

It is precisely this interdependence, evident in Hegel's work, that would justify the need to address wrongs in order to preserve the mutual recognition guaranteed by right. The problem that this paper aims to highlight, though, is that the justification of punishment comes from the nature of wrong as a breach of the common will; wrong is taken as a "wilful disregard for mutual recognition"<sup>61</sup> made by a rational being voluntarily breaking a previous contract in which they were fully recognized. It is imperative to ask, then, whether this account is coherent with the way in which individuals are recognized in social conditions.

The key to answer this question arguably lies not in Hegel's work in political philosophy, but in his account of the development of self-consciousness in the *Phenomenology of Spirit*. Though systematic accounts of Hegel's work tend to consider the *Phenomenology* as a preliminary work before his encyclopaedic systematization of themes and concepts,<sup>62</sup> it not only provides the most elaborate account of recognition as part of the movement of Spirit, but it also examines the aim of the process of recognition and, of particular interest to this paper, instances in which the process can deviate from its aim.

### A. Recognition and Self-Consciousness

Alexandre Kojève probably makes the most sophisticated account of Hegel's development of Spirit through History as a process of recognition, bringing together some of the elements of Hegel's earlier works on the topic through the Marxist elements in his interpretation. It starts with the idea that "Man is Self-Consciousness"<sup>63</sup>; what constitutes humanity, human subjectivity, is the fact that man is (or rather has the potential to be) "conscious of himself, of his human reality and dignity."<sup>64</sup> This essential subjectivism is implied in the essence of contemporary liberal philosophical conceptions

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61. Brooks, *supra* note 54, at 44.

62. See, e.g., Brooks, *id.* Dudley Knowles (Hegel and the Philosophy of Right, 2002), on the other hand, acknowledges the importance that the development of recognition in the *Phenomenology* has for Hegel's political philosophy; even though he claims that in the end Hegel falls short of his own demands for mutual recognition in the *Philosophy of Right* (*id.* at 106); this paper agrees with Knowles on this point, and aims precisely to develop how punishment in particular falls short of such demands.

63. Kojève, *supra* note 45, at 3.

64. *Id.*

of responsibility and autonomy; what is unique in Hegel, however, is his argument that recognition underlies self-consciousness.

The development of self-consciousness is for Hegel part of a long process of awareness, with alternating moments of integration and differentiation between subject and object. Understanding this genealogy of self-consciousness, the “origin”<sup>65</sup> of subjectivity and the philosophical conditions for its flourishing, then, provides an intrinsic tool to understanding human being in itself. The dialectics of self-consciousness, which informs this understanding, is essentially the movement between knowing and being or, in Kojève’s account, between knowledge and desire. Desire always presents itself as a lack: man desires what he lacks, what he is not, and thus by desiring, man acknowledges his own limits; and through these limits he sets up the boundaries of his own being, he defines himself. Whereas knowledge seems to bring forth synthesis and integration, desire initially highlights monadic antagonism and separation.

But “[i]n contrast to the knowledge that keeps man in a passive quietude, desire dis-quiets him and moves him to action”<sup>66</sup>; so man is moved to act upon the world and satisfy his desire, to negate his lack. “Thus, all action is ‘negating,’”<sup>67</sup> is transforming the world in pursuit of the satisfaction of a desire. This mechanics can be seen in simple examples like feeding, in which the lack of sustenance leads to the destruction (transformation, “real negation”<sup>68</sup>) of food for the satisfaction of hunger. Hegel refers to the developing subject in this particular moment as “life,” and this desire for survival distinguishes the subject from their surroundings through this process of active negation, in which “Life in the universal fluid medium, a passive separating-out of the shapes becomes, just by so doing, a movement of those shapes or becomes Life as a process.”<sup>69</sup> This process is, for Hegel, the “genus”<sup>70</sup> of consciousness and individuality.

Just as life as a process turns a passive knowledge of one’s surroundings into an active participation in the world (moved by the feeling of lack, desire), consciousness reflects upon the contrast between the world and itself. It is only through this comparison, through this process, that consciousness

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65. *Id.*

66. *Id.* at 4.

67. *Id.*

68. Cf. Norrie, *Dialectic and Difference* 25 (2010).

69. Hegel, *supra* note 39, at 107.

70. *Id.* at 109.

is able to know anything about itself—that it is able to become self-consciousness. It is desire—the feeling of lack, of difference—that puts this shifting of knowledge in motion, and it is precisely the action to satisfy a desire that transforms the subject’s relations with the world. This whole process of interaction shapes not only the subject’s knowledge of the world, but also their knowledge of themselves.

Thus it is, for example, the desire of self-preservation and proliferation, and the specific ways in which their satisfaction is possible, that teach the subject about their animal nature. The main point about recognition, however, is that to become conscious of their human nature, subjects need something in the world to reflect such humanity back to them; they need other human beings. Therein lies the limit of desire and the secret of the process of self-consciousness: to know itself, it must have itself as an object. In other words, a subject can only be aware of their own individuality if they can compare themselves to another subject. Kojève will say that “[h]uman Desire must be directed towards another Desire,”<sup>71</sup> toward another desiring subject, following Hegel’s claim that “[s]elf-consciousness achieves its satisfaction only in another self-consciousness.”<sup>72</sup>

Thus “[s]elf-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged.”<sup>73</sup> This statement gives the full thrust of Hegel’s critique of the state of nature; for the subject is only a proper individual through the acknowledgment of kinship with another individual—true individuality exists only within a social reality. Self-consciousness needs to “come out of itself”<sup>74</sup> and see its own subjectivity reflected in another being; that is what constitutes and initiates what Hegel calls the “process of Recognition.”<sup>75</sup> There is a necessary reciprocity in this movement, as it only works if one subject can recognize itself in the other. “Action by one side only would be useless because what is to happen can only be brought about by both”<sup>76</sup>; the process of self-consciousness must appear as a middle term through which subjects “recognize themselves as mutually recognizing one another.”<sup>77</sup>

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71. Kojève, *supra* note 45, at 5.

72. Hegel, *supra* note 39, at 110.

73. *Id.* at 111.

74. *Id.*

75. *Id.*

76. *Id.* at 112.

77. *Id.*



The history of subjectivity, according to this particular narrative, leads to the conclusion that the essence of human desire is to place man as the end of desire itself. This qualitatively distinct human desire for individuality (self-consciousness) can only be properly satisfied through recognition. “All human Desire is a function of the desire for ‘recognition.’”<sup>78</sup> Since such recognition is necessarily intersubjective, it has to be reciprocal. There is an intrinsic solidarity in this process, for to be an individual—to be acknowledged and valued as a subject—one needs to belong to a society of individuals. The mutual recognition implied in the social contract is not merely engendered by individuals; it shapes individuality as well.

### B. Recognition and the Life-and-Death Struggle

There is, however, a problem with recognition. Man needs to be mutually recognized for his subjectivity to be realized; while he may be aware of his own subjectivity, this certainty is not yet concrete, because “for an idea to be a truth, it must reveal an objective reality.”<sup>79</sup> And the only situation in which this objective reality can be achieved is when the subject is equally recognized by another. Although human individuality can only exist through recognition of the other’s equally human desires, there still exists the matter of the satisfaction of such desires. The acknowledgment of another desiring subject, as Hobbes implied in his *Leviathan*,<sup>80</sup> may simply mean that there are two people in the world desiring something that may not be enough for both; the anxiety behind this threat looms ever present in the process of recognition, which takes the shape of a struggle. So whereas the desire for recognition generates self-consciousness and individuality, the pursuit of this desire leads to conflict.

The ideal situation is likely one in which human values sustain a mutual understanding of reality, which can thus be truly understood as a social reality—or, in Duff’s terms, a community in which all of its members are properly and equally recognized. But this community, which in the abstract is a presupposition of every social interaction, can only be concretely (objectively) realized in the end of a process of awareness and solidarity, and what is seen throughout history, instead, is a variety of incomplete,

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78. Kojève, *supra* note 45, at 7.

79. *Id.* at 11.

80. Thomas Hobbes, *Leviathan* 83 (1996).

partial, one-sided forms of recognition. The acknowledgment of a mutual desire does not necessarily lead to cooperation toward mutual satisfaction; History usually tells a story in which the opposite is the rule.

So what starts as a “pure” conception of recognition results in a process in which recognition goes wrong, since it is not (yet) properly grounded in reciprocity. Hegel’s account of the mythical first encounter between two subjectivities takes the form of a life-and-death struggle that results from the competitive quality inherent in opposing claims of subjectivity. But the satisfaction of recognition necessitates an objective reality, as said before, and “self-consciousness learns that life is . . . essential to it.”<sup>81</sup> When this happens, the struggle becomes one of domination as one subject (the lord, the Master) imposes their recognition over another (the bondsman, the Slave)—“one being only recognized, the other only recognizing.”<sup>82</sup> The lord’s essential nature is “to be for itself,” to be independent, whereas the bondsman’s nature “is simply to live or to be for another,”<sup>83</sup> to live in submission.

It may seem at first that this unequal recognition is unsatisfactory because it is unfair that only one side is recognized. Although this may be true, the full thrust of Hegel’s critique is that, in fact, none of the parts to the conflict is fully recognized, not even the lord, as “for recognition proper the moment is lacking, that what the lord does to the other he also does to himself, and what the bondsman does to himself he should also do to the other.”<sup>84</sup> When the lord is recognized by the bondsman, he is recognized by someone whose autonomy he does not fully recognize, and so the bondsman’s recognition of the lord is also imperfect—“For he can be satisfied only by recognition from one whom he recognizes as worthy of recognizing him.”<sup>85</sup> To be properly recognized, one needs to properly recognize: that is the essence of concrete reciprocity.

The mutuality inherent in Hegel’s account of recognition points directly to a substantially communicative, relational framework. As Honneth points out in his argument,<sup>86</sup> a recognitive social theory should undoubtedly be

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81. Hegel, *supra* note 39, at 115.

82. *Id.* at 112.

83. *Id.* at 115.

84. *Id.* at 116.

85. Kojève, *supra* note 45, at 19.

86. See the discussion above and see *supra* notes 49–53.

communicative. But what Hegel's and mainly Kojève's<sup>87</sup> dialectics of recognition point out is that the recognition that underlies communication does not guarantee solidarity, and the process can go wrong. As we saw earlier, however, punishment requires the preexistence of a common will, of a community. It is not clear, however, how the process of recognition evolves from the Master-Slave dialectic to a situation of concrete mutual recognition. Hegel does not resolve this problem in the *Phenomenology*, showing instead that this dialectic repeats itself at higher levels of self-consciousness,<sup>88</sup> and in his post-phenomenological work he does not address this problem directly. But this illustration of the process of recognition can arguably be the key to understand the challenges and paradoxes that punishment presents to a liberal society.

In the *Philosophy of Right*, Hegel examines the theory of punishment from a perspective of abstract right; his theory is therefore still limited to an abstract, relatively subjective level, and Hegel himself points to the fact that "acts of punishment at the level of abstract right are acts of revenge, as there is no designated penal power."<sup>89</sup> He states that punishment in the abstract is in fact equated to crime as, without a common will to legitimate it, the right that punishment strives to preserve is as contingent as the right the criminal evokes in their actions. In the abstract, both crime and punishment display the same disregard for the other party's claim to right. That is why Hegel will say although there are many considerations to be taken in a theory of punishment, the essential point is to examine the fact that "all these considerations presuppose as their foundation the fact that punishment is inherently and actually just."<sup>90</sup>

There is a gap between this abstract account of punishment and what systematic readers of the *Philosophy of Right*<sup>91</sup> will consider Hegel's concrete account of punishment when he considers the administration of justice. There the focus of punishment changes from a direct relation with the wrongfulness of the criminal's deed to a relation with the state and condition of civil society. Indeed, Hegel points to the fact that the stability

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87. As briefly discussed above, Kojève's account of the dialectics of recognition radicalizes Hegel's account with a focus on a material dialectic through the use of a Marxist perspective. For more, see Kojève, *supra* note 45, at 3–30.

88. Williams, *supra* note 53, at 68.

89. Brooks, *supra* note 54, at 44.

90. Hegel, *supra* note 50, at 70.

91. See, e.g., Brooks, *supra* note 54.

or sense of security of a society can directly influence how punishments are envisaged,<sup>92</sup> and this represents a shift in what is considered to be a mainly retributive theory of punishment.<sup>93</sup> Although it seems that the administration of justice retains a retributive core, it is certain that the “penal code, then, is primarily the child of its age and the state of civil society at the time.”<sup>94</sup>

But what if the state of civil society in particular circumstances or in a particular context is not in a state of mutual recognition? If it is acknowledged that structural problems hinder the presumption of a common will, the justification of punishment as a communicative endeavor is not very far from the Master’s illusion that the submission of the Slave will grant him the recognition he desires; it is a situation of false consciousness.

Concrete recognition would require the conditions for a mutual satisfaction of human desires: structural problems of injustice and inequality would need to be resolved for it to occur. This structural disharmony generates dissonance in ethical and moral expectations. Recognition, taken seriously as the core of genuinely reciprocal communication, raises important questions for thinking about an account of punishment as communication.

### III. PUNISHMENT AND THE LIMITS OF COMMUNITY

We have now considered Duff’s account of punishment as communication, noting his underlying commitment to recognition, and examined in some depth the account of recognition provided by an examination of Hegel’s work. The possibility that recognition can go wrong appeared as problems in the recognition process that are related to questions of social structure and justice, and that hinder the justification of punishment. This

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92. Hegel, *supra* note 50, at 140.

93. Other commentators such as Dudley Knowles (*supra* note 62) argue that it is precisely this instance of administration of justice that will give coherence and substance to Hegel’s theory of punishment, since it brings together the restoration of right and the particular right of the criminal. But the focus to the subjective part still is the fact “that the criminal must recognize that his punishment is legitimate *in so far as it procures the restoration of right*” (*id.* at 156). Such restoration is not only dependent on social mechanisms that “demonstrate to all, honest and criminal citizens alike, the nature of their rights” (*id.* at 157), but also depend on the common will previously mentioned.

94. Hegel, *supra* note 50, at 140.

third section now returns to Duff's normative theory of punishment in light of this discussion of recognition.

Responsibility, autonomy, and communication can all be tied together and examined through a perspective of recognition. Duff's claim that we are owed a communicative engagement on the part of the legal system refers to the image of the abstract individual that the legal framework strives to uphold, and is in league with the ideal of mutual recognition. What Duff fails to recognize, however, is that these theoretical aspirations are not in harmony with the practices and categories of punishment. Punishment, even if conceptualized as forceful moral communication, carries within itself a certain logic of violence and domination; the punisher is only concerned with communication as a way to make the deviant conform to preestablished rules, and as thus cannot fully recognize their agency. There is a paradox within the system, between the paradigm it uses to justify its practices and the function and consequences of the practices themselves. Recognition seems to indicate that force goes against reciprocal communication, and there is no punishment without force.<sup>95</sup>

A theory of recognition, on the other hand, shows that socialization occurs in different levels or dimensions. First, a critical theory of recognition reformulates the nature of the social contract, by placing individuality as dependent on sociability; individuals do not gather to form a society, they are generated through social coexistence. Second, although sociability is inherent to human beings, the acknowledgement of a multitude of desires leads to a struggle for recognition where there is a clash of competing claims and expectations. And, third, although the struggle for recognition generates situations of violence and domination, the inherent solidarity in human sociability implies that the desire for recognition can only be fully satisfied in a condition of mutual recognition, where one subject is fully recognized by someone they fully recognize. It is quite understandable that a liberal legal order would seek to realize mutual recognition, but the very existence of the categories of crime and punishment suggests that the struggle for recognition still persists, since the recognition that such categories provide can at best be partial and unequal.

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95. Andrew von Hirsch has a similar critique of Duff's theory in relation to this point, although not from a perspective of recognition. See A. von Hirsch, *Proportionate Sentences: A Desert Perspective*, in *Principled Sentencing: Readings on Theory and Policy* 115 (A. von Hirsch, A. Ashworth, & J. Roberts eds., 3d ed. 2009).

Duff's communicative logic seems to begin from the end; that is, it seems to start with the assumption that a liberal political community is in a situation of mutual recognition, and that deviance drags the individual back to the struggle. Instead, what seems to be the case is that the legal framework embodies values and expectations that are in many cases still struggling to be fully recognized, and it finds in the deviant's values a competing claim. But as the parable of the Master and the Slave shows us, forceful communication not only fails to recognize the criminal, but it also does the system itself a disservice. Although there is certainly some logic behind the activity of punishment—and it seems to use the language of autonomy and recognition, which can be a positive thing—such logic necessitates rather than assures solidarity and mutual recognition.

The perspective that individuality is socially generated—and precisely because of that, it is not generated equally in different circumstances—elucidates that the struggle for recognition occurs between differentiated subjectivities, which due to their distinct social contexts do not share a common social, political, or legal understanding. The legal framework and its abstract individual, along with its image of an abstract (concretized) political community, fail to account for this social complexity. The legal framework assumes that every individual is an integral part of this political community—that is, that the struggle for recognition as a social reality is basically over—and, by assuming that every individual shares the values it represents, punishment does seem to be a legitimate endeavor.<sup>96</sup> The only ripple in this otherwise placid lake of theory, however, is that if every individual is fully recognized within a set of values that they fully understand and accept, then they would not desire anything outside of the system, and then punishment would not be necessary—or would be reserved to a select group of unenlightened few. The very fact that punishment exists and that society (even if reluctantly) accepts its categories and practices suggests that the community to which the legal system aspires is not yet fully realized.

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96. This seems also to be the case in Hegel's conception of the state, although interpretations of Hegelian scholarship would also suggest that this is Hegel's description of how the state sees itself rather than a normative description of what would happen in an ideal society (see, e.g., Robert Fine, *Political Investigations* (2001)). Even so, Hegel still finds many problems in modern society, such as the situation of endemic poverty where it "immediately takes the form of a wrong done to one class by another" (*supra* note 50, at 277–78) and "there is a consequent loss of the sense of right and wrong" (*id.* at 150).

Instead, what transpires is that the offender has a desire that the legal system is presently unable or unwilling to recognize. Although it is very likely that the offender's desire is being expressed in an inappropriate way (it is in itself at best an example of forceful moral communication), the punisher's answer seems to suffer from the same vice. The system feels threatened, and so it threatens (or retaliates) in return. One way to break out of this vicious circle would be to concretely communicate the recognition of the offender's humanity, of their value, and this can arguably only be done through a real dialogue that properly addresses the social context in which the offender's actions are situated. But this seems highly incompatible with the way in which punishment operates. The normative assumption of the deviant's expectations as wrongful (the fairness of which must be examined, but such examination is beyond the scope of this paper) is unable to provide a reciprocal engagement; it represses the existence of the struggle for recognition. This is indeed an issue for how contemporary criminal justice systems are envisioned and theorized: by preestablishing the wrongfulness of some course of action and only then pursuing the relationality between individual and community, theories of punishment seem to invert the logic of recognition, thus rendering the proposed communication inexistent at worst, insufficient—because it is one-sided—at best.

This is of course not to say that replacing the categories of punishment is something simple or even presently possible; neither it is to say that the fact that categories of punishment contradictorily reflect aspirations for mutual recognition is something only to be regretted. The main point is to address the fact that, if a theory of punishment is to be grounded upon notions of responsibility that strive to respect concrete individuality, that theory needs to be aware that communication is a project, and proper recognition still an aspiration. Otherwise, its categories start to challenge and contradict themselves, and the system finds itself working against the same principles it allegedly preserves. Duff's discussion about the terrorist provides an example of this paradox.

### A. Terrorism and Recognition

Duff concludes his article about punishment as secular penance with a question concerning what he calls "the limits of community." He starts by saying that punishment, as an essentially inclusionary activity, "is supposed to constitute a mode of moral reparation through which [the offender] is to

be reconciled with those he has wronged—through which the bonds of political community are to be repaired and strengthened.”<sup>97</sup> This leads to a question of “whether there are any crimes whose character is such that we need not, or should not, or cannot maintain such community with the offender”<sup>98</sup>—that is, crimes that negate this inclusionary character of punishment but do so in a “legitimate, appropriate or even necessary”<sup>99</sup> way, since the very nature of the crime denies the possibility of community. Duff presses the issue by suggesting that many kinds of punishment reflect precisely that assumption, such as capital punishment or life imprisonment without possibility of parole, since they do not leave open any real possibility of reintegration of the offender with the community. He rejects a general application of such categories of punishment under the limits of his theory, for “[w]ith at least the vast majority of crimes and criminals, we should continue to see and to treat them as fellow members of the normative community who must be punished, but whose moral standing as members is not to be denied or qualified.”<sup>100</sup> But then he presents the possibility of exceptions to the rule, in which some extreme forms of wrongful conduct might be enough to give rise to an unrepairable breach of community.

Duff argues that three particular scenarios exemplify the reasoning behind this compromise. The first inquires about some crimes being so terrible in themselves that they preclude any possibility of the restoration or continuation of community between criminal and society; the second corresponds to criminal careers, that is, the “persistent commission of dangerous and violent crimes, which display in the end such an incorrigible rejection of the community’s central values” as to lead to the aforementioned breach; and the third case finally refers to terrorist attacks “such as, most terribly, those committed on New York and Washington in September 2001.”<sup>101</sup>

Considering whether or not any of these examples would admit the impossibility of communicative punishment, Duff claims he is fairly confident that the first case should be answered with a negative as “no single deed, however terrible, should put a person beyond civic redemption.”<sup>102</sup> Duff is slightly more hesitant when it comes to the second case, as the insistence on

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97. Duff, *supra* note 6, at 305.

98. *Id.* at 305–6.

99. *Id.* at 306.

100. *Id.*

101. *Id.*

102. *Id.*



wrongful behavior could be significantly damaging to the bond between offender and community, and to deny the possibility of measures such as permanent detention in these cases would be “to believe that the bonds of community, and the status of citizenship, are unconditional and absolute—that nothing, not even a person’s own persistent demonstration that he utterly rejects the demands of citizenship and community, can destroy them.”<sup>103</sup> Duff seems to be reluctant to accept this possibility, which he approximates to a religious ideal unsuitable for the modern state. A recognitive perspective, however, would question first of all whether the aforementioned rejection is a consequence of the criminal’s actions, or whether it is inherent in the social context and consequently in the law’s interpretation of them.

As regards the matter of the terrorist attack, Duff complicates the problem by introducing a further discussion on law and punishment. He considers the hypothesis of a terrorist attack in which there is a good idea of who the perpetrators are, then asks whether, assuming those probable suspects are actually under pursuit, we should “treat this as an attempt to arrest suspected criminals . . . or as a defensive war to prosecute against an alien enemy.”<sup>104</sup> He reflects that, although moral constraints have to be acknowledged in regard to the treatment of these suspects, “the aims even of a just war and the moral constraints on its conduct clearly differ from the aims and constraints of a system of communicative punishments. War aims not at reconciliation with the enemy . . . but at victory.”<sup>105</sup> He further claims that the terrorists themselves probably see their own activities under the same light, as a war against an enemy regime or a state. But then he asks, “should we take this view?”<sup>106</sup>

In the article presently under discussion, Duff says he doesn’t have a clear answer to this problem; indeed, he says that “any normatively plausible account of the situation would need to be much more complex and nuanced than such a simple ‘either/or’ allows”<sup>107</sup>; he further argues that “we should surely be very reluctant to abandon the moral constraints that belong with the enterprise of criminal justice, in favor of the rather weaker constraints that apply to the conduct of war,” and that “we should also be very reluctant

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103. *Id.* at 307.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 308.

to exclude the perpetrator from any prospect of community with us.”<sup>108</sup> Two years later, however, in his article “Notes on Punishment and Terrorism,”<sup>109</sup> Duff addresses the same problem again and offers a rather different answer. As said before, the main theme of this article is the question of whether we should see the terrorist as a criminal (subject to the criminal law of the state), as an enemy combatant (protected by international humanitarian law), or as an “unlawful combatant” (that is, as someone with “no such moral claims on our respect or concern and whom we may treat in any way that seems necessary to ensure our own safety and to ‘defeat terrorism’”<sup>110</sup>). Duff says, first of all, that to see terrorists as criminals “is to see them as moral agents with whom we must still seek to communicate,” and under such view they would be “entitled to the same protections as any citizen.”<sup>111</sup> “However,” he continues, “we might plausibly feel that especially with the more serious kinds of international (as distinct from domestic) terrorism, we are faced by something that is more like war than crime.”<sup>112</sup>

The main argument Duff uses in support of his view<sup>113</sup> is that, given the extreme nature of the “wrongfulness” involved in certain terrorist activities, the interaction between a community<sup>114</sup> and the perpetrators would be better interpreted as a situation of war than one of punishment;

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108. *Id.*

109. Duff, *supra* note 2.

110. *Id.* at 760. Duff is here clearly referring to the approach purported by the U.S. government for many years, reflected in regimes of detention without trial such as Guantanamo Bay. The United Kingdom had a similar approach in Belmarsh prison with the Anti-terrorism, Crime and Security Act 2001 until the Prevention of Terrorism Act 2005 repealed the provisions for detention without trial.

111. Duff, *supra* note 2, at 759.

112. *Id.*

113. It should be noted here that Duff does not assert that he supports the view that the terrorist should be treated as an enemy combatant; instead, his claim is “that the rules of war mark the minimal constraints that we must respect in our dealings with other human beings, whatever they have done” (*id.* at 761). But it can be argued that, by saying this, Duff is accepting the possibility of denying access to the system of punishment to a terrorist.

114. Here Duff is thinking specifically of a community of citizens within a state, but it can be argued that his theory of punishment involves values that are not specifically directed toward any such limitation, but instead reflect a widespread ideology within Western legal and philosophical thought. His own argument, on the other hand, has strong claims to rational—and thus universal—validity, and by transferring his reasoning to the discussion of international terrorism and matters such as war, Duff is allowing his reasoning to go beyond the normative limits of a particular state.

and he believes such is an important distinction because “[i]t is true that warfare does not aim—as punishment should aim—at moral communication with the enemy.”<sup>115</sup> What seems to be confusing in this situation is what conception of communication Duff is referring to. If communication would be simply some attempt to reach out to the other in order to convince or persuade them (that is, forceful moral communication), then certainly the terrorist is trying to communicate something—even if it is an extreme and fundamentalist message. Looking at legislation in the United Kingdom, the definition of terrorism in the Terrorist Act 2000 states that it includes an intent “to influence the government or an international governmental organization or to intimidate the public or a section of the public,” and must have “the purpose of advancing a political, religious, racial or ideological cause,”<sup>116</sup> which necessarily implies that there is some clear message being transmitted through an act of terrorism.

Within a normative framework that takes recognition (and communication) seriously, the possibility that the specific attitudes of the terrorist may place them outside of any notion of community go against the very principles of responsibility and autonomy upheld by the tenets of liberal law that Duff is trying to espouse. This is so not because a sense of community would be taken as absolute, but because the actions of the terrorist should not be interpreted as directed completely against the community, but rather as an expression of the same desire for recognition that is taken as a presupposition of it. To say that war does not aim at moral communication with the enemy would be an argument against the legitimacy of war, rather than against the possibility of punishment.<sup>117</sup> Duff’s discussion on the limits of community rather hints at the situations in which the justificatory logic of punishment exposes its own limitations.

Terrorism challenges liberal conceptions of punishment precisely because its global and political nature expose the contradictions in the justification

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115. Duff, *supra* note 2, at 759.

116. Terrorism Act 2000, § 1(1), available at <http://www.legislation.gov.uk/ukpga/2000/11/part/I>.

117. This is particularly relevant if we consider that war is politics by other means, and that politics can also be seen as the continuation of war by other means. See Michel Foucault, *Society Must Be Defended* (2004). Also, for more on the dichotomy between crime and war, see Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 *J. L. & Soc’y* (2005); Noah Feldman, *Choices of Law, Choices of War*, 25 *Harv. J.L. & Pub. Pol’y* (2002).

of punishment. The book *Philosophy in a Time of Terror*<sup>118</sup> presents interviews with Jürgen Habermas and Jacques Derrida about the attacks of September 11, 2001, shortly after they occurred. Habermas provides a clear explanation of how terrorism in the twenty-first century, inflamed by fundamentalism, can be better understood as the result of frustrated claims of communities that are not adapted to the modern secular framework of Western society.<sup>119</sup> Furthermore, Western society in itself contains “a structural violence that, to a certain degree, we have gotten used to, that is, unconscionable social inequality, degrading discrimination, pauperization, and marginalization”<sup>120</sup>; this structural violence is deeply related to a distortion in communication that arises from conflicting expectations, and if left unchecked, one feeds into the other until communication is no longer possible.<sup>121</sup> This particular view arguably “explains why attempts at understanding have a chance only under symmetrical conditions of mutual perspective-taking”<sup>122</sup> where communication would be free from distortion. And although Habermas admits that “communication is always ambiguous, suspect of latent violence,”<sup>123</sup> he advises that seeing communication embedded purely in violence and letting force respond to force misses the point, “that the critical power to put a stop to violence, without reproducing it in circles of new violence, can only dwell in the telos of mutual understanding.”<sup>124</sup> This is a call to continued recognition and communication in structural conditions where all parties share some responsibility for what occurs; legal categories of guilt and wrongfulness go against this logic of mutual understanding, which is something that a communicative theory of punishment seems to ignore.

Activities that are taken as emblematic of terrorism are never to be endorsed or ignored; on the contrary, it is necessary that they be engaged and dealt with. But to properly confront the threat of extreme violence in a way that seriously considers the values of human dignity and individual autonomy, the legal system must either do better than to ignore the social context in which such violence occurs or abandon its pretensions to be communicative and find its justification somewhere else. Thus Derrida says, “One can

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118. Giovanna Borradori, *Philosophy in a Time of Terror* (2003).

119. Jürgen Habermas, in Borradori, id. at 30–33.

120. Id. at 35.

121. Id.

122. Id. at 37.

123. Id. at 38.

124. Id.

thus condemn unconditionally . . . the attack of September 11 without having to ignore the real or alleged conditions that made it possible.”<sup>125</sup> A critical account of September 11 is an example of how it is possible to try and understand terrorism from beyond this “lexicon of violence” that is “legitimated by the prevailing system.”<sup>126</sup> International terrorism<sup>127</sup> seems to act rather within the same framework as the law, as “all terrorism presents itself as a response in a situation that continues to escalate”<sup>128</sup>—and in this globalized situation of violence, “dialogue (at once verbal and peaceful) is not taking place. Recourse to the worst violence is thus often presented as the only ‘response’ to a ‘deaf ear.’”<sup>129</sup> This seems to be the expressed justification given by terrorists for their actions; surely a normative system committed to communication and recognition should do better.

Even if the terrorist is subjectively claiming to act against the “Western political community” (a claim inherent to the discourse attributed to jihadist violence), they are objectively acting in community, against (aspects of) a community that frustrates recognition. The means they choose to reclaim recognition are surely mistaken and lead to terrible consequences, and something indeed ought to be done about it; but the same mistake could be attributed to any overzealous imposition of a moral framework (any forceful moral communication or, even worse, a refusal to communicate) in response to their activities. The way out of such an orientation can only be grasped within a much larger perspective than would be permitted by an isolated legal framework. But if heed is to be paid to a serious account of the values behind the respect for the individual, it should at the very least be required that the law acknowledge its limitations.

## CONCLUSION

This paper has interacted with Duff’s communicative theory of punishment and its implications to the treatment of terrorism by the criminal law in an attempt to illustrate the difficulties in finding a liberal justification

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125. Jacques Derrida, in Borradori, *supra* note 118, at 107.

126. *Id.* at 93.

127. Although a similar critique could be elaborated in regard to all actions that are usually associated with terrorism, this paper focuses on the nature of international terrorism endemic to the twenty-first century. For more on that, see, e.g., Bruce Hoffman, *Inside Terrorism* (2006).

128. Derrida, in Borradori, *supra* note 118, at 107.

129. *Id.* at 122–23.

for punishment that can account for the normative implications highlighted by structural inequality and social injustice. Although it may be true that punishment has a place and a function in society, this function should not be mistaken with a normative justification that implies that violence and coercion can preserve or develop a framework of communication and recognition. Duff's contribution of engaging with difficult challenges and pushing forward the need to think normatively about punishment is welcome and necessary, but perhaps there is a need to acknowledge how this normative perception depends upon a larger framework that includes many other elements, which punishment is not only unable to provide, but also liable to harm.

Criminalization is one of the most important debates occurring in current criminal legal theory,<sup>130</sup> and such debate relies heavily on an examination of what the criminal law should be, in order to determine what should or should not be criminalized. This paper embraces an examination of the law's normative limits, hopefully suggesting a reflection on what it means to punish, and why there seems to be a social need for the institution. Such reflection invites the view that a shift in perspective—from punishment to recognition—is necessary if any of the wrongs identified in society are to be concretely dealt with. Then, maybe a properly communicative conception of responsibility can begin to unfurl, and problems such as terrorism will be better understood by the criminal law.

The intention here is not to advocate for the abolition of punishment, nor to denigrate the importance of its current moral constraints. It is rather to deal with the many tensions and contradictions that exist within the institution by critically analyzing its limitations and questioning its justification. Duff's call for communication and recognition is to be welcomed, but these concepts cannot have punishment as an end—on the contrary, they ought to aspire to an end to punishment. If the communitarian conditions to which Duff aspires are somehow realized, punishment is not vindicated—it begins to lose its purpose. If the institution of punishment still has a function in society, it should be clear that this function is in conflict with the higher liberal aspirations, and the criminal law's main role in a liberal society like the one Duff envisions, striving for autonomy and recognition, should be to eradicate its own presuppositions: to make itself unnecessary. A liberal system of punishment should ideally hope for its own demise. Although these reflections remain essentially theoretical and normative, after further development they

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130. See, e.g., R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, & V. Tadros, *The Boundaries of the Criminal Law* (2010).

could easily point to more practical suggestions in regard to the criminal law, both in its formal elements and in relation to a larger framework of the administration of justice.

The contemporary legal notion of terrorism is problematic, if one seriously considers the claims grounding the principle of individual autonomy. The problem may be mainly identified as coming from the tensions that exist in the interaction between a concrete, dialectical subject and an abstract, undialectical normative framework, represented in this particular case by the system of criminal law. If recognition is to be taken as expressive of the tenets behind the principles sustained by legal discourse, then the individual is formed precisely by this interaction of conflicting expectations in society, which are a consequence of their (human) desire to be recognized as a subject. Although the law acknowledges such desires in principle, the way in which it attempts to manage social expectations ends up repressing the complexity and diversity found in concrete social conditions, by delimiting what comes to be standard and acceptable behavior. All that falls outside of this framework is taken to be deviant and wrongful, and seen to deny the possibility of community that the law at its core strives to uphold. But instead of recognizing this paradox, normative legal theory seems to repress it in its attempts to fully overcome it without shifting its paradigm, focusing on the need for punishment expressed in issues of security or control.<sup>131</sup> As Hegel suggests, the lord's partial recognition of the bondsman is reflected back into himself, and punishment and terrorism, radically different though they may be in many respects, are both heir to and perpetrators of this vicious circle of structural violence and distorted communication.

Instead, the theory of recognition sketched here aims to suggest that the community ideally expressed by legal principles relies on the existence and development of mutual understanding; and its curtailing seems an affront to the very concepts that justify the legal order in the first place. This tension between mutual recognition and one-sided communication poses a paradox for the legal system, the answer of which is beyond the scope of the reflections allowed within this paper, but any normative theory of punishment that aims at advocating a need for communication and recognition has in the very least to acknowledge it. Only then can the possibility of dealing with the real problems found in seeking justice through punishment come to the fore.

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131. For examinations of this contemporary tendency, see Zedner, *supra* note 117, or mainly David Garland, *The Culture of Control* (2001).