

10. DOES PUNISHMENT NEED HARD TREATMENT? A REPLY TO DUFF

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Many punishment-theories contain monistic views on the question what punishment really is. Retributivists generally believe that intentionally inflicting suffering is the essence of punishment. Some of their theories reveal a so called "principled objectivism", which is in terms of the Dutch criminologist Willem Nagel typical of True Believers.¹ The allocation of a just measure of pain is elevated to a sublime principle of justice. Even if nobody would hold suffering appropriate, still one is obliged to follow that principle. A familiar example is Kant's cramped judgement that even when the world would perish the last criminal should be hanged.² In *On the Genealogy of Morals* Nietzsche criticises this "black magic": there is no need to transform a nasty but indispensable punishment practice into a higher principle. Unfortunately his advice fell on deaf ears, because – at least since the seventies of the last century – there is a revival of retributive armchair philosophies in which nice benefit-burden balances are conjured up, of course miles away from the expanding punishment industry.

Like their opponents, many restorative justice theorists try to define sanctions in a monistic way: reparation is given a supreme status. Reparative sanctions would offer just answers for all aspects of the penal system. Sometimes the old abolitionist slogan reverberates: criminal justice has to give way for restoration and reconciliation. In this case we are dealing with True Believers of a more utopian nature.

Both restoration and retribution occupy a legitimate position within the penal system. We have to rely on both punishment motivations.³ In many situations restoration is not appropriate or applicable, for instance when the offender is not interested in repairing the harm done or when feelings of revenge block a genuine dialogue. Nevertheless, I believe we should deal

¹ W. NAGEL, "The true believer" en het probleem van de vergelding" in *Speculum Langemeijer*, Zwolle, Tjeenk Willink, 1973, 365-386.

² The Dutch criminal justice philosopher L. POLAK, *De zin der vergelding*, Amsterdam, Van Oorschot, 1947, 338 points to the "tautonic sophisms of a senile genius", the Kant of *Metaphysische Anfangsgründe der Rechtslehre* (1797).

³ In this article I do not take consequentialism into account. As is well-known, this paradigm legitimates important punishment functions, but cannot offer the judge adequate motives to explain to the offender why he is punished.

with restoration in a pragmatic way, whereas retribution should be dealt with reticently. So, applying the “good old” proverb of the Modern School: restoration if possible, retribution if necessary.

To accentuate the meaning of retribution and restoration I will examine some basic ideas of one specific retributive author and in many ways a True Believer: Antony Duff. The studies of this outstanding scholar contain some misleading aspects, particularly the old expiatory idea that suffering is a condition to generate personal repentance. I believe his positive interpretation of inflicting suffering is illusory and undesirable. In particular I will criticise the supposition that hard treatment and two-way communication are compatible. Nevertheless, Duff's work contains many starting points for a solid foundation of restorative justice, like the view that proper punishment requires two-way communication, and that punishment is successful when it brings about moral self-reform. It is up to us to put Duff's theory on firmer ground. In the last paragraph's I will argue that hard treatment should be reserved for serious crimes when the public is shocked and the offender does not want to take responsibility. If the offender shows regret or repentance hard treatment seems to be superfluous. Before discussing Duff's theory I will shortly examine two questions: Why do we have to rely on retribution? And: What is hard treatment?

1. WHY DO WE HAVE TO RELY ON RETRIBUTION?

Retributivists are eager to demonstrate that bad practices and negative interventions can produce something good or have some worthwhile ends. Despite these efforts they did not really succeed in developing plausible justifications for intentionally inflicting pain. I do not believe that intentionally inflicting pain can be “explained or developed within a reasonable system of moral thought”.⁴ The principles that retributivists have invented for that purpose – annulling the crime, taking away benefits, lowering the status of the criminal, etc. – remain vague, imaginary and ambiguous.⁵ Nevertheless, retribution cannot be eliminated from morality. Retributive feelings, no matter how disappointing, are a vital part of our emotional life. Grievances reveal desires whose only satisfaction is the belief that offenders are being distressed or made to suffer. The task of retributivism is to bring these vindictive desires within a legal framework of just deserts and proportionality.

⁴ J.L. MACKIE, “Morality and the Retributive Emotions” in his *Persons and Values*, Oxford, Oxford University Press, 1985 206-219, also T. HONDERICH, *Punishment. The Supposed Justifications*, Oxford, Polity Press, 1989.

⁵ N. WALKER, *Why Punish?*, Oxford, Oxford University Press, 1991. Retributivists have developed many other ideas that indeed make good sense: the moral message of the public censure, warranting rights of offenders, the importance of guilt and proportionality, etcetera.

The difficulty that retribution cannot be made decent sense of and the fact that retributive feelings are inescapable: this is what Mackie calls the “paradox of retributivism”. When justifying these desires psychological, social and political functions are at stake. The political account of retributivism says that if the state does not take action against crimes it condones behaviour of which the effects run counter to the moral expectations that are connected with the law. Not taking action gives the impression that the state lacks the power to protect its citizens. Thus the authority of the state is compromised.⁶ Moreover the impression may last that crime pays and that the moral indignation of victims does not count. Therefore the state is obliged to take action and to declare publicly that punishment will follow. In terms of Spinoza: injustice ought never to thrive, avail or give advantage; it must fail.⁷

However, this political account of retribution cannot give convincing arguments for deliberately inflicting pain. The desire to cause this suffering fulfils psychological functions: grievance-satisfactions, canalisation of negative emotions like rage, revenge and fear, and regaining some peace of mind. At the same time the public must be informed that the “biased selfishness and norm-violating will” of the offender gets a severe blow.⁸ Nevertheless, with Nietzsche we endorse the thesis that retributivism obtains a bad victory: ultimately it works with instruments that are considered illegitimate when used by the other party.

2. WHAT IS HARD TREATMENT?

Retributivists are inclined to see one particular and rigorous aspect of punishment, namely intentionally inflicting pain, as the essence of criminal punishment: “The guilty deserve to suffer.” However, nowadays this a priori inflicting pain certainly does not hold absolute sway over the practice of allotting penal sanctions. Sentences can also be related to training, probation or compensation. In these cases the judge often deems it not relevant that suffering really manifests itself, and she can give priority to rehabilitation or pedagogical effects. These kinds of sentences can hardly be associated with “intentionally inflicting pain”: the pain or burden is the derivative of imposed obligations. On the other hand, what often is called “hard treatment” can be related to “active” and external ways of inflicting pain: the pain must act upon the psyche of the offender; it functions as an

⁶ T. BALDWIN, “Punishment, Communication and Resentment”, in M. Matravers (eds), *Punishment and Political Theory*, Oxford, Hart Publishing, 1999, 124-132.

⁷ See L. POLAK, *De zin der vergelding*, Amsterdam, Van Oorschot, 1947.

⁸ L. POLAK, *De zin der vergelding*, Amsterdam, Van Oorschot, 1947.

attack on his will. The offender must feel the censure in a compelling way and is not allowed to escape from the experience of suffering.

The problem is that retributivists do apply many different definitions of hard treatment. A formal one – popular among lawyers – says that hard treatment simply means deprivation of time and liberty. What actually happens during the execution is deemed not relevant, whether the offender does nothing or is burdened with heavy work. This is a senseless definition, at least from an ethical viewpoint, because the moral implications of the punishment regime are denied, while at the same time the person's status as moral agent is ignored.

We need more substantive descriptions. John Kleinig – who, as a good retributivist, equates punishment with hard treatment – offers some fine distinctions. He points out that merely to criticise, rebuke or censure the wrong-doer would fail to register the seriousness of what was done. Punishment not only involves a stigmatising condemnation, but also some significant deprivation is considered appropriate. This imposition serves to impress on the wrong-doer the nature of what he has done, and also acknowledges the personhood of the victim. But there are limits: cruel and degrading punishments tend to threaten the humanity of convicts, because they undermine their capacity for appraisal (in the Kantian sense of loss of autonomy). In current prison environments, Kleinig adds, we treat inmates in ways that compromise the human regard to which they are entitled. On the other hand, treating people humanely does not mean treating them softly. "Hard treatment may be onerous, tiring, difficult, vigorous, austere, and rigorous without being inhumane".⁹

Like Kleinig, Andrew von Hirsch states that blaming is not enough to explain the institution of punishment. Punishment does convey blame through the visitation of deprivation on the offender. In other words, we express disapproval through hard treatment. At the same time Von Hirsch believes that visiting deprivation on those who offend is only justified when the criminal sanction is useful in preventing crime. Were the censure sufficient to prevent crime, no hard treatment was needed. But too many offenders are not impressed. Therefore a "supplement" of deterrence is needed. "The hard-treatment in punishment serves a prudential reason for obedience to those insufficiently motivated by the penal censure's moral appeal."¹⁰ In other words, hard treatment provides an additional reason

for compliance to those who are capable of recognising the law's moral demands, but who are also tempted to disobey them. Echoing the liberal worries of Kleinig, he remarks that the harsher the penalty system is, the less plausible it becomes to see it as embodying a moral appeal. Hard treatment then appears as a system of bare threats.

This version of hard treatment as "communication plus deterrence" is criticised by Antony Duff. He claims that this account is not consistent with the ideal of a liberal political community. To address citizens in the coercive language of deterrence is to cease to treat them as members of the normative community. Duff admits that many offenders have no serious regard for the values that the law embodies. But a moral regard is not entirely absent. The problem is that this regard is not wholehearted, or consistent, or always sufficient to overcome the temptations of self-interest. Offenders are not wholly deaf to the law's moral appeal and we do not attend to it enough. A second critical point is directed against Von Hirsch's idea of hard treatment as a supplement. "We must ask whether 'prison sentences of up to three (or five) years can really be seen as *supplements* to the law's moral appeal".¹¹ Duff rightly fears that in the context of severe punishments prudential "incentives" will replace the moral voice of censure. On the other hand, if punishments were modest enough to be mere supplements it might be questioned whether the preventive aims are as effective as Von Hirsch presupposes. A modest supplement fails to dissuade.

To overcome these shortcomings Duff develops a more ambitiously communicative account of hard treatment. Punishment must give offenders an opportunity to examine their souls. The deprivation in punishment must provide a kind of secular penance.

3. DUFF'S ACCOUNT: SOME IMPLAUSIBLE PSYCHOLOGICAL ARGUMENTS

In his study *Punishment, Communication, and Community* Duff points out that penal hard treatment is an essential part in the communication of disapproval. His aim is to persuade the offender to accept the censure as justified, to recognise and repent his crime as a wrong, and to engage in moral self-reform. We have to invite the offender to attend to these core questions, but we should not penetrate his conscience. He has to develop his moral competences himself. However, mere words are not enough to persuade: they are too easily ignored or forgotten. A suitable kind of hard treatment can help keep the offender's attention focused on his crime, and

⁹ J. KLEINIG, "The Hardness of Hard Treatment", in A. ASHWORTH and M. WASK (eds), *Fundamentals of Sentencing Theory. Essays in Honour of Andrew von Hirsch*, Oxford, Clarendon Press, 1998, 286.

¹⁰ A. VON HIRSCH, "Desert and Previous Convictions", in A. VON HIRSCH and A. ASHWORTH (eds), *Principled Sentencing. Readings on Theory and Policy*, Oxford, Hart Publishing, 1998, 171; A. VON HIRSCH, *Censure and Sanctions*, Oxford, Clarendon Press, 1993.

¹¹ R.A. DUFF, *Punishment, Communication, and Community*, Oxford, Oxford University Press, 2001, 88.

so help to induce repentance. Secondly, the offender must give a forceful apology to the victim and also to the wider community. He must "make up" for his crime, but a merely verbal apology is too easy: undergoing or undertaking suitable penal hard treatment gives more force to the apology. At the same time, he must offer reparation to those whom he wronged. In short, punishment is two-way communication, and penal hard treatment is essential to both communications because it induces the pain of remorse and enforces the pain of reparation.

Duff stresses that his rationale for hard treatment is not of a consequentialist nature: what makes the punishment appropriate is not its effectiveness, but addressing offenders as responsible moral agents. Punishment requires the communication of censure and the encouragement of moral learning, not providing training programmes to change the offender's behaviour. Offenders should not be instrumentalised to reach a "greater good". We have to address them as autonomous agents in terms of their own values so that their moral respect is guaranteed.

Persuading is a central concept in Duff's theory. We should persuade the offender, even if we are sure we will fail. We should not give up on him as a moral agent. In that case we would treat him as beyond moral redemption. "We owe it to him to continue to treat him as someone who is not irrevocably cut off from the values he has flouted, who could still redeem himself – even if he will not do so".¹² In short, we have to treat him as a potential penitent.

Duff's theory has significant implications for sentencing practices. It should lead to reducing the use of imprisonment, given its exclusionary meaning, and of fines, as implying a monetary value to crime. Sentences as community service and probation should be favoured, since they support self-correction and repentance. Their communicative content is direct and explicit. Duff aims to impose meaningful tasks that are related to the wrongdoing.¹³ At the same time, negotiated sentencing and penal versions of victim-offender mediation could be promoted, so offenders and victims might have a more active role in the determination of reparation-work.

Doing so, Duff constructs a "third way" between pure retributivism and consequentialism, a way that offers many points of departure for restorative justice advocates. Nevertheless, his theory holds some severe flaws. I will concentrate on some implausible psychological arguments. First – and this is the main objection – it must be questioned whether two-way communication and hard treatment go together. During communication between

autonomous persons everyone's integrity is respected. Does penal hard treatment fit in with respecting integrity? The answer is probably negative because the communication goes by in implicit terms of dominance and submission. Dominating persons often fail to convey moral authority. For this reason hard treatment tends to incite mistrust: the offender is anticipating hostile intentions, feigns conformity, resists or withdraws. At the same time it is improbable that submission or "being the subject of deliberative inflicting pain" encourages moral reflection, since the attention of the offender is concentrated on his own suffering. The attention shifts from the harmfulness of the criminal act to present hardships. This makes the offender obstinate, incites anger or raises depressive feelings. Nietzsche – in his study *On the Genealogy of Morals* – summed up these effects in a succinct way: "Punishment is supposed to possess the value of awakening the *feeling of guilt* in the guilty person; one seeks in it the actual *instrumentum* of that psychical reaction called "bad conscience", "sting of conscience". Thus one misunderstands psychology and the reality of things even as they apply today (...). It is precisely among criminals and convicts that the sting of conscience is extremely rare; prisons and penitentiaries are not the kind of hotbed in which these species of gnawing worm is likely to flourish (...). Generally speaking, punishment makes men hard and cold; it concentrates; it sharpens the feeling of alienation; it strengthens the power of resistance."¹⁴

Duff mistakenly presupposes that persons who must endure punishment, are receptive to reasonable arguments and moral learning. Suffering would encourage the offender to concentrate on the crime, the censure and misery that the victim had to endure. The offender recognises what he did wrong. This is only plausible when the offender accepts the justice of his suffering. In Duff's terms: burdensome tasks only serve the aims of the communicative enterprise when the offender is convinced that he was wrong and that he deserves punishment. If this is not the case then hard treatment does not at all contribute to more moral insight: suffering precludes concentration and the opening of the self that are necessary for learning. Generally offenders do not experience suffering as a contribution to a "lesson they need to learn", but as an indication that they have no control over their fates.¹⁵ For that reason serious deprived offenders will not take initiatives to repair harm or offer genuine apologies to victims. Moreover, there are too many offenders who are not susceptible to moral

¹² R.A. DUFF, *Punishment, Communication, and Community*, Oxford, Oxford University Press, 2001, 123.

¹³ See also R.A. DUFF, "Alternatives to Punishment – or Alternative Punishment", in W. CRAGG (ed), *Retributivism and its Critics*, Stuttgart, Franz Steiner, 1992, 43-69.

¹⁴ F. NIETZSCHE, *On the Genealogy of Morals*, Vintage (translation Walter Kaufmann, first publication in 1887), New York, 1967, 81.

¹⁵ T.R. CLEAR, "The Punitive Paradox: Desert and the Compulsion to Punish", (1996) 33 *Journal of Research in Crime and Delinquency* 94-108.

messages, from amoral risk-takers to status-seeking machos. Others are not susceptible because they have too much awe for legal authorities.

In short, Duff works with dubious psychological premises. It is highly questionable if the moral communication and moral education he aims at, will occur. Hard treatment is no reliable route to moral self-reform. Attention and support from others are more important.¹⁶

A subsequent question is why we should communicate with offenders when they reject our moral message. According to Duff – and here he shows himself a real True Believer – we must try to persuade them to repent their crimes otherwise we would treat them as being beyond moral redemption. We have to treat the offender as someone who could come to repentance, even if we know that our attempt will fail. That is not convincing: Duff leaves the door wide open for the troubles of making converts. Even less convincing is Duff's argument that we have to treat offenders who are punished as if they have apologised themselves. "to treat him as a fellow citizen (.) is to treat him as someone who has through his punishment made apologetic reparation for his crime – which means that we must treat him at least as if he is to be trusted again".¹⁷ Duff believes this "insincere apology" makes clear to the victim that the community takes seriously the wrong she suffered. The possibility that many victims would experience this insincerity as cruel does not occur to him.

In short, combining hard treatment and two-way communication, repentance and serious deprivation, is a misleading idea. Anyone who deems deliberative inflicting pain necessary should not expect remorse. In most cases that is unreal. One cannot conciliate and feel excluded at the same time. Now it is possible that Duff cannot find himself entirely in these critical remarks because he interprets "hard treatment" in different ways. He works with several accounts, what makes his theory difficult to assess. A first account is specific: hard treatment is connected with the pain of remorse and the pain of reparation (see his contribution in this volume). Although in these cases the offender is voluntarily enduring pain – one might call it a kind of "hard self-treatment" – Duff also wants to induce this pain. In his words: one function of hard treatment is to make it harder for the offender to ignore the message that punishment aims to communicate. But persisting attempts to persuade and convert offenders who reject moral messages, can easily degenerate into bullying. Keeping on talking to a wall

of silence is in fact also degrading for the reformer. The second account is more encompassing: in some passages in his recent book Duff calls every kind of punishment that is burdensome – independently of its censorious meaning – a kind of hard treatment. But that is senseless, because for instance a probation programme aimed at controlling aggression generally is not accompanied with hard treatment. Surely, such a programme is burdensome and implies deprivation, and is in that respect a fully fledged punishment. But this does not mean that the programme's aim is to inflict a priori pain. In the case of constructive sanctions the pain is rather – as Walgrave stresses – a side effect.¹⁸ When the aim is learning offenders are treated in a careful way, not harshly.

If Duff's views do not convince it is tempting to embrace Von Hirsch's account of hard treatment. In this volume (p.137) Duff admits that Von Hirsch's interpretation is in some sense attractive. Those who are deaf to the moral voice of the law must be addressed in a language of self-interest and deterrence. There is certainly some logic in this proposition: criminals are supposed to understand the language of threats. But also this account seems to fail: not only for the reasons Duff mentioned but also because many criminals are not inclined to calculate benefits and costs, or weigh up the risks of criminal behaviour. In fact prudential reasoning leads to loss of status in criminal sub-communities.¹⁹

It seems more realistic to give hard treatment another meaning: impose deliberately painful tasks in a disciplined environment, as a reaction to serious crimes that have alarmed public indignation and rage feelings. Hard treatment must temper these feelings. In some ways this comes close to Kleinig's description of hard treatment: keeping offenders on a tight rein, refuse them to take initiatives, pursuing intensive control, etc. Probably Duff would criticise this realistic account because it makes to many concessions to "the primitive and vindictive desires to inflict pain". He would not tolerate the idea that hard treatment only has this "nihilistic" function. It comes too close to the disconcerted practices of the "real existing punishment industry". But I think it is a serious omission to give no attention at all to these negative feelings. Like many restorative justice advocates Duff has carefully banished these emotions from his moral universe.

In sum, Duff is reasoning in an idealistic way and disregards the troublesome psychological "basis" of inflicting pain. Therefore we must

¹⁶ See also U. NARAYAN, "Moral Education and Criminal Punishment", in T. MAGNELL (ed.), *Values and Education*, Rodopi, Amsterdam, 1998, 69-80; J. BICKENBACH, "Duff on Non-Custodial Punishment", in W. CRAIG (ed.), *Retributivism and its Critics*, Stuttgart, Franz Steiner, 1992, 69-74; B.M. BAKER, "Consequentialism, Punishment and Autonomy", in W. CRAIG (ed.), *Retributivism and its Critics*, Stuttgart, Franz Steiner, 1992, 69-74.

¹⁷ R.A. DUFF, *Punishment, Communication, and Community*, Oxford, Oxford University Press, 2001, 169-170; also 123-4.

¹⁸ L. WALGRAVE, "Imposing Restoration Instead of Inflicting Pain", in A. VON HIRSCH et al. (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford University Press, Oxford, 2003 and p. 153 in this volume.

¹⁹ T.R. CLEAR, "The Punitive Paradox: Desert and the Compulsion to Punish", (1996) 33 *Journal of Research in Crime and Delinquency* 94-108.

bring the Scottish "Hegel" down to earth: uncouple two-way communication and hard treatment and relate each of them with separate sentences: restorative sanctions that draw the offender into a dialogue on the one hand and retributive sanctions that bring along discipline on the other hand.

4. REPENTANCE AND TRUST: FACILITATING TWO-WAY COMMUNICATION

Some core-ideas in Duff's philosophy are highly instructive to substantiate restorative justice theories. Punishment should not only refer to backward looking retribution, but if possible it also has to obtain the future good of self-reform. Particularly relevant is the difference between experiencing punishment in a passive or active way. In the classic "punishment as expression" theory the offender is a passive recipient of a public censure.²⁰ Expression is a *one-way* activity of a "ruler" over the "subservient convict". Duff stresses that real communication is a *two-way* activity, which does not require a passive recipient but a participant whose reasonableness and responsibility is addressed. The parties argue and judge together. Duff is inclined to give the offender a greater say in the determination of his own punishment: he is a participant in the discussion which kind of reparation is needed. Duff points out that offenders get a better understanding of the consequences of the wrong-doing when they are involved in this discussion. Offenders are forced to put themselves in the position of the victim and to consider what is required.

A restorative sanction – work for the victim or the local community – normally presupposes an offender who admits his guilt and who wants to take (some) responsibility. The offender regrets or repents, which means that he is somehow connected with the values which the law is appealing to. For that reason – contrary to Duff – there is no need for intentionally inflicting pain (although restorative justice conferences have their own tough habits: being painfully reminded to the wrong-doing; forcing the offender to recognise the harm he brought about).²¹ Suppose the remorseful offender is beforehand informed that he is not allowed to escape from external suffering. Then it would be senseless to discuss with him in constructive ways which reparation must be offered. Besides, we must prevent the offender from performing meaningless or degrading tasks with

no relation to the wrong-doing. If the tasks are related to his competences and interests he is better able to provide for victim-needs.

So when an offender repents there seems to be no need for concomitant, external infliction of pain. But there are exceptions. In the case of serious and abhorrent crimes apologising words will fail, no matter how honestly and eagerly expressed. Repentance is outweighed by a shocked sense of justice. For that reason hard treatment should have (temporary) priority over two-way communication. The offender is not yet conferred the status of sincere participant and co-director of his punishment. First the retributive emotions must erode before we can grant him a dialogue on the subsequent modelling of his punishment. In other words, some crimes are so serious that the inner pain of repentance does not convince and retribution is ordered. That is why both punishments – restoration and retribution – have a certain relentlessness when it comes to their demarcation. Often retributive feelings are silenced during the execution of a reparation-sanction. Some of the parties involved will find it difficult to accept. Conversely, in the case of hard treatment empathic feelings are silenced. Some parties – for instance victims of violence at home – will not appreciate that.

Restorative justice – like any other system that rewards remorse, as plea bargaining – attracts offenders who fake repentance. Their crocodile tears cause mistrust: we are forced to investigate the authenticity of repentance signs. How to deal with this problem? I believe the offender's plans to offer repair-work must prove his genuine intentions. We have to trace signs of active repentance – what the Germans call "tätige Reue" – that give moral force to the apology.²² Offenders who apologise but are half-heartedly involved in the discussion on reparation-plans or offer no serious proposals, are problematic. They can hardly function as the "author" or "manager" of their own punishment.

Genuine repentance points at a positive moral disposition, a commitment to avoid wrongdoing in the future. It is an indication – an aspect that Duff does not work out – that trust can be renewed. Now many offenders can be trusted: their behaviour only reveals a deficit, which can be remedied through attention, support and learning. The willingness to repair the harm done not only indicates that the offender acknowledges that he committed a wrong, but also that he will respect other persons' rights in the future. Others cannot be trusted, for instance when the offender says: "when I am free I will steal again". Threatening to continue criminal behaviour is promising to harm or suffer other persons and implies a breach of trust.

²⁰ J. FEINBERG, "The Expressive Function of Punishment", in *Doing and Deserving*, Princeton, Princeton University Press, 1970, 95-118.

²¹ See L. WALGRAVE, "Imposing Restoration instead of Inflicting Pain", in A. VON HIRSCH et al. (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford, Hart Publishing, 2003, 161-78.

²² See B. VAN STOKKOM, "Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy", (2002) 6 *Theoretical Criminology* 339-360.

It is my opinion that trust should be decisive in choosing which kind of sentence is suitable: for instance impose a community service coupled to hard treatment (disciplining) or impose a community sentence directed at restoration. If the offender shows goodwill and trustfulness, he is qualified for the last sentence. Is the offender defying or uncooperative, the first can be meted out.²³ However, if the seriousness of the crime is at stake the judge should operate with comparable tariffs, so the principle of just deserts is obeyed.²⁴ In other words, an uncooperative offender does not deserve a supplementary term, but a different kind of sentence.²⁵

Thus, the decisive standard is trust, i.e. the assessment of expected moral conduct.²⁶ Trust is a personal quality and part of someone's attitude or "character". Now "character" is a tricky question. Punishing character, Nigel Walker says, is "to engage in moral book-keeping, using previous records as an index of total moral worth."²⁷ There is a clear danger of double punishment: allocate additional punishment on the basis of former conduct. Another danger is to define character statically. Of course initially remorseless offenders can change themselves. For that reason the execution of sentences should be adapted to actual "good" behaviour. Conversely, an initially cooperative convict who fulfils no obligation at all forfeits our compliance.

Nevertheless, attention to "character" is inevitable because it gives information on the faithfulness of the motives for the crime and because it points out which kind of sentence is indicated.²⁸ The judge has to take into account offender characteristics such as repentance and the possibility of recidivism, just as she takes the social circumstances of offenders and their families into account. If you adhere to the principle that the offender "has to learn a lesson" it is good to know if he is stubborn, has learning

disadvantages, or lacks self-control. Moreover: suppose the judge does not take in account the moral disposition of the offender and his social situation. This would stimulate offenders to cope with the imposed sanction in cynical and indifferent ways.

CONCLUSION

Hard treatment, although in many cases inevitable, often brings more psychological and social desperation than the judge aims. It destroys trust and goodwill, and reduces opportunities for restoration, reconciliation, and augmenting self-respect. Next to that hard treatment is not suited for offenders who repent and are prepared to do reparation-work. If this is ignored only an ideology is served, be it the ideology of blind retribution or inducing repentance in circumstances of sorrow and misery.

If punishment is only inflicting pain there is no guarantee that the offender "will learn his lesson". Suffering cannot repair harm or reconstruct what is destroyed. It only can communicate a sense of injustice. Nevertheless: in cases of serious crimes and serious harm our trust is affected so much or the community feels so terrified that a priori inflicting pain is unavoidable. We have to do justice to the outraged feelings of victims and the larger community. But it is a mistake to believe that in this way offenders are stimulated to reform themselves as True Believers like Duff think.

Thus, both punishment legitimizations – retribution and restoration – have their own proper place in the penal system. Monistic views on what criminal punishment should entail, are superfluous.

²³ In this last case one can – of course – also take behaviour change programmes into consideration.

²⁴ Some retributivists argue that genuine repentance should lead up to reduction of sentencing terms, see J.C. MURPHY, "Repentance, Punishment and Mercy", in A. ETZIONI and D.E. CAENEY, 1997, 143-170; L. POLAK, *De zin der vergelding*, Amsterdam, Van Oorschot, 1947). I agree with Duff that (later occurring) repentance does not make the crime less serious. The same is true for the defying criminal: defiance does not make the crime worse.

²⁵ B. VAN STOKKOM, "Herstel, zelfcorrectie en communicatief straffen", in B. VAN STOKKOM, *Straf en herstel, Ethische reflecties over sanctietoelieden*, Den Haag, Boom Juridische Uitgevers, 2004, 287-313.

²⁶ For restorative approaches in which the factor trust is important, see W. CRAGG, *The Practice of Punishment: Toward a Theory of Restorative Justice*, London, Routledge, 1991. A. FATIC, *Punishment and Restorative Crime-Handling. A Social Theory of Trust*, Aldershot, Avebury, 1995. In J. WEIJERS, *Restoration and the family: a pedagogical point of view*, in L. WALGRAVE (ed), *Restorative Justice and the Law*, Willan Publishing, Cullompton, 2002, 68-81. For a retributive approach see S. DIMOCK, "Retributivism and Trust", (1997) 16 *Law and Philosophy* 37-62.

²⁷ Cited in M. BAGARIC, *Double Punishment and Punishing Character: The Unfairness of Prior Convictions* (2000) 19 *Criminal Justice Ethics* 10-28.

²⁸ R.A. DUFF, "Choice, Character and Criminal Liability", (1993) 12 *Law and Philosophy* 345-383.