

Rethinking expressive theories of punishment: why denunciation is a better bet than communication or pure expression

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Abstract Many philosophers hold that punishment has an expressive dimension. Advocates of expressive theories have different views about what makes punishment expressive, what kinds of mental states and what kinds of claims are, or legitimately can be expressed in punishment, and to what kind of audience or recipients, if any, punishment might express whatever it expresses. I shall argue that in order to assess the plausibility of an expressivist approach to justifying punishment we need to pay careful attention to whether the things which punishment is supposed to express are aimed at an audience. For the ability of any version of expressivism to withstand two important challenges, which I call the ‘harsh treatment challenge’ and the ‘publicity challenge’ respectively, will depend on the way it answers them. The first of these challenges has received considerable discussion in the literature on expressive theories of punishment; the second considerably less. This is unfortunate. For careful consideration of the publicity challenge should lead us to favor a version of the expressive theory which has been under-discussed: the view on which punishment has an intended audience, and on which the audience is society at large, rather than—as on the most popular version of that view—the criminal. Furthermore, this view turns out to be better equipped to meet the harsh treatment challenge, and to be so precisely because of the way in which it meets the publicity challenge.

Keywords Punishment · Expressive theories · Communicative theories · Harsh treatment · Publicity · Denunciatory theories

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1 Introduction

Many philosophers hold that punishment has an expressive dimension.¹ Some, but not all of them have argued that the expressive dimension of punishment is relevant to explaining how punishment can be justified, either in general, or in the particular context of a liberal state.² Advocates of expressive theories have different views about what makes punishment expressive, what kinds of mental states and what kinds of claims are, or legitimately can be expressed in punishment, and to what kind of audience or recipients, if any, punishment might express whatever it expresses. Some authors take the justification of punishment to depend on the fact that it expresses a message to an offender; others that it express a message to the society whose norms the offender has transgressed; and others that the existence of an audience plays no role in an expressivist account.³ I shall call these forms of expression ‘communicative’, ‘denunciatory’ and audience-independent’ respectively.⁴

To assess the plausibility of an expressivist approach to justifying punishment we need to pay careful attention to the differences between these forms of expression. I shall argue that in order to meet two important challenges, expressivists need to place more emphasis on denunciatory forms of expression than they have done in recent discussions.⁵ The challenges I have in mind arise from two features of

¹ They include Feinberg (1965), Nozick (1981), Duff (1986, 2001), Falls (1987), Hampton (1988, 1992), Primoratz (1989), Kleinig (1991), Von Hirsch (1994), Metz (2000, 2007), Bennett (2008) and Glasgow (2015).

² Apart from Feinberg (1965), who thought that expressive considerations presented an obstacle to justifying punishment, all the authors in footnote 1 take expressive considerations to be relevant to justifying punishment. Duff (2001), Metz (2007), Bennett (2008) are especially concerned with justifying punishment in liberal states. For skepticism about expressivism see Sayre-McCord (2001), Boonin (2008) and Hanna (2008), discussed in Wringe (2013) and Tadros (2011) discussed below.

³ See respectively Duff (1986, 2001), Hampton (1988), Glasgow (2015). I note that one referee contested this reading of Duff’s position, on grounds which I find unpersuasive (see footnote 15 for detailed discussion). But I should note that whatever the upshot of that textual discussion, my reading of Duff is not an eccentric one: it is shared by—among others—Hanna (2008), Boonin (2008), various contributors to Cruft et al. (2011) and Glasgow (2015). Nor is this a strawman position: those who adopt this reading of Duff’s views typically take it to be one of the more impressive forms of expressivism.

⁴ I use the word denunciation to pick out a form of expression which has a particular audience (the public at large or the political community, as opposed to the offender) and not, as some authors do, to pick out a kind of communication with a particular kind of content (for example, a specifically moral content) For earlier uses in this sense see Wringe (2006). For the other sense see Bennett (2006, p. 293).

⁵ The title of Bennett (2006), and in particular the fact that we both use the word ‘denounce’ and its cognates, suggests a significant similarity between the view put forward in this paper and Bennett’s. However, as noted in footnote 4 Bennett uses the term ‘denunciation’ in a sense which is importantly different from mine. Moreover, in this piece—and elsewhere, including Bennett (2014)—Bennett is fairly unspecific about who exactly the intended audience of punishment is. He does nonetheless, appear to take the offender to be a significant part of that audience (For example on p. 299 ff, Bennett emphasises that the state’s duty to engage in what he calls ‘denunciation’ is a duty to the offender. This fits better with the idea that the offender is the audience than that it is the political community at large.) By contrast, on my view, it is communication with the political community as a whole rather than with the offender in particular which is most important here. In many cases, the offender will be a member of the political community, but in some interesting cases they will not be: consider, for example, the case of punishing visiting foreigners or corporations (see for example SELF-REFERENCE). But even when the offender is

punishment which any plausible theory of legal punishment must accommodate: the fact that the kind of punishment that our legal systems dispense is in an important sense a public matter (the ‘Publicity Challenge’) and the fact that it involves hard treatment (‘The Hard Treatment Challenge’). The second of these has been widely discussed; the first less so.

In what follows, I shall call a theory in which the fact that punishment involves a denunciatory form of communication plays a significant part in explaining how punishment can be justified a denunciatory theory of punishment. So I shall count as denunciatory theories ones which in another context one might call ‘hybrid’ versions of expressivism, on which punishment has both a communicative and a denunciatory aspect. This not merely a piece of definitional sleight of hand. Communicative theorists have typically not taken denunciation in my sense to be among the features of punishment that can play a role in justifying it, and some have been distinctly suspicious of the idea that it might play a role here.⁶ Furthermore, my aim is not to argue that the only expressive role that punishment can legitimately have is a denunciatory one, but simply to insist that the problems which face expressive theories of punishment can only be solved by paying attention to the denunciatory aspects of penal communication. That said the positive arguments of this paper will not appeal at any point to the communicative functions of punishment: if punishment has a communicative function it plays no role in helping it to meet the two challenges which I shall be discussing.⁷

My strategy will be as follows. I shall start by outlining a number of different versions of expressivism. I shall then introduce the ‘Publicity Challenge’, and argue that neither audience-independent nor purely communicative versions of expressivism can meet it. I shall then argue that for the denunciatory theorist, the publicity challenge turns out to collapse into a more well-known challenge to expressivism—what I call the ‘Hard Treatment’ Challenge. I then argue that a denunciatory version of expressivism can meet the Hard Treatment Challenge, but neither audience-

Footnote 5 continued

a member of the political community, they will be addressed as a member of the political community, rather than as an offender. It is also worth noting that Bennett argues for his view on the basis of an expressive theory of criminal action, on which criminal acts make a claim about their victims which the state is obliged to contest (pp. 291 ff). My argument does not depend on a view of this sort. I find the expressive theory of criminal action implausible because, like Nozick (1981). I take punishment is expressive in virtue of expressing certain communicative intentions. If criminal acts have expressive properties which can be cancelled in the way Bennett’s account suggests, they presumably involve the same kind of expression. But, although some kinds of crime, such as hate crimes, may involve communicative intentions of this sort, it is implausible to suppose that all crimes do, since criminals typically make considerable efforts to ensure that their crimes, and therefore any communicative intentions which they might embody, go undetected.

⁶ Bennett (2006) may be an exception. See footnote 5 for discussion. For discussion of whether communicative theorists suspicion is justified here see Wringe (2010).

⁷ Since I leave open the possibility that punishment might have a number of expressive aspects one might wonder why I take the denunciatory ones to be especially important. The answer, to be developed in some detail in what follows, is that on my view the denunciatory aspects of punishment help to explain why punishment needs to have the feature whose possession makes it hardest to justify—namely hard treatment—and the others do not. I thank a referee for *Philosophical Studies* for raising this question.

independent expressivism nor purely communicative expressivism can. In short, the alternatives to the denunciatory view face two objections, which cannot be met; the denunciatory version of expressivism only faces one objection, which can be met. So we should prefer a denunciatory form of expressivism to its rivals.⁸

In what follows I shall mostly be concerned with the question of how the different kinds of expressive role which punishment can play might figure in justifying punishment. One might wonder how the account I give might affect our view of the sorts of punishment we can justifiably impose.⁹ I shall address this question briefly at the end of the paper. While important it is secondary to the main business of the paper: that of discussing whether any kind of expressivist account of punishment can succeed, and if so what form it should take.

2 Punishment as expressive: audience-dependent views

The idea that punishment has an expressive dimension is often traced back to Feinberg's (1965) article 'The Expressive Theory of Punishment'.¹⁰ Feinberg suggests that accounts of punishment which define punishment as involving 'the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command)'¹¹ leave out 'the very element which makes punishment theoretically puzzling and morally disquieting',¹² namely 'a certain expressive function'¹³ or 'symbolic significance'. Feinberg further characterizes this 'symbolic significance' by saying that punishment is a 'conventional device for the expression of attitudes of resentment and indignation and of judgments of disapproval and reprobation, either on the part of the punishing authority himself, or of those 'in whose name' the punishment is inflicted.'¹⁴

Some expressivists think that whatever punishment expresses must be expressed to a particular audience. Thus, Antony Duff holds that punishment should be intended to communicate a message of disapproval *to a particular offender*.¹⁵

⁸ I thank a (different) referee for *Philosophical Studies* for suggesting this formulation of my strategy.

⁹ I thank the referee for *Philosophical Studies* mentioned in footnote 7 for emphasizing the importance of this question.

¹⁰ Feinberg (1965).

¹¹ Feinberg (1965).

¹² Feinberg (1965).

¹³ Feinberg (1965).

¹⁴ Feinberg focusses, as I shall, on the idea that punishment involves some form of expression on the part of those imposing the punishment. One might also think, as Bennett (2008) sometimes seems to that punishment involves a form of expression by the person on whom punishment is involved. However, it seems hard to reconcile the idea that punishment is something which one is compelled to undergo with the view that it involves any intention on to communicate the part of the offender (and I suspect that any plausible account of the content of penal communication needs to appeal to such intentions). See footnote 15 below for further discussion.

¹⁵ Duff (2001), Tasioulas (2006). Duff (2001) suggests that there is a useful analogy to be drawn between punishment and a secular analogue of the religious notion of penance. This might suggest that his view should be counted as one on which punishment has a significant denunciatory element. However, I am

Primoratz and Hampton suggest an alternative view. Hampton writes that ‘the retributivist...wants the moral truth to be heard’¹⁶ and Primoratz suggests that ‘punishment is not like a private letter; it is like a billboard put up on a busy street...it is also meant for the victim of crime *and for the public at large*’.¹⁷ Both Hampton and Primoratz seem to have in mind the possibility that the public or members of society might be an important secondary audience for punishment.¹⁸ But we might also take this to be the primary audience of penal communications.¹⁹ I shall call views on which it is essential to the justification of punishment that it express something to an audience of some sort ‘audience-dependent’ versions of expressivism.

In Sect. 1, I distinguished between ‘communicative’ and ‘denunciatory’ forms of communication.²⁰ Duff’s view focusses on the role that communicative forms of expression play in justifying punishment.²¹ I shall call views of this sort ‘communicative views’, and contrast them with views on which denunciatory

Footnote 15 continued

dubious both as to whether the notion of penance can play the role that Duff wants it to play and as to whether thinking of punishment as a form of secular penance need not involve regarding it as a form of denunciatory communication. If religious penance involves communication, it is presumably the penitent who expresses something and God to whom it is expressed, at least in the first instance. The role that the religious authority plays is that of specifying the form in which the communication must be made, not that of communicating itself. This suggests that penance, whether secular or religious involves a different kind of communication from that which is envisaged by either communicative or denunciatory theorists, where the direction of communication is from the punishing authority to some other audience. In secularising the notion of penance, we might substitute the political community for God as the intended audience. But in order to have anything like a denunciatory theory, of the sort that I am discussing, the communication would still need to come from the punishing authority, rather than the offender.

A further reason why one might take Duff to have denunciatory view might be his characterization of crimes as ‘public wrongs’, where the ‘public’ is to be read as ‘being properly of concern to the public.’ For if crimes are wrongs that are properly the business of the public, one might suppose that any condemnation of them should be expressed to the public. However, as far as I can see, this is not Duff’s view. Here is one reason why not: if a wrong is ‘properly of concern to me’, then it may be appropriate for me to condemn it—or to have it condemned on my behalf by someone who acts for me; or to make sure its perpetrator is called to account for it (as Duff 2007 argues). However although these ways of manifesting concern do not rule out that I should also be the recipient of communications about the punishment they certainly do not require it. (For the role which a slightly different sense of publicity plays in my version of a denunciatory theory, see Sects. 4–6 below.) I thank a referee for *Philosophical Studies* for raising these issues.

¹⁶ Hampton (1988, p. 132).

¹⁷ Primoratz (1989, p. 200) italics mine.

¹⁸ For Primoratz (1989), it is an important secondary audience, since it plays a significant role in explaining why punishment should involve harsh treatment.

¹⁹ As Primoratz (1989) seems, at times to suggest.

²⁰ The terminology originates with Narayan (1993). One apparent alternative, on which the justifiability of punishment depended entirely on its expressing something to the victim of crime, seems unsatisfactory since some crimes—for example, speeding on an empty road—do not have a clearly identifiable victim; and some crimes, such as murder, have victims who can no longer be communicated with.

²¹ Though as we shall see, Duff also seems to allow some role for communication with the victims of crime.

forms of expression play a significant role in explaining the justification of punishment, which I shall ‘denunciatory theories’.²²

One might wonder whether there can be forms of communication which are denunciatory without being (in my terms) ‘communicative’. This question is easily answered. I defined the two forms of communication in terms of their primary audiences. There certainly can be forms of communication which are directed at the audience characteristic of denunciatory communication rather than an offender: we can think of the possibility of news broadcasts which are aimed at the general public, but are made inaccessible to offenders; or of posters warning potential citizens of the activities of foreign spies or escaped convicts. It is worth noticing that communication of this sort might ‘involve’ an offender in a fairly significant manner: it might, for example, incorporate CCTV images of individuals committing crimes. We can also consider denunciations of the actions of the dead to the living. Consider for example the fate of Thomas Hobbes, exhumed after the Restoration in order that he might be publicly decapitated.

With the possible exception of Hobbes’ posthumous decapitation, none of these examples of denunciatory communication are naturally understood as involving punishment. So we might wonder whether it is possible for *punishment* to involve forms of communication which are denunciatory without being communicative. Given the way I defined denunciatory theories in Sect. 1, I need not be committed to the possibility that there are. For I defined denunciatory theories as ones on which the denunciatory aspect of the communication involved in punishment played an essential part in the justification of punishment, and the communicative one does not. So a denunciatory account might allow that punishment does involve communication with an offender, so long as this feature of punishment was irrelevant to its justification.

We might think it followed that there would be a problem for my view if it turned out that punishment could only be denunciatory in virtue of also communicating with an offender. For we might think that if this was true, then it would follow from the denunciatory aspect of punishment’s being essential to the justification that the communicative aspect of punishment must also be essential to that justification. So we should ask whether it is true that punishment can only be denunciatory in virtue of being communicative.

Here is one argument for the view that denunciatory punishment must also be communicative. First, one can only be punished if one knows one is being punished. Since punishment essentially involves denunciation, one cannot be punished

²² We might distinguish further, among denunciatory theories, between those on which punishment communicates with the whole of the political community, and those on which it addresses only a part of it (for example, as on Fletcher 1996’s view the victims of crime or those closely associated with them) While I take the former view to be considerably more plausible—not least because there may be crimes whose victims are no longer there to be the recipients of communication, and who may have no-one who is associated with them in any other way than sharing a political community, this aspect of my view is not central to my arguments (though see the last paragraph of Sect. 10 for one possible exception to this) We should also notice the possibility of what one might call ‘indeterminate views’ on which the justification of punishment depends on it communicating to some audience or other rather than to any particular audience. I thank referees for *Philosophical Studies* for raising these issues.

without knowing one is being denounced. Secondly, one cannot know one is being denounced without treating that as some kind of communication with oneself. If so there cannot be denunciatory punishment which is not also communicative.

The first step in this argument is not beyond reproach. We might wonder whether it is really true that one cannot be punished without knowing that one is being punished. If we think that punishment must involve suffering and that one cannot suffer without knowing that one is suffering the conclusion that one cannot be punished without being aware that one is being punished might be thought to follow. But not everyone thinks that punishment must involve suffering.²³ Furthermore, even if one does think that punishment must involve suffering, and that one cannot suffer without being aware that one is suffering one might suffer while being unaware that the suffering one was undergoing was a form of punishment.²⁴

The second step of the argument also seems problematic. We might start by noting that if denunciation plays a role in the justification of punishment but not its definition, one might know that one was being punished without thereby knowing that one was being denounced. This response to the second step of the argument seems to be dependent on the justification of punishment not being transparent to those it is inflicted on. We might regard this as objectionable. A more satisfactory reply, which does not have this drawback is that on this line of thought, punishment only communicates with the offender in a derivative manner: that is to say, simply as a consequence of the fact that it communicates with a wider audience. The fact that punishment is communicative plays no independent role in explaining why punishment is justified.

In introducing audience-dependent expressivism, I have relied heavily on the idea of a message being expressed *to* a particular audience. It is worth examining this notion more closely. We can think of audience-dependent forms of expression as involving a two-sided transaction in which something is expressed by one party to another. Call the first party the ‘sender’ and the second party the ‘recipient’. We can then ask what kinds of condition need to be satisfied by sender and recipient in order for expression of this sort to have taken place.

What conditions must the sender satisfy for audience-dependent expression to have taken place? The simplest view would be one on which a sender must intend a particular audience to receive a message for audience-independent expression to have taken place. However, I shall take a weaker condition to be sufficient: I shall take it to be both necessary and—provided that appropriate conditions on the receiver’s side are satisfied also sufficient—that the sender’s expectation that a some actual recipient or recipients will be capable of understanding and in a position to understand the message should play some role in making the expression of the

²³ Wringer (2013), Coverdale (2013), Poama (2015).

²⁴ It might be more plausible to claim that one cannot justifiably be punished without knowing that one is being punished. If this is true, and the second step of the argument succeeds, this may be enough for the objection to succeed. For it would be of little interest to establish that there can be punishment which is denunciatory without being communicative if the only punishments of which this is true are unjustified ones. But as we shall see the second step in the argument also fails.

message justifiable, and that the expression would either not have taken place or would not have been taken by the sender to have been justified if this expectation had not existed.²⁵

Are there also conditions that the receiver must satisfy in order for audience-dependent expression to have taken place? The only one which I shall take to be relevant to our purposes is relatively weak: it must be reasonable for the sender to think that recipient is at least capable of understanding the message being sent. We might be tempted to think that a stronger condition is necessary—for example that the audience should agree with or accept the message being communicated to them. However, this is certainly no part of the conception of audience-dependent expression used by one prominent audience-dependent theorist—namely Antony Duff. Duff holds that punishment involves a message expressed to an offender for the purpose of inducing remorse or regret for wrong-doing. However, he also holds that in order to respect the autonomous agency of the wrong-doer we must allow for the possibility that the communication may fail to achieve its purpose.²⁶ (One reason why it might plausibly fail is that the offender refuses to accept the condemnation offered.)²⁷ This being so, we should avoid assuming the stronger condition.

We should distinguish these conditions for audience-dependent expression from a weaker condition which I shall call weak interpretability. I shall call an expression weakly interpretable provided that the sender is aware of some audience which could understand the message, provided they were to become aware of it (independently of the speaker's expectations as to whether they will become so aware.) Weakly interpretable expression need not be audience-dependent: consider someone who writes in a secret diary which they make efforts to hide. It is less clear whether there can be forms of expression which are not weakly interpretable. I shall not assume there can.

²⁵ I thank an anonymous referee for *Philosophical Studies* for encouraging me to consider this possibility.

²⁶ It follows that, at least as far as Duff is concerned, the conception of understanding which is in question here is one on which understanding a message does not require that one accept it as correct. Duff's instincts here seem correct: if we think that what is communicated in punishment is something which can be articulated in the way which he does in his writings on punishment, that it seems clear that understanding and accepting must be thought of as being independent of one another. The same is true, *mutatis mutandis* for the kind of denunciatory conception which I advocate. I thank an anonymous referee for raising this issue.

²⁷ Glasgow (2015) has proposed a different condition on audience-dependent expression: namely that the recipient be at least capable of understanding the message. He then argues that Duff's communicative justification of punishment fails because it does not explain why we are justified in punishing what he calls 'unreceptive offenders', since we cannot so much as try to communicate with those we know to be unreceptive in this sense. I think Glasgow's objection fails since it is not clear that we are justified in punishing offenders whom we can know to be unreceptive (such as say, the cognitively developmentally disabled.) Furthermore, we could revise our punitive institutions in such a way as to accommodate this fact without a major overhaul of them, because offenders of whom we can know this are relatively rare. [As a referee for *Philosophical Studies* pointed out Glasgow's critique also seems to neglects another aspect of Duff's view—at least as that view is put forward in Duff (1986)—namely that the offender is in a sense the agent of their own punishment. However, it's not clear to me that this idea is central to more recent articulations of Duff's view such as Duff (2001)].

3 Punishment as expressive: audience-independent views

Joshua Glasgow has recently argued that audience-dependent versions of expressivism are unsatisfactory.²⁸ He suggests that expressivists should adopt what he calls ‘pure expressivism’ and what I shall call ‘audience-independent expressivism.’²⁹ Audience-independent expressivism might be motivated by reference to the idea that there is a close constitutive link of some sort between holding and expressing certain kinds of values.³⁰ If one holds a view of this sort and takes it to be either valuable or mandatory to hold certain kinds of values then one might take this fact to play a role in justifying punishment.

It is no part of my brief to argue for the coherence of audience-independent expressivism. I shall argue later that it can meet neither the publicity challenge nor the hard treatment challenge. However, the view does not seem obviously untenable. There is at least a *prima facie* case for allowing the possibility that the expression that is required here could be an audience-independent form of expression. For there certainly do seem to be values to which one could express a commitment by certain symbolic actions while remaining indifferent as to whether any actual audience understood—or even learnt of—those symbolic actions (perhaps the value of religious humility expressed in Jesus’ injunction not to pray in public is one.)³¹

We might wonder whether the sorts of values we can plausibly regard legal punishment as expressing could fit this model.³² Consider a view on which punishing a criminal expresses a commitment to the moral standing of the victim. One might think that in order to express this commitment properly what is required is a public acknowledgment of this standing, where public needs to carry the sense

²⁸ Glasgow (2015) mostly focuses on communicative views. But at p607 footnote 12 he claims that his arguments rule out denunciatory views as well.

²⁹ Glasgow attributes this view to Kleinig (1991) and Metz (2000). However, Kleinig’s comment that ‘In imposing on the wrongdoer punitively, we give expression to our condemnation of his conduct, and attempt to bring home *to him* what he has done’ (Kleinig 1991, p 418: my italics) suggests his view is in fact a communicative one. One referee for *Philosophical Studies* suggested that Nozick (1981) might be regarded as putting forward an audience-independent view. However, this strikes me as incorrect. Nozick certainly seems to share the idea that I suggest might *motivate* audience-independent expressivism. However, I defined audience-independent views as ones on which the existence of an audience plays no role. Nozick’s view does not belong in this category for two reasons. First, he suggests that the canonical message carried by punishment might be understood as being something like ‘this is how wrong *you* (sc. the offender) were.’ Secondly, he appeals to Gricean communicative intentions in order to explain *how* punishment could carry this message; and the existence of such intentions seems to depend on the existence of an audience.

³⁰ Kleinig’s comment that ‘It is a measure of the importance that we give to morality in our lives that we deem it appropriate to respond punitively. Indeed, I want to suggest, unless punishment is seen as warranted by such breaches, we fail to accord morality the seriousness it deserves’ (Kleinig 1991, p. 410) expresses this well. Compare Anderson (1993), Metz (2007), Glasgow (2015).

³¹ Expressions of this sort might still need to satisfy the ‘weak interpretability’ condition from Sect. 2. But, as already noted, weak interpretability is not audience-dependence.

³² I am grateful to a referee for *Philosophical Studies* for prompting this line of thought.

of being both *by* the public and *to* the public.³³ If so, then it seems as though the idea that there is a constitutive link between holding and expressing the kinds of values that we expect a modern society hold might be deployed in service of an audience-dependent (and, specifically denunciatory) form of expressivism, rather than an audience-independent one.³⁴

Does this line of argument defeat all forms of audience-independent expressivism? That is unclear. Since it is hard to give an exhaustive list of the kinds of value that an audience-independent expressivist might appeal to here, it is hard to show that each of the values to which an audience-independent expressivist might appeal to in exploiting the constitutive link between commitment and expression is constitutively linked to at least one audience-dependent form of expression. As we shall see, considerations about publicity and hard treatment make the case more clearly.

4 The publicity challenge

I claim that the public nature of punishment presents a difficulty for both audience-independent and communicative versions of expressivism. To make my case I need to explain the sense in which I take punishment to have a public nature, and also to say something about the way in which this public nature is relevant to deciding between theories of punishment.

I shall start with the second of these points. Antony Duff has argued that we should not regard it as a constraint on the acceptability of a theory of punishment that it should show that the institution of punishment is justified. We cannot rule out, without further argument, the possibility that punishment should turn out to be a morally unacceptable practice. Still less should we assume than any successful defence of the institution of punishment should vindicate every feature of our existing penal practice. To make either of these moves would be, as Duff puts it, to ‘beg the institution’.

Nevertheless, views on which the institution of punishment cannot be justified at all seem to start out at an initial disadvantage. A view of this sort seems less likely to cohere with the rest of our moral beliefs—other things being equal—than a view which does not entail it. And since coherence with other normative beliefs is relevant to normative justification, views of this sort will be harder to justify—

³³ Metz (2000) seems to hold a somewhat similar view: he suggests that a state has a duty to ‘censure’ injustice, as a means of disavowing unjust actions, affirming the worth of victims and treating victims as responsible. Metz understands ‘censuring’ as a form of expression of disapproval that may, but need not involve an audience and argues that our duty of censure explains our intuitions that a state has obligations to disavow, affirm, and treat as responsible. However, insofar as I share Metz’s intuitions here, I take them to be intuitions to the effect that the state has duties to disavow certain forms of behavior or to affirm the worth of victims to a particular audience—namely, its own citizens. It is at best highly counter-intuitive to suppose that a state could satisfy the duty to disavow the behavior of wrongdoers by issuing secret denunciations of wrong-doing.

³⁴ Contrast this with Kleinig’s suggestion mentioned in note 23 that the commitment-expression link supports a communicative form of expressivism.

again, other things being equal.³⁵ We should not overstate the case: what I have just said about punishment might be taken to be equally true of any other long-standing social institution; and yet some such institutions—for example chattel slavery—have turned out to be morally insupportable. But we should not understate the case either.

What is true of views on which punishment cannot be justified is also—I suggest—true of views which entail that features of almost all existing and practically feasible systems of punishment are unjustified. We should treat views which entail that imprisonment, monetary fines, restrictions on movement and other temporary deprivations of rights can never be justified with as much suspicion as views which entail that no instance of punishment can be justified.

I shall now argue that views which entail that punishment should not be public, in a sense of publicity which I shall specify in a moment, are problematic in precisely this respect. And I shall also argue that both audience-independent expressivism and communicative versions of audience-dependent expressivism do entail that punishment should not be public in the relevant sense. I shall proceed in three steps. First, I shall outline the sense of publicity which I have in mind. Secondly, I shall make a preliminary case for thinking that both audience-independent and communicative versions of audience-dependent views entail that punishment should not be public in this sense. Finally, I shall address some ways in which advocates of those views might rebut that case, by considering, and rejecting some arguments that advocates of those views might give for thinking punishment should not be public.

5 The publicity of punishment

I take existing practices of punishment to be public in (at least) the following two senses. The first concerns the procedures of the law. Law courts are public buildings; the outcomes of criminal proceedings (and often the proceedings themselves) are a matter of public record, and can be publicly challenged so and on. A second has to do with the outcomes of the criminal law: punishment is a public matter, both in the sense that the imposition of punishments is a matter of public record, but also in the sense that punishments imposed can affect one's status as a member of the public. This is most obvious where punishments involving imprisonment are concerned: in being imprisoned one is deprived of one's liberty, but one is also deprived of the ability to participate in public life. But some forms of punishment can affect other aspects of one's capacity to engage in public life, such as a person's eligibility for certain forms of employment and (in some places) to vote. The first of these senses of publicity seems to entail the second.

³⁵ I am, in effect, appealing to a coherence-based theory of the justification of our moral beliefs. There are a number of such theories: reflective equilibrium based theories Daniels (1979, 1980) provide one well-known example. It is important to note that on such views, no belief has the status of an unquestioned building block; but that some beliefs seem more likely to survive a process of reflective equilibrium than others.

It is worth distinguishing these two senses of publicity both from the notion of ‘weak interpretability’ introduced in Sect. 2, and from two further respects in which one might take punishment to be a public matter.³⁶ One concerns the subject matter of criminal law: Duff has argued that the only kinds of wrong which we should regard as properly falling under the view of the criminal law are what he calls ‘public wrongs’; those in which the state legitimately has an interest.³⁷ A second has to do with the fact that within the setting of the criminal trial—and thus in determining whether punishment is appropriate, and also, on the communicative view, when imposing punishment, a judge (and perhaps also the members of a jury) speak on behalf of the public.³⁸

Someone might worry about the significance I accord to considerations about publicity. Some authors suggest that one distinctive, and desirable feature of contemporary societies, and one way in which they are superior to pre-modern ones is that in them it is the criminal trial, rather than the process of punishment which is most conspicuously a public matter.³⁹ However, this normative judgment seems to be underpinned by an (understandable) revulsion at forms of social control in which the purpose of either trial or punishment to be that of humiliating an offender.⁴⁰ However, the ways in which punishment is of necessity carried out under the gaze of the public need not be taken as a reason for understanding the purpose of punishment in this way.

The publicity of punishment poses problems for audience-independent expressivism. On an audience-independent view the justification of punishment depends on its being a manifestation of an emotion which is an appropriate response to a particular kind of wrongdoing. It is not essential to its being such a manifestation that it should be public in the senses I have just identified.⁴¹ Furthermore punishments that are public in this sense will in many cases make offenders liable to feel shame. Shame is in general a painful emotion. There seems no reason from an audience-independent expressivist point of view to prefer forms of expression which bring shame on an offender over ones which do not. And there may be reasons for

³⁶ A clarification may be helpful here: I am not denying that punishment is public in these two further senses. I am merely setting them to one side as not being relevant to establishing the points I aim to establish in this and the following sections. (I thank a referee for *Philosophical Studies* for alerting me to this potential misunderstanding).

³⁷ For further discussion see Lee (2015).

³⁸ The anonymous referee of footnote 31 also suggested that punishment’s being public in this fourth sense might present a problem for a denunciatory view, since it would seem to entail that for the denunciatory theorist, punishment is an action in which the political community is communicates with itself. However, I think that any appearance of paradox here is misleading: it is not uncommon for someone speaking on behalf of a group to address the members of that group; that may be the best way of making sure, for example, that the agreed upshot of a deliberative process—or of a vote—is well-understood by all members of the group. We might see the role of judges or jury members as representatives of the public in the same kind of way.

³⁹ Duff et al. ff (2007) citing Foucault (1977) on the historical claim.

⁴⁰ This concern seems to underlie the point which Duff and his co-authors make.

⁴¹ There may be some grounds for thinking it needs to be public in the much weaker sense identified in footnotes 31 and 36, but this is not what is at issue here.

avoiding such forms of punishment: they may stigmatize offenders, making it more difficult for them to be re-integrated into society, and increase their chance of re-offending.⁴²

The publicity of punishment also raises problems for communicative theorists, such as Duff.

Duff thinks we should understand punishment as a form of communication which is addressed to an offender in the hope of prompting remorse and reconciliation. It is not clear why a communication of this sort needs to be public: why, that is, it needs to be overheard—as it were—by individuals to whom it is not directly addressed. A communicative theorist might take the experience of shame and stigmatization to play a significant role in conveying the message which such a theorist thinks should be conveyed by punishment. However Duff has distanced himself from an account of punishment on which the shaming of offenders plays a significant role, and at least some of the literature on the damaging effects of shame and stigmatization suggest that he is right to do so.⁴³

It is easy to account for the public nature of punishment on a denunciatory version of expressivism. For punishment can only communicate something to a given audience if the audience is able to become aware of it. For this to be possible, punishment needs to be a public matter in the second of the senses I have distinguished.⁴⁴ Consider Primoratz's comparison between punishment and a public bill-board: there is no point in putting up a billboard that no-one can see.

Do the points that I have made about shame and stigmatization pose a problem for the denunciatory view? The denunciatory view does not claim that shame and stigmatization are not harmful. So advocates of a denunciatory view have something to worry about. However, the problem they face is rather different from the problem faced by advocates of communicative and audience dependent views. On the denunciatory view the harms of shame and stigmatization arise from aspects of punishment which play a central role in the justification of punishment. We must therefore ask whether we are justified in imposing these harms in order to achieve the ends which we take punishment to aim at. In other words, we are faced with a version of the 'hard treatment challenge' which I discuss in Sects. 8–10 below.

⁴² Could the audience-independent theorist meet this objection by arguing that there are both audience-independent and denunciatory reasons for punishing, and that although concerns about stigmatization are sufficient to defeat the audience-independent ones, they do not undermine the denunciatory ones? Perhaps. But we should note three things. First, on the characterization of audience-dependent views I gave in Sect. 3 this would in fact be an audience dependent view, not an audience-independent one. Secondly, this view is explicitly rejected by at least one recent audience-independent theorist—namely Glasgow (2015). Finally, it's not clear what advantages this mixed view would have over the purely denunciatory view I am defending. So I am inclined to reject it on grounds of simplicity.

⁴³ For a good overview see Braithwaite (2000).

⁴⁴ Bennett (2008) has emphasized the public nature of punishment in arguing for his version of expressivism. On Bennett's view, punishment is a way for offenders to make a publicly dramatized expression of remorse. However, we might be impressed by the public nature of punishment without accepting Bennett's claim that we should be concerned with expression on the part of the offender rather than on the part of the state.

By contrast, on the communicative and audience-dependent views the harms of shaming and stigmatization seem to arise out of features of punishment which do not play an essential part in justifying the practice. We therefore need to explain why we would be justified in imposing these harms when we engage in a practice which is justified by the kinds of considerations an advocate of a communicative or audience-independent view would take to be significant.

6 Responding to the publicity challenge

I have argued that attention to the public nature of punishment provides us with reasons for preferring denunciatory versions of expressivism to audience-independent and communicative versions. On a denunciatory account, we should expect punishment to be public; but on communicative and audience-independent accounts we appear to have little reason to expect this, and some for expecting the reverse.

Advocates of communicative and audience-independent views might turn this point on its head and argue that the correctness of their views gives us reason to reform our punitive practices, and adopt forms of punishment which are not public in the sense I have been considering here. Duff has certainly argued that a communicative theory can be used as a basis for arguing for some kinds of reform of our penal practice (such as a gradual reduction in sentence lengths).⁴⁵ However, it is worth noticing that the kind of reform that would be required here would be considerably more far-reaching than the kind of reform which Duff has argued for: in fact we might wonder whether any of the forms that punishment standardly takes in existing societies, such as fines, imprisonment, or community service could be preserved if we adopted this line of response.⁴⁶

We might think that considerations independent of punishment's expressive form which might require punishment to be public, and outweigh the reasons why it should not be. If there are such reasons, this weakens the case that I have made for the denunciatory view. For in this case it will not be true that only the denunciatory view can account for the public nature of punishment. However, I shall now argue that in fact there are not.⁴⁷

One possibility is that the communicative role of punishment needs to be supplemented by

a deterrent function.⁴⁸ Duff himself is skeptical of this possibility, since he takes the threat involved in levels of hard treatment which are sufficiently onerous to present a serious chance of deterrence to run the risk of compromising the autonomy of the offender.⁴⁹ But whatever the truth of this, it is not clear that deterrence of this

⁴⁵ See for example Duff (2001, p. 92 and pp. 174–200).

⁴⁶ I am grateful to Lars Vinx for raising this issue.

⁴⁷ One possibility we can rule out for now is one on which punishment has a variety of expressive roles including an audience-dependent denunciatory one. Views of this sort are denunciatory views on the characterization I offered in Sect. 1.

⁴⁸ Cf von Hirsch (1994), Lippke (2007).

⁴⁹ Duff (2001, pp. 82ff).

sort requires that punishment be public in the sense we have been considering. It certainly requires the levels of penalties for crimes to be matters of public knowledge; it seems less obvious that it requires the identities of offenders to be so as well.⁵⁰

As Duff notes, we may think that some forms of punishment, including probation, community service and victim-offender reconciliation programs are valuable insofar as they allow for an offender to make public reparation for a crime in a way that may allow for reconciliation between offenders and victims.⁵¹ He also argues for the increasing use of forms of punishment of this sort. We may (but need not) think that punishments can only play this role in reconciliation if they are public in the sense discussed here.⁵²

We might want to concede this. However, it falls short of what is required in order to justify the publicity of punishment for two reasons. First, as Duff also notes, there seems to be something problematic about the idea that the sorts of behavior required of offenders subject to measures of this sort could be regarded as a kind of move towards reconciliation when coerced.⁵³ This suggests—as we might in any case think on independent grounds—that a workable penal regime which incorporates punishments of this sort will also need to make room for more traditional forms of sanction such as imprisonment. Furthermore, it is not clear how the points Duff makes about reconciliation and reparation could justify the publicity of more traditional forms of sanction, which presumably do not have this kind of reparative role.

Perhaps there are other kinds of reason why punishment should be a public matter. For example, there might be pragmatic grounds for thinking that punishment should be public in this sense. It may simply be cheaper, or more effective. Alternatively, making punishment public in this sense might protect against certain kinds of abuse. Or again the publicity of punishment might be best accounted for on the basis of considerations of the nature of the trial. If any of these considerations give us reason for thinking that punishment must be public, my argument against communicative and audience-dependent theories is undermined.

⁵⁰ One referee suggested that on a deterrence-based view, it might be necessary for the identities of offenders to be public in order to ensure the credibility of the criminal justice institution. The thought here might be that if the identities of punished individuals were not known members of a society might rationally doubt whether punishment was going on at all. This seems implausible: my own confidence in the existence of a variety of social practices does not seem to depend on my knowledge of the identities of individuals who participate in that practice. (I am, for example, quite convinced that criminal punishment takes place in France, Canada and Azerbaijan, even though I cannot identify any particular individuals who have been criminally punished in any of those countries).

⁵¹ Duff (2001, pp. 93–101). There might be some dispute as to whether all the cases Duff considers constitute forms of punishment: I agree with Duff that they do.

⁵² Duff also suggests that the state owes a public acknowledgment of wrongdoing to victims. However, this doesn't establish a case for the publicity of punishment [since acknowledging wrong-doing needn't require identifying offenders (Duff 2001, p. 114)].

⁵³ Duff (2001, p. 107). Duff considers the response that the offender is 'not required to *mean*' what he says and confesses to some doubts about the adequacy of this response. I think his doubts here are justified. For further critical discussion see Brownlee (2011).

If these theories were neutral on the question of whether punishment should be public, the fact that punishment might be cheaper or more effective if it is public might provide an adequate justification of the publicity of punishment. In Sect. 5, I argued that these theories are not neutral on this issue: on both views considerations about shame and stigmatization constitute reasons why punishment should not be public. Considerations of cost and effectiveness would have to outweigh these reasons. Furthermore these considerations would have to be ones which justified imposing harms on convicted offenders which went beyond those that were required by the communicative and expressive goals of punishment. As such they would, require an advocate of one of these two views to be able to give a response to the problem of hard treatment. As we shall see in Sects. 7–9 below, we should be skeptical about whether they can.

The suggestion that punishment needs to be a public matter in order to prevent abuse seems more promising. Since the prevention of abuse is something which protects convicted offenders rather than harming them, it does not seem to raise the same sorts of problems as a justification based on considerations of effectiveness or cost. However, even if penal systems require some form of public scrutiny in order to prevent abuse, they do not require that punishment be a public matter in the sense that I have been concerned with here.⁵⁴ They do not require, in other words, that the fact of a particular individual's punishment be a matter of public record, or that punishment should affect an offender's civic status.

The public nature of punishment might be thought to follow from a normative theory of the trial. Antony Duff and his co-authors have argued for an account of the trial on which trials must be public.⁵⁵ Their account explores how the publicity of the trial illuminates and justifies features of criminal law which we might otherwise struggle to explain, such as the presumption of innocence, the high burden of proof that is required in criminal trials and the right to silence on the part of the accused. If the public nature of punishment is simply a consequence of the public nature of the trial, this might provide a justification of the publicity of punishment which would be as good as the justification given on behalf of the denunciatory account earlier in Sect. 2. If so, the public nature of punishment will not constitute a reason for preferring denunciatory theories to other versions of expressivism.

However, an account like this could only provide a justification of public punishment if it included an explanation of why trials should be public in this sense. This might seem easy to provide. There are certain respects in which criminal trials must be public. For example it is natural to see judges and perhaps also members of criminal juries speaking, when they do so from within their officially defined roles, on behalf of the public. Furthermore Duff and Tadros have both defended the view that publicity must be invoked in order to explain which wrongs are properly the

⁵⁴ One might also rationally doubt whether the publicity of punishment is an especially effective way of preventing abuse of convicted offenders: there seems to be little clear-cut evidence in favour of this proposition.

⁵⁵ Duff et al (2007).

business of the criminal law: they are on this view public wrongs in the sense of being wrongs which are properly the concern of the public.⁵⁶

However caution is needed here.⁵⁷ As we have seen, publicity is a multi-faceted word: a process which is public in one of these senses need not necessarily be public in any of the others. In particular it does not follow from the fact that an action is carried out on behalf of the public, and in which the public has some legitimate interest must be carried out in view of the public. To think otherwise is to offer a quick and implausible argument against a government engaging in any activity in secret whatsoever. This conclusion seems too strong: there are surely activities carried out on behalf of the public and in the interests of the public which may legitimately be carried out in secret.⁵⁸

7 The hard treatment problem

In Sects. 4–6 I argued that for the denunciatory theorist of punishment, though not for the audience-independent expressivist or the communicative theorist, the Publicity Challenge can be seen as a version of the Hard Treatment challenge. I shall now argue that unlike the communicative and audience-independent expressivist, the denunciatory theorist has a convincing response to the Hard Treatment Challenge.

In this section I shall set out the Hard Treatment Challenge. In Sect. 8 I shall show that the audience-independent expressivist cannot meet it; and in Sect. 9 I shall show that the communicative theorist cannot meet it either. Along the way, I shall address an objection to communicative views which has been raised by Joshua Glasgow, which arises from a consideration of the possibility of unreceptive offenders. Doing so will help us to see that it is the hard treatment problem rather than the problem of unreceptive offenders which presents the biggest obstacle to the communicative view, and also prepare the ground for responding to an objection which Glasgow has leveled against the denunciatory view and which is modeled on the unreceptive offender problem.

Punishing someone typically involves treating them in ways which they find unpleasant, and in which we would not normally be permitted to treat them, in the absence of their consent, outside of a punitive context. In imprisoning people, we deprive them of their liberty: this may be found burdensome by itself; or it maybe

⁵⁶ Duff (2001), Tadros (2007). See also Duff (2007) for the idea that in a criminal trial a defendant is called upon to answer for their actions *to* the public.

⁵⁷ Duff (2001), Tadros (2007).

⁵⁸ Might punishment be one such activity? Nothing that I have said entails that actions carried out by the state must be public in order to constitute punishment. (I have argued in Wringer (2013) that it is essential to a form of hard treatment's constituting punishment that it have some expressive function; but the arguments put forward there do not determine that this expressive function must be denunciatory). My claim is instead that the denunciatory aspects of punishment play a role in justifying punishment. If this is correct then instances of secret punishment would be unjustified (or at least not susceptible of justification in the way I take to be the standard way. This seems consistent with the views put forward in Farmer (2012).

found burdensome insofar as it deprives an individual of the opportunity to pursue their interests. If a monetary fine is imposed on someone, we expect it to have a negative effect on their well-being. And when people are sentenced to community service, the tasks they are assigned are often intended to be deliberately tedious, and on some occasions a source of shame. I leave on one side forms of punishment which involve the deliberate infliction of physical pain or death: here the point is obvious.

Some authors think that punishment must involve an intention to cause an offender to suffer.⁵⁹ I disagree: if we impose a monetary fine on someone, we have not failed to punish them if the fine imposes no financial hardship (though we may have failed to punish them effectively.)⁶⁰ Nevertheless, punishment inflicts suffering in a manner that is non-accidental: if a form of behavior which never caused suffering to anyone were imposed on an individual, it would be difficult to understand why we should regard it as a form of punishment.⁶¹

The fact that punishment typically involves inflicting hard treatment appears to raise a problem for expressivists. We normally think the fact that a certain practice can be expected to cause suffering is a reason against engaging in it. It is not necessarily a conclusive reason: there may be occasions on which we can only achieve an important goal at the cost of inflicting suffering on someone. Under such circumstances we may be justified in doing something which we expect to impose suffering on someone.⁶² Nevertheless it seems plausible that in most cases the fact that a practice will predictably cause someone to suffer is at least a contributory reason against engaging in it. If we can find a way of achieving the same goals in ways that do not cause suffering, or cause it to a lesser degree these means, are to that extent, preferable.

Someone who thinks that our penal institutions are justified in virtue of their expressive features needs to do one of two things. They must either show that there are no ways of treating offenders which have the same the same expressive features as punishment does, but which do not predictably cause this level of suffering; or explain why the sorts of reasons we have for not engaging in practices which cause suffering when there alternative means to the same goals are either inapplicable, or over-ruled by other considerations.

⁵⁹ Hanna (2008), Boonin (2008).

⁶⁰ As I argue in Wringe (2013).

⁶¹ Wringe (2013). Coverdale (2013) and Poama (2015) have both argued that punishment should not be seen as a definitional element in punishment. But we could agree with this claim while thinking that punishment does typically involve suffering.

⁶² See Tadros (2011) for a detailed exploration of the issues here.

8 Responding to the hard treatment problem: audience-independent views

Advocates of audience-dependent versions of expressivism often appeal to the way the hard treatment that punishment involves affects an audience to account for its role in punishment. As Kleinig puts it: ‘Hard treatment may register where words fail’.⁶³ This kind of argument is not available to advocates of an audience-independent version of expressivism.

We might wonder whether the Hard Treatment problem is really a problem for the audience-independent view. If the justification of punishment depends on its expressing a message to a particular audience, then the possibility of expressing that message in other ways which do not involve hard treatment seems to undermine that justification.⁶⁴ For example, there might be ways of affirming the value of victims; of communicating with offenders in a way that encourages them to experience regret and remorse; and so on which do not involve hard treatment. If so, the high moral and practical costs involved in punishing offenders might give us a strong reason for preferring those measures.⁶⁵ However if the justifiability of punishment turns on its being a way of expressing certain kinds of attitude then the possibility of achieving the (independently specifiable) effects of punishment by some other means will be irrelevant.⁶⁶

What makes the hard treatment challenge bite for advocates of audience-independent expressivism is a combination of two facts. The first is that a certain practice’s being one which can be expected to cause suffering typically provide us with a reason against engaging in it. The second is the apparent possibility of finding alternative ways of expressing the emotions which we currently express via punishment.⁶⁷

This argument deserves closer scrutiny. As Joshua Glasgow has emphasized, it is not enough in this context to draw attention to the mere logical possibility of forms of expression which differ from our own.⁶⁸ The forms of expression by which we might express certain values are not infinitely malleable. Insofar as we are interested in responses to wrongdoing that it makes sense for us to implement and institutionalise, we need to consider forms of expressive response to wrongdoing which are possible for us.

For my purposes, it will be helpful to distinguish between two aspects of expressive behavior which we might call natural expressions and cultural

⁶³ Kleinig (1991, p. 417), defending a communicative version of expressivism. Cf Primoratz (1989, p. 200), making a similar point in the context of a more denunciatorily oriented form of expressivism: ‘the victim of the crime and the public at large would surely see purely verbal condemnation of crime, however public and solemn, as half-hearted and unconvincing’.

⁶⁴ Hanna (2008), who depends here on a conception of hard treatment which I contest. (cf footnote 30).

⁶⁵ Tadros (2011, chapter 5).

⁶⁶ This isn’t to rule out the possibility of other closely-related kinds of objection: the possibility of alternative forms of expression; the difficulty of justifying high-cost forms of expression and so on.

⁶⁷ As a number of authors, starting with Feinberg (1965), have noted.

⁶⁸ Glasgow (2015).

elaborations. By natural expressions of emotion I mean such things as trembling as an expression of fear, shouting as an expression of anger, and crying as one of grief. These forms of expression seem to have some physiological basis; they are cross-culturally shared; and they often involve some involuntary element.⁶⁹

When we think of emotions being expressed in behavior, we often have in mind natural expressions of this sort. However, other forms of expression seem to involve elaborating on the natural expression of emotions in a symbolic manner, in ways which can vary dramatically from culture to culture. Mourning provides a good example here: although mourning rituals vary radically from culture to culture, many of them can be seen as a dramatic elaboration of some of the natural expressions of the emotion of grief.⁷⁰

These two aspects of emotional expression give rise to two ways in which what we might call the expressive repertoire for a given emotion could be constrained. It might be constrained by features of our underlying nature, or by features of the symbolic vocabulary which enable us to elaborate on it. So for example, in the case of an expression of love the reason we can say it with flowers but not with weeds has to do with culturally variable considerations as to which forms of flowering plant are an appropriate gift to a lover; whereas the fact that we cannot say it with weevils has to do with the fact that weevils typically elicit disgust—and this might seem to be a more biologically-based constraint.

We might be tempted to regard punishment as the natural expression of an emotion such as resentment at wrongdoing or what Glasgow calls ‘punitive hostility’. If so, we would have good reason to regard it as being significantly constrained. For it is plausible that our natural forms of emotional response seem to be constrained by features which are not entirely under our individual or collective control.

However, although we might think that the natural expression of whichever emotion is expressed by punishment involves harming an offender or a perceived offender, it seems implausible that the elaborate system of social institutions which embody the mechanisms of legal punishment stands to punitive hostility in the way which crying stands to grief. Here we seem to be in the realm of dramatic elaborations of natural responses. As a result there seems to be much more scope for shaping our responses (as there is with mourning).

Of course, dramatic elaborations of our natural responses are also constrained in certain ways. However many of these constraints seem to depend the ways in which we could naturally expect them to be understood by certain audiences given certain background knowledge—what we might call their social significance. We might initially think that an advocate of audience-independent expressivism seems unable to appeal to this kind of constraints, since, if a form of expression is not aimed at an

⁶⁹ This is not to say that they are never subject to voluntary control. For further elaboration see Griffiths (1997).

⁷⁰ My thinking has been influenced by Bennett (forth coming), with which I nevertheless disagree substantially.

audience, it is hard to see how the way in which an audience might understand it should constrain the form which it should take.⁷¹

However, matters are not quite so straightforward. In Sect. 2 I distinguished between what I called ‘audience-dependence’ and ‘weak interpretability’; and in Sect. 3, I suggested that an audience-independent expressivist might nevertheless insist that punishment must involve forms of expression which are weakly interpretable. Since a form of expression’s being weakly interpretable requires that it be comprehensible to some actual audience as expressing what it does in fact express there may nevertheless be a role for culturally-based constraints on expressive behaviour to play a role here after all.

Nevertheless, I am skeptical as to that constraints on the cultural elaboration of punitive hostility on individuals deriving from the weak-interpretability requirement are so strong as to rule out the possibility of expressions of punitive hostility which do not involve hard treatment. For in fact we have ways of expressing punitive hostility which do not seem to involve inflicting hard treatment on individuals.⁷² One can do so, for example, by treating their images in certain kinds of ways: burning in them in effigy, spitting on photographs, destroying physical representations and so on.⁷³ None of these seem to involve hard treatment. If they do not, they do not constitute punishment. Nevertheless, it seems as though they could serve the expressive goals which the audience-independent expressivist takes to justify punishment. So we do not have a justification of punishment on audience-independent expressivist lines.⁷⁴

⁷¹ An audience-independent expressivist might hold the following two views: first, that in order for our expressions of punitive hostility to be able to properly express our commitment to the appropriate values, they must be intelligible to some possible audience, even though they do not need to be aimed at any audience, and secondly, that constraints on what a potential audience could find intelligible might limit the range of potential expressions in such a way as to require that they involve hard treatment. However, a view of this sort still seems vulnerable to the publicity constraint of Sects. 3–5, since nothing about this form of punishment requires it to be public in the sense outlined there: a communication can be intelligible to some possible audience, without being actually known about by any particular audience.

⁷² This point also counts against the possibility of there being biological constraints on our cultural elaborations which require the expression of punitive hostility.

⁷³ These forms of expression have in common the idea of treating violence visited on a symbolic representation of an individual as a way of expressing punitive hostility to that individual. I suspect that as forms of expression go, this is one which can be quite widely understood by actual audiences. There might be audiences who could not understand violence inflicted on a symbolic representation in this way. For societies consisting only of such individuals a defence of the hard treatment involved in punishment along audience-independent expressivist lines might succeed. But that is not how things are for us.

⁷⁴ One might think that these are, in fact, forms of hard treatment, and thus of punishment. It would remain true that the audience independent expressivist was unable to justify many of the specific forms we typically take to be acceptable forms of punishment, such as deprivation of liberty, monetary fines, and so.

9 Responding to the hard treatment problem ii: communicative views

In Sect. 5, I introduced the Hard Treatment Problem as the problem of explaining how it can be justifiable to treat people in ways which they can be expected to find burdensome. This formulation pre-empts the following response from the communicative theorist: in punishing someone we need not intend that they suffer, and so a communicative theorist need not be committed to thinking that communicative goals must somehow make it legitimate to intend to inflict suffering.⁷⁵

Duff is committed to a view on which it must be at least predictable that punishment will involve suffering on the part of offenders.⁷⁶ For Duff holds that punishment is to be justified by its communicating a message to an offender which is intended to make the offender experience remorse, an experience which he takes to be necessarily experienced as painful.⁷⁷ Some authors take Duff's response to the problem of hard treatment to be that remorse or regret offers a means by which an offender may reintegrate themselves into a community, that this is a valuable goal, and that since remorse is an emotion which is necessarily experienced as painful, we have a justification for treating people in ways that they find painful.⁷⁸

This defence of the communicative view seems inadequate. Even if it is permissible for state institutions to inflict on offenders treatment that causes remorse, it does not follow that it is permissible for the state to cause an offender the other kinds of suffering which our institutions of punishment predictably and reliably produce.⁷⁹ Someone who is deprived of their liberty may thereby be led to reflect on their actions and to experience remorse. But the isolation from family, friends or their usual environment which prison entails, and the humiliations involved in living under the kinds of regime of surveillance which even the most humane forms of confinement might be expected to entail will lead them to suffer in ways which seem to be independent of their suffering remorse.⁸⁰

Might a communicative theorist appeal to considerations of effectiveness in communication to justify the kinds of hard treatment that punishment typically involves? They might argue either that communication expressed via hard treatment is more likely to bring about remorse, or that in many cases it is the only way to bring about remorse. However, neither line of argument seems plausible. First, consider the claim that expression via hard treatment is a more effective way of leading prisoners to feel remorse than communicative condemnation that is not so accompanied. This cannot, by itself constitute a justification of the hard treatment involved in punishment. It might do so if we thought there was some kind of

⁷⁵ As, for example, Sayre-McCord (2001) supposes.

⁷⁶ Duff (2001).

⁷⁷ Duff (2001).

⁷⁸ For example Hanna (2008).

⁷⁹ The argument here is that if punishment involves a form of suffering which does not figure directly in the justification of punishment in addition to forms of suffering which do so figure, the fact that the imposition of this second kind of suffering is insufficient to justify suffering of the first sort.

⁸⁰ For further criticisms, see Primoratz (1989), Sayre-McCord (2001), Hanna (2008), Bennett (2008), Tadros (2011).

obligation to adopt the most effective means to inducing remorse. But this is highly implausible. If it is impermissible to treat people in a certain way, then we are obliged to adopt a less effective means, and if it is permissible, but highly costly to do so, we might plausibly adopt a less costly means.

Suppose we claim that we are under an obligation to try to make offenders feel remorse and that communication via hard treatment is the only way of doing so. Some of the considerations which arose in our discussion of unreceptive offenders seem relevant here. We can try to make offenders feel remorse even if we are destined to fail. Of course, we cannot try to do what we know to be impossible. So, if we were in a position to know, of some offenders, that nothing other than hard treatment could make them feel remorse, we might be justified in imposing such treatment on them. However, this argument drastically restricts the range of offenders who we are justified in inflicting hard treatment on. For most people seem to be unpredictable enough for us to be unsure what kinds of treatment might make them feel remorse. Furthermore, the literature on restorative justice suggests that in many cases engagement with the victims of crime will be more effective in bringing about remorse than standard forms of hard treatment.⁸¹

10 Responding to the hard treatment challenge III: denunciatory views

In Sect. 7 I suggested that an expressivist theorist of punishment might argue that hard treatment was necessary for punishment to achieve its expressive goals. In Sect. 8, I suggested that an advocate of an audience-independent version of expressivism could not appeal to this argument. In Sect. 9 I argued that an advocate of a communicative version of expressivism could not do so either. I shall now argue that an advocate of a denunciatory account can do so.

On the Denunciatory View the idea that hard treatment is a necessary condition for the effective communication of the message that punishment is supposed to carry to its intended audience is a natural development of a response to the ‘Publicity Challenge’. Just as the denunciatory theorist can hold that punishment must be public in order to communicate with its intended audience (since if it is not known to them it cannot communicate anything to them), they can hold that it must involve hard treatment in order to be taken seriously by that same audience.⁸²

Using Primoratz’s billboard analogy once again, we might say that just as there is no point in putting up a billboard that no-one can see, there is also no point in putting up a billboard whose intended audience are unlikely to take it seriously.⁸³

⁸¹ Braithwaite (2000).

⁸² As I have previously argued in Wringer (2006, 2013). The ‘must’ in this formulation is not intended to express either conceptual or moral necessity: it is akin to the necessity expressed in the claim: ‘If you want to arrive in Istanbul before midnight, you must leave before 4 in the afternoon’: in other words, it is a modality that expresses the restrictions on the availability of means to a given end within a particular practical context. (I thank a referee for this journal for raising this issue).

⁸³ Insofar as the publicity of punishment itself inflicts a form of suffering on offenders we might feel that it also requires justification. And we might feel that unlike other respects in which punishment is harsh,

The denunciatory theorist need not rule out that there might be communities where harsh treatment was not required for communication of this sort to be taken seriously: they need only hold that actually existing political communities do not fall into this happy category. The argument does not show that the institution of punishment would be justified in any possible norm-governed community. This is correct. However, those who wish to justify the institution of legal punishment need not aim so high: they need only show that it would be justified in any society reasonably like ours.⁸⁴

Tadros has argued that expressivists need to explain how the good involved in the kind of expression which punishment involves can justify the costs that punishment involves.⁸⁵ Since it may turn out that if the denunciatory theory is correct, we ought to devote fewer resources to punishment than we currently do, the challenge here is to establish that some kind of system of punishment is justifiable, not to justify the particular forms our punitive systems have taken.

The denunciatory theorist should adopt the view that in societies as they actually exist, some enforcement is required in order to demonstrate to the members of a given society that certain norms are the norms of that society.⁸⁶ This already meets Tadros' challenge. But notice also that Tadros holds that the costs involved in punishment can be justified on grounds of deterrence (and that deterrent-based justifications of punishment need not involve impermissibly treating people as means.) A denunciatory theorist should hold that the purpose of punishment is not to deter crime, but to make clear that certain norms are to be taken as norms. The goal of establishing that people knowing that certain norms are in force is logically prior to the goal of enforcing those norms. If we can justify the costs involved in punishment by reference to the first goal, then we can also justify them by reference to the second goal.

Footnote 83 continued

this aspect of punishment is inessential to punishments being taken seriously. If so, the account I have given may seem to be vulnerable to objections based on the principle put forward in footnote 79. I am unconvinced that the publicity of punishment is inessential in the way the objection suggests. But even if this were true, the billboard analogy seems relevant in a different way: it's a precondition of a billboard's being taken seriously that it should be seen in the first place.

⁸⁴ Scanlon writes 'affirmation as a value is something citizens may reasonably demand of a system of law. It does not seem likely that a system of law that fails, in general, to respond to such demands is likely to survive' (Scanlon 2003, p. 223). I add two further points. First, if citizens may reasonably demand affirmation of a system of law, they may reasonably demand affirmation of a sort that is comprehensible to them as such. Secondly, in societies as they currently exist, no form of affirmation that falls short of inflicting harsh treatment is likely to be able to do this.

⁸⁵ Tadros (2011).

⁸⁶ I thank a referee for this journal for drawing my attention to the need to emphasise that the qualification 'in societies as they actually exist' is important here: I don't want to claim that the idea of a norm which is never transgressed is incoherent, but only that there are some norms which could only be norms in any society we might plausibly inhabit if they are enforced. A second referee also noted that there are some apparent similarities between this view and that put forward in Bennett (2006). But as I have already noted (footnote 4 above), Bennett does not explicitly identify the intended audience of penal communication as society at large.

Duff has suggested that the denunciatory view is objectionable insofar as it treats offenders merely as a means.⁸⁷ He holds that on a communicative view inflicting hard treatment on an offender does not involve impermissibly treating them as a means because the point of treating them in that way is to express a message to them. The denunciatory theorist seems to have a problem here. On the denunciatory view the message that punishment expresses is addressed to the members of the society whose laws have been transgressed, rather than to the transgressor.

One point to note here is that although the notion of ‘treating someone as a (mere) means’ (and the associated notion of instrumentalization’) may seem intuitively clear, it is harder than one might think to come up with a plausible interpretation of the prohibition on treating others as a means. On one plausible account, put forward by Onora O’Neill, to treat someone as a means is to treat them following a maxim to which they could not possibly consent. But it is far from obvious that an offender could not, in fact, consent to being punished on denunciatory grounds.⁸⁸ Even a burglar may desire that the norm of respect for property be affirmed, on pain of being unable to enjoy the fruits of their illegal endeavours in peace. (Perhaps it is harder to defend the view that someone who is punished in a denunciatory manner should be able to share the ends of those punishing him or her,⁸⁹ since one might think that those ends typically include not only that a norm should be affirmed, but also that it should be universally observed. But this need not be correct: one might not have such an end in view in affirming such a norm, since one might think that this end was not capable of realisation, and one might also have a general objection to having unachievable ends.)⁹⁰

We should also note that the denunciatory theorist is in fact no worse off than the communicative theorist here. For in paradigmatic cases of punishment the offender is a member of the society whose laws have been transgressed.⁹¹ Insofar as a message is being expressed to members of that society, it is being expressed to him or her. If the advocate of the communicative theorist can appeal to this fact in order to explain why the use of hard treatment to communicate with an offender does not involve impermissibly treating the offender as a means, so can the advocate of the denunciatory view.⁹²

⁸⁷ For further rebuttal of the idea that denunciatory punishment treats offenders as a means, including discussion of the case where the offender is not a member of the political community whose laws have been broken see Wringle (2006, 2012). See also Tadros (2011).

⁸⁸ O’Neill (1989); for further discussion see Wringle (2010, 2012).

⁸⁹ As Korsgaard (1996) requires.

⁹⁰ Tadros (2011) has recently advanced a sophisticated account of what is involved in treating someone as a means. Tadros argues that inflicting punishment on offenders for deterrent purposes does not involve treating them as a mere means in any way which is morally objectionable. I argued earlier that deterrence presupposes denunciation. So if Tadros is right that deterrence does not involve objectionably treating offenders as a means, the same must be true of denunciation.

⁹¹ And in non-paradigmatic cases, such as the punishment of corporations and of individual who are not members of a given political community, the communicative theory has further problems, as I point out in Wringle (2006) and Wringle (2012).

⁹² Is the Denunciatory View vulnerable to a version of Glasgow’s ‘unreceptive audience’ objection discussed in footnote 21? The objection would require it to be the case that every member of the audience

One might again worry at this point that the denunciatory view collapses into a version of the communicative view. However, this seems like a mistake. One way of putting the point would be to say that on the account proposed punishment addresses the offender *qua* community member rather than *qua* offender. But without further elucidation this point may seem opaque or even *ad hoc*. One way of seeing that it is not is to note the existence of cases in which the offender is *not* a member of the political community: for example cases of extra-territorial punishment. In such cases the offender will not be being addressed *qua* member of the political community. In such cases the difference between addressing someone as offender or as community member will be significant (and as has been observed elsewhere, the Duff-style communicative theorist has difficulty coping with such cases.)⁹³

A further reason for distinguishing a view of the sort I have outlined here from communicative views is this. Such views have typically relied on the idea that punishment communicates with an offender in a distinctive way and for a distinctive purpose, and that this purpose plays a significant role in explaining why punishment is an endeavour worth engaging in. But on my view, there is nothing distinctive about the way punishment communicates with an offender, and the fact that it does so (in the cases where it does so) is derivative from the fact that it communicates with the political community as a whole. One might take this to be a mere difference of degree. But in fact it points us in an entirely different direction when considering questions about the nature and justification of punishment.

11 Conclusion

The question of whether expressivists can justify the hard treatment which punishment involves has played a central role in discussions of expressive theories of punishment, ever since Feinberg made the view prominent. If the arguments of this paper are correct, much of that discussion might more profitably have focussed on a different feature of punishment: namely its publicity. A refocusing of this sort more quickly reveals which form of expressivism is most plausible,—namely a denunciatory view—and makes clear the resources which an expressivist can appeal to in defending this view.

It is natural to wonder what the implications of the view I am propounding might be for our punitive practice. Space precludes a detailed discussion of this important issue here. However, it is worth noticing that many, if not all of our existing penal practices are compatible with the account I have given. The idea that these practices have a denunciatory role in virtue of their public nature played a significant part in

Footnote 92 continued

to whom the denunciatory message of punished was expressed should be incapable of understanding the denunciatory role of punishment, and that those who were administering punishment should be in a position to know that this was the case. It seems hard to construct a plausible scenario in which this is true. Even if we can the denunciatory theorist might simply say that in such a society punishment would not be possible: what is important is that our society is very unlike this.

⁹³ Wringer (2006, 2012).

the arguments of Sects. 4–6. This is not to say that my views commit us to some form of penal conservatism: it may turn out that the denunciatory goals of punishment could be carried out more effectively or at less cost by other means than those we currently use.

However two kinds of caution are in order here. One corollary of the arguments put forward in Sect. 10 is that if the denunciatory view is correct, we are unlikely to be able to eliminate the ‘Hard Treatment’ aspect of punishment, at least within society as is currently exists or is likely to develop in the foreseeable future. Furthermore we should not necessarily assume that the account I have offered entails that we should make efforts to make punishment more conspicuously public. For as I argued in Sect. 6, the public nature of punishment constitutes one aspect of the way in which it involves hard treatment. Making punishment more conspicuously public would thus amount to incrementing the hardness of the treatment which it involves. And although my argument entails that punishment must involve hard treatment, nothing I have said will license the claim that it ought to involve a greater degree of hard treatment than it currently does.⁹⁴

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